WHO IS MY CLIENT?

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State Bar of Texas
CHOICE OF ENTITY IN TROUBLED TIMES
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CHAPTER 4

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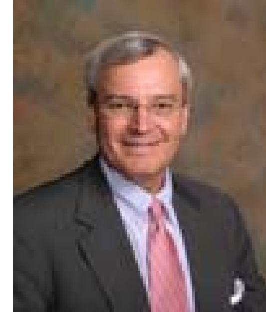

BACKGROUND, EDUCATION AND PRACTICE

John Ale is the partner leading the Houston office of Skadden, Arps, Slate, Meagher & Flom LLP, focusing on energy, infrastructure, finance and corporate matters. He has represented clients in the development, financing and acquisition of energy and water infrastructure projects, privatizations, and acquisitions and divestitures of whole companies or divisions. In addition, he has worked extensively with partnership and other joint-ownership formats and innovative financings, including publicly traded partnerships, or MLPs.

John received his B.A. (with highest honors) and J.D. (Order of the Coif) from the University of Virginia, where he also served as Executive Editor of the *Virginia Law Review*. Following law school, he clerked for Hon. Edward Allen Tamm of the U.S. Court of Appeals for the District of Columbia Circuit and for Hon. Warren E. Burger, then Chief Justice of the United States.

After practicing in Houston for 15 years, John was the managing partner of the London office of another US-headquartered law firm in 1997 and 1998. From late 1998 until early 2002, he was executive director and general counsel of Azurix Corp., a global water company.

John is a past Chairman of the Business Law Section of the State Bar of Texas. He previously was Vice Chair of the Section and chaired its committees on Partnership Law, Professional Ethics and Choice of Law Legislation. He was heavily involved in the preparation of Texas partnership and limited liability company statutes.

John also has written and spoken extensively on project finance and partnership issues. He is the author of *Partnership Law for Securities Practitioners*, volume 20 of the West Group's Securities Law Series. Previously he has taught as an adjunct professor at the University of Texas School of Law.

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Who Is My Client?

Choice of Entity
in Troubled Times

TexasBarCLE
San Antonio, May 22, 2009

John C. Ale

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What Law Governs?

- > Disciplinary Rules
  - Texas and other states
  - In grievances
  - In malpractice cases
- > Ethics Opinions
- > Disqualification Law
- > Malpractice Law
- > Restatement of Law Governing Lawyers

Who Can Be Clients?

- > Entity
- > Equity Owners
  - Founding Shareholders/Partners/Members
  - Current/New Shareholders/Partners/Members
- > Directors/Managing General Partner/Managing Member
- > Officers/Employees
- > Contract Manager/Operator/Service Provider

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Does It Depend On . . .

> Who's signed an engagement letter with you?
> Who's giving you information?
> Who's hearing and relying on your advice?
> Who's paying your fees?

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And For Each of These People . . .

> May they rely on your advice—and sue you if you're wrong?
> Are you obligated to share information with them?
> Are you obligated to follow their instructions?
> What if you think they're doing something unlawful or breaching a duty?

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Ethics Rule

"A lawyer employed or retained by an organization represents the entity."

But constituents can be clients, too, if:

> You choose to represent them
> You give them legal advice or
> They don't understand your role and reasonably believe you represent them.

Source: TDRPC 1.12(a) and comment 1

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Duty to Maintain Confidences

- You must ***maintain in confidence*** information received ***from*** client's employees, officers, directors, and other representatives.
- You ***may share*** confidences only with those representatives who need to know.
- You ***must share*** confidences with your client, through its appropriate representatives.

Source: TDRPC 1.12 comment 3

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Attorney-Client Privilege

- In Texas, a communication between a lawyer and a client's representative is privileged if made in:
  - Providing legal advice to the appropriate representatives of the client
  - Obtaining facts necessary to effect legal representation
- But remember, the privilege belongs to the ***client***, not to:
  - The particular officer, director, employee or other representative IF they are not clients
  - The lawyer

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Dealing with Representatives

- **"In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part."**
- If interests diverge, tell representative and suggest representative obtain separate counsel ***in writing.***

Source: TDRPC 1.12(e) and comment 4

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Conflicts of Interest: Common Business Situations

- Action benefits officer/partner/employee personally
- Reporting misconduct may get officer/partner/ employee dismissed
- Entity and officer/partner/employee may have different and inconsistent defenses or defense theories
- A confidence of an individual client affects the representation

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Conflicts of Interest: Multiple Clients

- Lawyer (internal or external) for promoter, general partner, individual venturer or contract manager also represents entity
- Lawyer's duty then is to entity and individuals
  - May not advise "regular" client adversely to entity
  - Must share information relating to entity with all entity's constituents
- All parties should understand and agree in writing to:
  - Representation despite principal relationship with "regular" client
  - Fee arrangements (entity pays; "regular" client pays and is or is not reimbursed)

Source: Tex. Comm. on Professional Ethics, Opinions 487 (1992) and 512 (1995)

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Dealing with Conflicts

- Conflicts are not consentable if the lawyer cannot adequately represent the client
- Conflict waivers are not a cure-all
  - Insufficient disclosure and consent
  - External actions suggesting not important
  - Circumstances can change
  - Consent can be withdrawn
- Put in writing, even if not required by the disciplinary rules

12

Discovering Misconduct: Texas Rules

You must take action if you know or learn that:

> Representative has violated or intends to violate a legal obligation to the organization or that will be imputed to the organization

> The violation likely will result in substantial injury to the organization and

> The violation is related to a matter within the scope of your representation

Source: TDRPC 1.12(b)

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What Must You Do?

> First, attempt to resolve matter internally
- Ask client to reconsider
- Advise that a separate legal opinion be sought for presentation to appropriate authority in organization
- Refer matter to higher authority, including highest authority if necessary

> In determining course of conduct you should consider:
- Seriousness of the violation
- Consequences of the violation
- Scope and nature of your representation
- Responsibilities and motivation
- Organization's own policies

Source: TDRPC 1.12(c)

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Do You Withdraw?

> You ***must*** withdraw if continued representation violates professional rules or applicable law

"A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent."

> You ***may*** withdraw if:
- Client persists in course of action involving your services that you reasonably believe may be criminal or fraudulent
- Client has used your services to perpetrate crime or fraud
- Client insists on pursuing objective you consider repugnant or imprudent, or with which you fundamentally disagree

Malpractice tip: Do withdraw even though the rules suggest it is optional.

Source: TDRPC 1.02(c), 1.15

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APPENDIX A

Texas Disciplinary Rules of Professional Conduct

1.12 Organization as a Client

(a) A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in the situations described in paragraph (b) the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.

(b) A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:

(1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;

(2) the violation is likely to result in substantial injury to the organization; and

(3) the violation is related to a matter within the scope of the lawyers representation of the organization.

(c) Except where prior disclosure to persons outside the organization is required by law or other Rules, a lawyer shall first attempt to resolve a violation by taking measures within the organization. In determining the internal procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b), a lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyers representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Such procedures, actions and measures may include, but are not limited to, the following:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(d) Upon a lawyers resignation or termination of the relationship in compliance with Rule 1.15, a lawyer is excused from further proceeding as required by paragraphs (a), (b) and (c), and any further obligations of the lawyer are determined by Rule 1.05.

(e) In dealing with an organizations directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it

is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.

Comment:

The Entity as the Client

1. A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. Unlike individual clients who can speak and decide finally and authoritatively for themselves, an organization can speak and decide only through its agents or constituents such as its officers or employees. In effect, the lawyer-client relationship must be maintained through a constituent who acts as an intermediary between the organizational client and the lawyer. This fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the organizational client.

2. As used in this Rule, the constituents of an organizational client, whether incorporated or an unincorporated association, include its directors, officer, employees, shareholders, members, and others serving in capacities similar to those positions or capacities. This Rule applies not only to lawyers representing corporations but to those representing an organization such as an unincorporated association, union, or other, entity.

3. When one of the constituents of an organizational client communicates with the organizations lawyer in that persons organizational capacity, the communication is protected by Rule 1.05. Thus, by way of example, if an officer of an organizational client requests its lawyers to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the clients employees or other constituents are covered by Rule 1.05. The lawyer may not disclose to such constituents information relating to the representation except for disclosures permitted by Rule 1.05.

Clarifying the Lawyers Role

4. There are times when the organizations interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyers should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care should be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged insofar as that individual is concerned. Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

5. A lawyer representing an organization may, of course, also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.06. If the organizations consent to the dual representation is required by Rule 1.06, the consent of the organization should be given by the appropriate

official or officials of the organization other than the individual who is to be represented, or by the shareholders.

Decisions by Constituents

6. When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyers province. However, different considerations arise when the lawyer knows, in regard to a matter within the scope of the lawyers responsibility, that the organization is likely to be substantially injured by the action of a constituent that is in violation of law or in violation of a legal obligation to the organization. In such circumstances, the lawyer must take reasonable remedial measure. See paragraph (b). It may be reasonably necessary, for example, for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organizations interest. At some point it may be useful or essential to obtain an independent legal opinion.

7. In some cases, it may be reasonably necessary for the lawyer to refer the matter to the organizations highest responsible authority. See paragraph (c)(3). Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere, such as in the independent directors of a corporation. Even that step may be unsuccessful. The ultimate and difficult ethical question is whether the lawyer should circumvent the organizations highest authority when it persists in a course of action that is clearly violative of law or of a legal obligation to the organization and is likely to result in substantial injury to the organization. These situations are governed by Rule 1.05; see paragraph (d) of this Rule. If the lawyer does not violate a provision of Rule 1.02 or Rule 1.05 by doing so, the lawyers further remedial action, after exhausting remedies within the organization, may include revealing information relating to the representation to persons outside the organization. If the conduct of the constituent of the organization is likely to result in death or serious bodily injury to another, the lawyer may have a duty of revelation under Rule 1.05(e). The lawyer may resign, of course, in accordance with Rule 1.15, in which event the lawyer is excused from further proceeding as required by paragraphs (a), (b), and (c), and any further obligations are determined by Rule 1.05.

Relation to Other Rules

8. The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule is consistent with the lawyers responsibility under Rules 1.05, 1.08, 1.15, 3.03, and 4.01. If the lawyers services are being used by an organization to further a crime or fraud by the organization, Rule 1.02(c) can be applicable.

Government Agency

9. The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See Preamble: Scope.

Derivative Actions

10. Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

11. The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyers client does not alone resolve the issue. Most derivative actions are a normal incident of an organizations affairs, to be defended by the organizations lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyers duty to the organization and the lawyers relationship with those managing or controlling its affairs.

APPENDIX B

TEXAS PROFESSIONAL ETHICS OPINION 487

December 1992

Tex. Comm. on Professional Ethics, Op. 487, V. 57 Tex. B.J. 304 (1994)

QUESTION PRESENTED

Is it proper for a law firm to represent an employer and employee, both of whom are named as defendants in a suit, deliver to the employer and employee confidential information adversely affecting the employee that leads to a conflict of interest between the employer and employee, and continue representing the employer but not the employee in the suit, pursuant to a written agreement executed by the employer and employee?

FACTS

A former employee sues Company X and Supervisor Y in an employmentrelated matter. Company X wants to pay for Y's defense. Law firm has been representing Company X for several years in its labor and employment matters. Thus, Company X enlists law firm in the representation of both X and Y. Prior to entering into representation of X and Y, law firm consults with Y and discusses the implications of this dual representation. After a similar discussion with X, both X and Y sign the following agreement:

"There are no known or suspected conflicts of interest between X and Y at this time. X, Y and law firm reasonably believe that none will arise. Both X and Y declare that they have revealed to each other all information they are aware of that may indicate a conflict of interest or a potential conflict of interest between them. In this suit, X and Y are generally aligned in interest. The expense of separate representation and unlikelihood of a conflict, indicate that it would be a prudent use of X's resources for law firm to represent both X and Y in this common lawsuit.

It is understood that the remote possibility of a future conflict of interest does exist. Law firm may discover confidential information about either X or Y that may damage X's relationship with Y, thereby causing a conflict of interest. In the event such information is discovered, such information is to be revealed to both X and Y as soon as the conflict is recognized. Both X and Y understand the revelation of such information may result in Y's termination or a cause of action by X against Y. Law firm will not subsequently represent either X or Y in any suit against the other unless and until consent is obtained from both parties. Law firm may continue to represent X in the present litigation even though that representation may adversely affect Y."

In the course of law firm's investigation for the defense of former employee's suit, it discovers that while Y is innocent of the former employee's charge in the suit, he is not a suitable supervisor. Y has committed no criminal or fraudulent acts. X and Y are informed of law firm's discovery and Y is fired by X. Law firm withdraws from Y's representation and continues to represent only X in the present litigation.

QUESTIONS

1. Does the agreement between X and Y violate any Disciplinary Rule?

2. Is it proper for the law firm to reveal to the employer confidential information about the employee obtained by the law firm's interview of the employee?

3. Is it proper for the law firm to withdraw from representing the employee and continue representing the employer in the present litigation after discovery of the information about the employee that led to termination of employment?

DISCUSSION

Answers to the questions presented are governed by Rules 1.05 and 1.06, Texas Disciplinary Rules of Professional Conduct.

Rule 1.05 provides that a lawyer shall not knowingly reveal confidential information of a client or a former client to anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm, except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (h) of Rule 1.05.

Paragraph (c) provides:

A lawyer may reveal confidential information:

(1) When the lawyer has been expressly authorized to do so in order to carry out the representation.

(2) When the client consents after consultation.

Implicitly, the first exception under subparagraph (c) means that the lawyer may reveal confidential information about a client when the lawyer has been expressly authorized to do so in order to carry out the representation of the client. Therefore, this exception does not allow disclosure of confidential information in order to carry out the representation of another party.

The second exception under paragraph (c), authorizing a lawyer to reveal confidential information when the client consents after consultation, does not require, on its face, that the client's consent be obtained after the confidential information is obtained by the lawyer.

Requiring a lawyer to obtain consent after consultation would aid in insuring that a client is fully informed of the consequences or potential adverse effect of the disclosure of confidential information so that the client can give (or withhold) informed consent to the disclosure of that information. It may be difficult to fully inform a client of all potential consequences of the disclosure of confidential information before knowing the substance of that information. That difficulty does not, however, require a determination that consultation about and consent to the disclosure of confidential information occur after knowledge of the details of that confidential information is obtained by a lawyer.

The other provisions of paragraph (c) and the provisions of paragraphs (d), (e), and (h) provide no guidance to the answer of the question presented and are inapplicable under the facts of this inquiry.

Rule 1.06 provides that a lawyer shall not represent opposing parties to the same litigation. The employer and employee are not opposing parties in the lawsuit in which

the law firm was employed. Their interest in that suit is stated to be common and free from conflict. The conflict that exists between the employee and employer relates to the employee's termination, and not the subject of the suit under the facts stated. Therefore, Rule 1.06 did not prohibit the law firm from representing the employer and employee initially.

It is not improper for the law firm to continue representing the employer if all implications of the dual representation of the employer and employee, including the potential consequences to the employee of the disclosure to the employer of confidential information about the employee were fully discussed with the employee by the lawyer and the employee was fully and competently informed as to the consequences prior to the execution of the agreement.

CONCLUSION

If the law firm fully advised the employer and employee of the implications, any potential disadvantage or adverse consequences to the dual representation, and the consequences of the disclosure of confidential information before the agreement was executed, then:

1. No disciplinary rule was violated by the law firm in allowing the employer and employee to execute the agreement.

2. It is not improper for the law firm to reveal to the employer confidential information about the employee obtained during the law firm's interview of the employee.

3. It is not improper for the law firm to withdraw from representing the employee and continue representing the employer in the present litigation.

APPENDIX C

TEXAS PROFESSIONAL ETHICS OPINION 512

June 1995

Tex. Comm. on Professional Ethics, Op. 512, V. 58 Tex. B.J. 1147 (1995)

QUESTION PRESENTED

May the in-house lawyer of a corporation represent a joint venture in which the corporation is a venturer, without violating Texas Disciplinary Rule 1.06, Conflict of Interest, and/or Texas Disciplinary Rule 5.05, Unauthorized Practice of Law?

FACTS

A corporation is considering forming joint ventures, in corporate and partnership form, with other corporations. Most of the other joint venturers will have their own legal departments, but some may not. The corporation will sometimes own a majority of the joint venture, sometimes 50%, and other times it will be a minority owner. Often the joint ventures will not have their own separate employees; rather, certain employees of each joint venturer will be "loaned" to the joint ventures, but will not be separately compensated by the joint venture.

In line with this arrangement, and in order to operate efficiently and cost effectively, the corporation would like to make its in-house lawyers available, from time to time, to provide legal services to these joint ventures. Similarly, the other joint venturers may desire to make their in-house lawyers available, from time to time, to provide legal services to the joint venture. It may be that one party makes available to the joint venture one type of legal service (e.g., labor) and the other party makes available another type of legal service (e.g., corporate). These legal services would relate to the ongoing business activities of the joint venture. Under one arrangement, no charge would be made by the corporation to the joint venture for the legal services provided by its in-house lawyers, but under an alternative arrangement, the corporation may be reimbursed by the joint venture for the costs of providing the lawyer, based on the proportion of time each in-house counsel spends on joint venture matters.

DISCUSSION

The above situation raises questions governed by Texas Disciplinary Rule 1.06, Conflict of Interest: General Rule; Texas Disciplinary Rule 5.05, Unauthorized Practice of Law; and Texas Disciplinary Rule 1.07, Conflict of Interest: Intermediary. Each Rule will be considered separately and applied to the fact situation presented above.

DR 1.06--Conflict of Interest (General Rule)

In relevant part, Rule 1.06 reads 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:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(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 fact situation presented, the "loaned" in-house counsel must recognize that the joint venture is his client (Rule 1.12) and that loyalty is an essential element in the lawyer's relationship with that client (Rule 1.06, Comment 1). The potential conflict does not arise by virtue of the extent of control or ownership that the corporation has in the joint venture, or because the corporation charges or does not charge an amount for providing the in-house lawyer. It is the simultaneous representation of the joint venture and the corporation that presents the potential for conflict under Rule 1.06(b)(2). The rule prohibits a lawyer from representing a person if the representation "reasonably appears to be or become adversely limited by the lawyer's responsibilities to another client to or a third person . . . . " (Rule 1.06(b)(2)). However, even though a conflict, or a potential conflict, may exist in simultaneous representation of the corporation and the joint venture, such multiple representation is permissible if there is compliance with Rule 1.06(c). That is, the lawyer must reasonably believe that the representation of each client will not be materially affected and the corporation and the joint venture must consent to such representation after full disclosure. In these circumstances, the required consent could not be given on behalf of the joint venture by the corporation employing the lawyer; instead, consent must be obtained from an authorized employee of the joint venture, if the joint venture has its own employees, or from the other joint venturers (See Comment 5 to Rule 1.12). The disclosure to the joint venture and the joint venture's consent should also include the fact that the lawyer may be paid by the corporation and not the joint venture. Under Rule 1.08(e), a lawyer may be paid from a source other than the client if (1) the client is informed of that fact and consents, (2) the arrangement does not compromise the lawyer's duty of loyalty to the client, and (3) confidential information is treated properly under Rule 1.05.

It is only when a potential or actual conflict develops into an impermissible conflict that the lawyer should withdraw. If such a situation should develop after properly accepting multiple representation under Rule 1.06, the lawyer must promptly withdraw from one or more representations to the extent necessary for any representation not to be in violation of the Rules (Rule 1.06(e)). In the situation presented, the lawyer would normally withdraw from representation of the joint venture.

DR 5.05-Unauthorized Practice of Law

Rule 5.05 provides as follows:

"A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." The intent of Rule 5.05 is to protect individuals and the public from the mistakes of the untrained and from schemes of the unscrupulous, who are not subject to the judicially imposed disciplinary standards of competence, responsibility, and accountability (Rule 5.05, Comment 1). In the fact situation presented herein, the corporation proposes to "loan" its in-house lawyer to a related joint venture and not to the public in general. As such, the intent of Rule 5.05 would not be automatically violated by any of the described arrangements.

In the factual situations presented, the Committee believes that the lawyer involved would not be assisting his employer corporation in the unauthorized practice of law. This conclusion is based on the assumption that, when the lawyer is providing legal services to the joint venture as a client, (1) the lawyer is not directed by the corporation in the provision of these services (other than by the corporation explicitly acting on behalf of the joint venture as a managing venturer of the joint venture) and (2) any reimbursement by the joint venture or the other venturers for the compensation paid by the corporation to the lawyer is calculated in good faith to pay no more than the full costs to the corporation of the portion of the lawyer's time that is devoted to services for the joint venture.

In such circumstances, regardless of whether or not the corporate employer is reimbursed by the joint venture for the cost of the lawyer's services, the lawyer is properly viewed as providing legal services directly to the joint venture, which is the lawyer's client. If the joint venture reimburses the corporation for the salary and benefits paid to the lawyer, such reimbursement does not constitute payment by the joint venture to the corporation for the corporation's provision of legal services since only the lawyer and not the corporation is providing services as a lawyer to the joint venture. This conclusion applies equally if the employer/corporation is not reimbursed for the cost of employing the lawyer who is loaned to the joint venture; in that case, the corporation is contributing legal services to the joint venture, but the lawyer's client is the joint venture and the lawyer, not the corporation, is providing legal services to the joint venture. Texas Professional Ethics Committee Opinion 343 dealt with a situation similar to the question presented herein. Although the opinion was published before enactment of the present Texas Disciplinary Rules of Professional Conduct, its logic and reasoning are still sound. In holding that the possibility that the in-house lawyer was assisting his corporate employer in the unauthorized practice of law was "more imaginary than real," the opinion stated: "While it is not the function of this Committee to decide what constitutes unauthorized practice of law, we are satisfied that under the facts presented in this inquiry the general corporate employer is not undertaking to furnish legal services to the other corporations; it is not holding itself out as a furnisher of legal services, and it is not exploiting the services of the lawyer. It is merely providing a convenient means whereby the lawyer's services can be made available to the related corporations as they have need for such services, and in these arrangements we see no real likelihood that the lawyer would be aiding his general corporate employer in the practice of law."

DR 1.07-Conflict of Interest (Intermediary)

The Committee has also considered whether Rule 1.07, Conflict of Interest: Intermediary, should be deemed to apply to the situations presented. On the facts stated, the lawyer loaned to the joint venture is not being loaned to act as an intermediary between the corporation and the joint venture in any usual sense of the term "intermediary." Instead, the lawyer is being loaned to the joint venture to provide legal services to the joint venture as a separate entity for its ongoing business. The loaned lawyer does not provide legal services jointly to the corporation and the joint venture in the same matter.

Paragraph (d) of Rule 1.07 does not require a contrary conclusion. That paragraph provides that "[w]ithin the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests." This provision cannot mean that in any case where a lawyer represents in different matters two clients with potentially conflicting interests, the terms of Rule 1.07 apply. If Rule 1.07 applied in such cases, it would apply to every situation involving potential conflict of interest between clients of a lawyer; in every case where a lawyer represents two clients in substantially related matters in which the clients' interests are adverse, the clients would have potentially conflicting interests.

A result in which Rule 1.07 would, in effect, "swallow up" Rule 1.06 as to client conflicts of interest is directly contrary to the intent of Rule 1.06 as expressed in the Comments to that rule. For example, Comment 3 to Rule 1.06 states that Rule 1.06(b) (and by implication not Rule 1.07) governs representation of co-plaintiffs or codefendants in the same litigation matter. Comment 3 concludes as follows:

On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 1.07 involving intermediation between clients.

To avoid an interpretation under which Rule 1.07 would supplant Rule 1.06 in all conflict situations, Rule 1.07 must be interpreted to mean that a lawyer is acting as an intermediary only when the lawyer is representing in the same matter two clients with potentially conflicting interests who seek to consummate a transaction or resolve a dispute between or among themselves. [FN1] In that circumstance, the lawyer will usually be acting as an intermediary between the two clients with respect to the single matter. Even in such circumstances, however, the lawyer would not be acting as intermediary between the clients with respect to other matters dealing with third parties, as to which the lawyer represents only one of the two clients. [FN2]

CONCLUSIONS

Rule 1.06 (Conflict of Interest: General Rule): Under the facts presented, even though a conflict or potential conflict of interest exists in the lawyer's representation of the employing corporation and the joint venture to which the lawyer is loaned, such multiple representation is permissible if (1) the corporation and joint venture consent after full disclosure and (2) the lawyer reasonably believes that the lawyer's representations of the corporation and of the joint venture will not be materially affected.

Rule 5.05 (Unauthorized Practice of Law): Provided that the corporation/employer does not direct the lawyer in the performance of legal services for the joint venture (other than explicitly as a managing venturer of the joint venture) and provided that the joint venture or other venturers do not reimburse the corporation for more than the estimated full costs

to the corporation/employer of the lawyer's time devoted to services for the joint venture, a lawyer/employee who is loaned to a joint venture to perform legal services for the joint venture is not deemed to be assisting the employing corporation in the unauthorized practice of law.

Rule 1.07 (Conflict of Interest: Intermediary): Provided that the loaned lawyer is representing only the joint venture entity in the matter or matters for which the lawyer has been loaned to the joint venture, rather than two clients who seek to consummate a transaction or resolve a dispute between themselves, the requirements applicable to intermediaries set forth in Rule 1.07 do not apply.

FN1. The interpretation that Rule 1.07 is to be confined to cases of a lawyer's representation of two clients in the same matter finds additional support in the reference in Rule 1.07(c) to "the matter that was the subject of the intermediation."

FN2. In most situations involving co-plaintiffs or codefendants in a litigation matter in which the clients are adverse to a third party, the lawyer would not be acting as an intermediary between the clients. However, if the representation at any point involves resolving a dispute between the two clients, the lawyer would become an intermediary as to the matter in dispute between the clients and the requirements of Rule 1.07 would apply.