

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 637**

August 2013

QUESTIONS PRESENTED

Do the Texas Disciplinary Rules of Professional Conduct permit a lawyer to include in an agreement with a client the client's waiver of rights under Texas statutes providing civil remedies for violations of laws against barratry?

May a lawyer settle with a client who is not represented by other legal counsel a claim under Texas statutes providing civil remedies for barratry violations?

Must a lawyer who has been sued under the Texas statutes providing civil remedies for barratry violations report such fact to the State Bar of Texas?

STATEMENT OF FACTS

In 2011, the Texas Legislature amended section 82.065 of the Texas Government Code to provide that any contract for legal services is voidable by the client if the contract is procured by violating Texas law or the Texas Disciplinary Rules of Professional Conduct regarding barratry by lawyers or other persons. The Legislature also added section 82.0651 of the Texas Government Code, which provides civil liability for violating laws against barratry. Effective September 1, 2013, Sections 82.065 and 82.0651 of the Texas Government Code were amended in certain respects. In this opinion, sections 82.065 and 82.0651 of the Texas Government Code as currently in effect are collectively referred to as the "Barratry Remedies Provisions."

A Texas lawyer proposes to enter into an agreement with a prospective client in which the client would waive any and all rights under the Barratry Remedies Provisions.

In the event that a client did not validly waive rights against the lawyer under the Barratry Remedies Provisions and a claim is asserted against the lawyer under these provisions, the lawyer wishes to negotiate a settlement of the claim with the client who is not represented by another lawyer.

DISCUSSION

Section 38.12 of the Texas Penal Code (hereafter referred to as "Section 38.12") defines barratry to include the solicitation of, or the payment for solicitation of, employment for legal services with the intent to obtain an economic benefit. The provisions of Section 38.12 are discussed in more detail in Professional Ethics Committee Opinion 623 (February 2013).

Section 38.12 provides that violations of its provisions are felonies or misdemeanors subject to criminal penalties.

Rule 8.04(a)(9) of the Texas Disciplinary Rules of Professional Conduct provides that a lawyer is prohibited from engaging “in conduct that constitutes barratry as defined by the law of this state[.]” In addition, Rule 7.03 prohibits certain solicitations of legal business and payments to other persons for the purpose of soliciting legal business. Many of the actions prohibited by Rule 7.03 would also constitute barratry as defined in Section 38.12. Thus a lawyer who commits barratry as defined in Section 38.12 will in all cases violate Rule 8.04(a)(9) of the Texas Disciplinary Rules and in many cases will also violate provisions of Rule 7.03. Although a Texas lawyer may be disciplined for an act that also constitutes an offense under the Penal Code, the Texas Disciplinary Rules—not the Penal Code—provide the basis for discipline. See section 82.062 of the Texas Government Code (“An attorney may be suspended from practice or the attorney's license may be revoked under this section regardless of the fact that the act complained of may be an offense under the Penal Code and regardless of whether the attorney is being prosecuted for or has been convicted of the offense.”); *Smith v. State*, 523 S.W.2d 1, 5-6 (Tex. App.—Corpus Christi 1975, writ ref'd, n.r.e.) (“Professional misconduct is grounds for disciplinary action regardless of whether the act or acts in question constituted an offense under the Penal Code of this State.”). A disciplinary proceeding is civil in nature, not criminal. *State Bar of Texas v. Evans*, 774 S.W.2d 656, 657 n.1 (Tex. 1989).

With respect to Section 38.12 and the Barratry Remedies Provisions, while it would seem unlikely that these provisions would be construed to exclude from the definition of barratry, or from civil remedies for barratry, conduct as to which a client has purportedly waived his rights, this question of statutory construction would ultimately be a question of law as to which this Committee does not have authority to provide an opinion. However, even if a client’s waiver of rights under the Barratry Remedies Provisions were found to be valid as a matter of state law, it is the opinion of this Committee that such a waiver could not prevent the application to the lawyer of the Texas Disciplinary Rules prohibiting barratry as defined under state law (Rule 8.04(a)(9)) and solicitation and payments for solicitation (Rule 7.03) . Some provisions of the Texas Disciplinary Rules provide that a lawyer may obtain a client’s consent to certain conduct that would otherwise be prohibited. See e.g. Rule 1.05(b)(2) (use of a client’s confidential information); Rule 1.06(c) (representation of clients with material, adverse interests to each other); Rule 1.09(a) (conflicts of interest with respect to former clients); Rule 1.10(a) (private employment after government employment in a matter). That is not the case with respect to Rules 7.03 and 8.04. It is the opinion of the Committee that the Rules do not permit lawyers to obtain waivers or consents from clients with respect to conduct prohibited by Rules 7.03 and 8.04.

Thus there is no basis in the Texas Disciplinary Rules of Professional Conduct for giving effect to a purported waiver by clients of provisions of the Texas Disciplinary Rules prohibiting barratry as defined under the Texas Penal Code and prohibited under the Texas Disciplinary Rules. The question of whether civil or criminal remedies may be waived by clients in agreements with their lawyers is ultimately a matter of statutory construction rather than interpretation of the Texas Disciplinary Rules. However, it is the Committee’s view that, unless a lawyer has a reasonable basis for believing that such a waiver is likely to be legally effective, a

lawyer would be prohibited under the Texas Disciplinary Rules from including such a purported waiver provision in a lawyer's agreement with a client without a complete explanation by the lawyer to the client of the possible legal ineffectiveness of the purported waiver. Without a full explanation to the client of the possible ineffectiveness of the waiver provision, the provision would be a misrepresentation to the client as to the client's rights and would therefore constitute a violation of Rule 8.04(a)(3), which prohibits a lawyer's conduct that involves "dishonesty, fraud, deceit or misrepresentation[.]"

With respect to a lawyer's negotiating directly with a client a settlement of a claim against the lawyer under the Barratry Remedies Provisions, it is the opinion of the Committee that the principles outlined in Professional Ethics Committee Opinion 593 (February 2010) should apply. Opinion 593 considered a lawyer's negotiation with a client concerning settlement of the client's claim against the lawyer for malpractice. Opinion 593 determined that several provisions of the Texas Disciplinary Rules of Professional Conduct are applicable in the case of a lawyer's negotiating a settlement of a client's claim against a lawyer. First, Rules 1.06(b)(2) and 1.06(c) (concerning prohibited conflicts of interest) require that a lawyer seeking to negotiate a settlement with his client terminate the representation of the client in the matter that is the subject of the client's claim against the lawyer if that representation has not already ended. Second, Rule 2.01 (concerning the requirement that a lawyer render candid advice), Rule 1.15(d) (relating to obligations of a lawyer to protect the client's interest when representation of the client terminates) and Rule 8.04(a)(3) (prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), require that the lawyer inform the client of the circumstances relating to the client's possible claim against the lawyer and of the fact that the lawyer cannot advise the client with respect to the settlement of the claim. Opinion 593 also relied on Rule 1.08(g), which specifically concerns a lawyer's settlement with an unrepresented client of a claim against the lawyer for malpractice. Applying the principles of Opinion 593, the Committee concludes that a lawyer may settle a claim against the lawyer under the Barratry Remedies Provisions with a client who is not represented by other counsel provided that the lawyer terminates the representation of the client in the matter if the representation has not already terminated, discloses to the former client the lawyer's conduct that might constitute barratry, advises the former client in writing that independent representation is appropriate for the former client's consideration of the lawyer's offer to settle the claim, and avoids any conduct involving dishonesty, fraud, deceit or misrepresentation in connection with the negotiation and settlement of the claim.

Reporting professional misconduct under the Texas Disciplinary Rules is governed by Rule 8.03(a), which provides, with exceptions not here applicable, that:

“. . . a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.”

This Rule applies to one lawyer who has knowledge of another's lawyer's violation under the Texas Disciplinary Rules but it does not require self-reporting by a lawyer of his own violations of the Texas Disciplinary Rules. Hence a lawyer against whom a claim has been asserted under the Barratry Remedies Provisions is not required to report the claim to Texas disciplinary

authorities. However, Rule 8.03 would require a lawyer who represents a party asserting a claim of barratry against another lawyer to inform the appropriate disciplinary authority if the nature of the alleged barratry violation raises a substantial question as to the other lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

CONCLUSION

The Texas Disciplinary Rules of Professional Conduct do not permit a lawyer to include in an agreement with a client the client's waiver of provisions of the Texas Disciplinary Rules prohibiting barratry by the lawyer, but the question of the validity of an agreed waiver by a client of Texas statutes providing civil remedies for barratry is a question of state law rather than of the interpretation of the Texas Disciplinary Rules.

A lawyer is permitted to negotiate with a client who is not represented by other counsel a settlement of a claim under the Texas statutes providing civil remedies for barratry provided the lawyer terminates the representation of the client in the matter involved if the representation has not already terminated, discloses to the former client the lawyer's conduct that might constitute barratry, advises the former client in writing that independent representation is appropriate with respect to the settlement, and does not engage in conduct involving dishonesty, fraud, deceit or misrepresentation in connection with the negotiation and settlement of the claim.

A lawyer against whom a claim is filed under the Texas statutes providing civil remedies for barratry is not required by the Texas Disciplinary Rules of Professional Conduct to report the claim to disciplinary authorities.