

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 581
April 2008**

QUESTION PRESENTED

May a lawyer entering into an agreement to defend a client in litigation include in the engagement agreement with the client a provision that requires the client to pay defense expenses incurred by the lawyer if the lawyer is later joined as a defendant in the litigation?

STATEMENT OF FACTS

In the past, a lawyer has been engaged to defend clients in lawsuits brought by beneficiaries of estates. In these cases, the lawyer has sometimes been joined as a defendant by the plaintiff beneficiaries based on allegations of fraud and conspiracy between the lawyer and the client to breach fiduciary duties. The lawyer believes that his joinder as a defendant in prior cases has been a tactic to dissuade the lawyer from appearing as counsel for defendants in such litigation. The costs of the lawyer's defense in the past have been borne by the lawyer. The lawyer wants clients in future cases to agree, in the lawyer-client engagement agreement, to pay the lawyer's defense expenses if the lawyer is sued by the beneficiaries in the litigation for which the lawyer is being engaged.

DISCUSSION

Rule 1.06(b)(2) of the Texas Disciplinary Rules of Professional Conduct provides that, unless a lawyer can comply with certain additional requirements, the lawyer may not represent a person where the representation of that person is adversely limited by the interests of the lawyer. This Rule does not prohibit a lawyer from seeking to further the interests of the lawyer with respect to the terms under which the lawyer will agree to represent a client in a matter. The conflict of interest addressed by Rule 1.06 with respect to the self-interest of the lawyer is an interest on the part of the lawyer that would limit the lawyer's zealous representation of the client once the lawyer has agreed to represent the client. In the circumstances here considered, the lawyer's representation of the client would not appear to be adversely limited by the client's agreement to pay the lawyer's defense costs if the lawyer is added as a defendant in the litigation. Should the client be called upon to pay the lawyer's defense costs under the terms of the agreement, the nature of the suit against the lawyer could create a potential for a conflict of interest but that possibility would not itself preclude the lawyer from requiring the provision in question in the lawyer-client engagement agreement. Once a lawyer-client relationship has been established, Rule 1.03(b) requires that the lawyer advise his client of any potential for a conflict of interest under Rule 1.06(b)(2) that might arise in the course of the litigation as to this or other matters so that informed decisions can be made by the client concerning the representation.

Rule 1.08(g) provides that a lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the agreement is permitted by law and the client is independently represented in making the agreement. The agreement described in the Statement of Facts does not prospectively limit the lawyer's liability to the client for malpractice and hence no violation of Rule 1.08(g) is involved in such an agreement. However, the

agreement must be clear that the obligation to pay defense costs incurred by the lawyer does not limit in any way the lawyer's liability in the case of malpractice and does not permit the lawyer to receive and retain reimbursement for legal expenses if such expenses are determined to have arisen from the lawyer's malpractice.

The proposed agreement for the client to pay the lawyer's legal fees in the specified circumstances is properly viewed as a form of compensation to the lawyer since the client is agreeing to pay for expenses that, absent the agreement, would be an obligation of the lawyer. The proposed arrangement, as with any compensation arrangement for a lawyer's services, must not be unconscionable under Rule 1.04(a). Rule 1.04(a) provides that a lawyer shall not enter into an agreement for an illegal fee or an unconscionable fee and states that a fee is unconscionable "if a competent lawyer could not form a reasonable belief that the fee is reasonable."

When proposing to a potential client that the client agree to pay the lawyer's legal fees if the lawyer is added as a defendant in the suit, the lawyer must consider whether the likely cost of the proposed undertaking by the client is of sufficient magnitude that this proposed undertaking taken together with the proposed cash fee arrangement would violate the standards of Rule 1.04(a). For example, if the value of the matter to the client was at most \$20,000, but the obligation to pay legal defense costs of the lawyer under the proposed agreement would involve a significant possibility of an obligation of up to \$100,000 in reasonable defense costs of the lawyer, the totality of the arrangement as between the lawyer and the client could not normally be viewed as reasonable under Rule 1.04(a). It should be noted that, in a case where the likely cost of the legal defense obligation was disproportionately high in relation to the amount at stake for the client, the proposed fee and legal expense obligation arrangement would normally be in violation of Rule 1.04(a) as between the lawyer and the client even though the amount charged by unrelated defense lawyers for the lawyer's defense might be entirely reasonable as between the unrelated defense lawyers and the lawyer being defended.

Under Rule 1.04(b), factors that may be considered in determining the reasonableness of a proposed compensation arrangement include the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, and the experience, reputation and ability of the lawyer performing the services. In the situation addressed in this opinion, an additional factor that may be appropriate to consider is that the litigation tactic of joining the client's lawyer as a defendant may in some cases be a threat facing any lawyer representing the client. Costs of the lawyer's defense could in these cases be viewed as an unavoidable cost (that must be borne by the lawyer if not shifted by agreement to the client) of effective legal representation of the client.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer-client engagement letter may include a provision under which the client agrees to pay the defense expenses incurred by the lawyer in the event of a joinder of the lawyer as a defendant in the client's litigation provided that (1) the agreement does not prospectively limit in any way the lawyer's liability to the client for malpractice and (2) the obligation for payment of the lawyer's legal defense fees and the obligation to pay the fees billed by the lawyer for his work do not taken together constitute a compensation arrangement that would be unconscionable within the meaning of Rule 1.04(a).