

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 633
July 2013**

QUESTION PRESENTED

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for the general counsel of an entity jointly owned by two cities to be an employee of one of the cities?

STATEMENT OF FACTS

City A and City B jointly own Entity Z, which operates a facility of interest to both cities and which is governed by a board consisting of members appointed by the governing bodies of the two cities. The general counsel of Entity Z is an employee of City A, which pays the salary and benefits of the general counsel and is reimbursed in full by Entity Z after approval by the Entity Z board. Under the agreement between the cities, City A has the right to hire and fire the general counsel of Entity Z, and the general counsel, as an employee of City A, is subject to City A's policies on employment matters, including leave and vacation time. Similarly, City B employs a lawyer to serve as assistant general counsel of Entity Z and pays the salary and benefits of the assistant general counsel, which are reimbursed in full by Entity Z after approval by the Entity Z board. Under the agreement between the cities, when outside counsel is hired, City A must approve the budget for the outside counsel and City A has the right to veto the choice of outside counsel. The general counsel has his office at Entity Z's headquarters and provides full-time legal services exclusively for Entity Z. City A does not direct the work of the general counsel. In some situations, what Entity Z believes to be best for Entity Z is contrary to what City A believes to be best for City A. The present solution for these conflicts is for the general counsel to recuse himself from situations that involve a conflict between City A and Entity Z.

DISCUSSION

The first issue raised is whether Entity Z's general counsel can accept compensation from someone other than Entity Z. This question is addressed by Rule 1.08(e) of the Texas Disciplinary Rules of Professional Conduct, which provides as follows:

“A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client consents;

- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.05."

In addition, Rule 5.04(c) provides that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

Under the facts presented, Entity Z is fully aware of how the general counsel is employed and compensated. Provided that there is no interference with the general counsel's independence of professional judgment or with the client-lawyer relationship between the general counsel and Entity Z and provided that the confidentiality of the information relating to the representation is maintained, the general counsel's representation of Entity Z does not in and of itself violate the Texas Disciplinary Rules of Professional Conduct.

In these circumstances, when there arises a significant difference of interest between Entity Z and City A on a matter, the difference may create a conflict of interest for the general counsel. Rule 1.06 specifies how a lawyer is required to handle a conflict of interest. As relevant to the circumstances here considered, Rule 1.06 provides as follows:

"(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

...

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any."

In the factual situation considered, the general counsel has only one client—Entity Z. The Committee is of the opinion that the fact that the general counsel is paid, and may be fired, by City A does not in and of itself create an impermissible conflict of interest with respect to the general counsel's representation of Entity Z. This Committee has recognized that the source of payment of a lawyer's fees does not result in an

impermissible conflict of interest so long as the lawyer's exercise of independent judgment is not compromised and the client is aware of the source of the lawyer's fees. For example, in Professional Ethics Committee Opinion 533 (Nov. 2008), this Committee, relying in part on Rules 1.01(b), 1.06, 1.08(e) and 5.04(c) of the Texas Disciplinary Rules, recognized long-standing Texas precedent that a lawyer may be employed by an insurance company to represent the company's insureds provided that the lawyer does not have a conflict of interest with regard to the particular insured or matter, that the lawyer is able to exercise independent judgment, that the client is aware of who employs the lawyer and that the lawyer carries out the obligations the lawyer owes to the client. Similarly here, the fact that City A pays the salary and benefits of the general counsel and is reimbursed by Entity Z for the cost of the general counsel's salary and benefits does not in and of itself create an impermissible conflict of interest.

In assessing the application of Rule 1.06 to the situation here considered, the initial issue here is whether under Rule 1.06(b)(2) the general counsel's representation of Entity Z in a matter reasonably appears to be adversely limited by the general counsel's employment relationship with City A. If the general counsel's representation in a matter appears to be so limited, then the exception provided by Rule 1.06(c) must be considered. In these circumstances, Rule 1.06(c) will permit the general counsel to represent Entity Z in the matter only if each of two requirements is met: (1) the general counsel reasonably believes that the representation of Entity Z will not be materially affected by the fact that City A is the general counsel's employer and (2) Entity Z consents to the representation in the matter after full disclosure of the "existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any." Thus the general counsel should seek the consent of Entity Z under Rule 1.06(c)(2) only if he reasonably believes that representation of Entity Z will not be materially affected by the general counsel's relationship to City A. Comment 7 to Rule 1.06 makes clear that "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent."

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, the general counsel for an entity jointly owned by two cities may be an employee of one of the cities provided that the client entity consents, there is no interference with the lawyer's independence of professional judgment or with the lawyer's relationship with the entity, and information relating to representation of the entity is protected as required by the Texas Disciplinary Rules. When matters arise where the interests of the entity and the city employing the general counsel are divergent and the general counsel's representation of the entity in the matter appears to be adversely limited by the general counsel's interest as an employee of the city, the general counsel is permitted to represent the entity in the matter only if the general counsel reasonably believes that the representation will not be materially affected and the entity consents after full disclosure.