

Welcome to Winstead.

Interesting Issues In Legal Ethics

David F. Johnson

Tarrant County Bar Association

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Scope of Presentation

- This presentation will cover the following topics:
- Mediator participation in suit after a failed mediation;
- An attorney acting as a witness;
- Conflicts of interest; and
- Confidentiality issues.

Mediator Issues

- There are occasions when a mediator or other similar facilitator wants to participate in the suit after a failed mediation.
- Is that ethical and proper?

Mediator Issues

- Texas Rule of Professional Conduct 1.11 states: “A lawyer shall not represent anyone in connection with a matter in which the lawyer has passed upon the merits or otherwise participated personally and substantially as an *adjudicatory official* or law clerk to an adjudicatory official, unless all parties to the proceeding consent after disclosure.” See TEX. DISCIPLINARY R. PROF'L CONDUCT, 1.11, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R., art. X, § 9) (emph. added).
- The Rules define an "adjudicatory official," the term used in Rule 1.11, as "a person who serves on a Tribunal." See TEX. DISCIPLINARY R. PROF'L CONDUCT, Terminology, A.

Mediator Issues

- "Tribunal" is defined any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. *Id.*
- "Tribunal" includes such institutions as "courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and *comparable persons empowered to resolve or to recommend a resolution of a particular matter*; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity." *Id.*

Mediator Issues

- An attorney acting as a mediator is an adjudicatory official, and he may not participate as a lawyer in the suit. See *Moore v. Altra Energy Techs., Inc.*, 295 S.W.3d 404 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Mediator Issues

- Rule 1.11 goes on to provide that “no other lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless: (1) the lawyer who is subject to paragraph (a) is screened from participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the other parties to the proceeding.” See TEX. DISCIPLINARY R. PROF'L CONDUCT, 1.11.
- So, the entire firm may also be disqualified from representing a party if one member was a mediator or other member of a tribunal.

Mediator Issues

- If the attorney refuses to withdraw, then it may be necessary to file a motion to disqualify the attorney and/or her firm.
- While disqualification of an attorney or firm is an extreme remedy, it is warranted when an attorney has violated the Texas Disciplinary Rules of Professional Conduct. See *In re Epic Holdings, Inc.*, 985 S.W.2d 41, 48 (Tex. 1998).
- “The Texas Disciplinary Rules of Professional Conduct do not determine whether counsel is disqualified in litigation, but they do provide guidelines and suggest the relevant considerations.” *Landers v. State*, 256 S.W.3d 295, 306 n.32 (Tex. Crim. App. 2008).

Mediator Issues

- In *Moore v. Altra Energy Techs., Inc.*, a party moved to disqualify opposing counsel and his firm due to the opposing counsel acting as mediator in the case. 295 S.W.3d 404 (Tex. App.—Houston [14th Dist.] 2009, no pet.).
- The mediator received confidential information about the strengths and weaknesses of the case from the party moving for disqualification.

Mediator Issues

- The court held that no other member of the firm could knowingly undertake or continue the representation unless the requirements of subsection (c) were satisfied.
- The court held that the firm did not provide prompt notice as it only sent notice after the motion to disqualify had been filed.

Mediator Issues

- “[I]t is the policy of this state to encourage the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures. It is the responsibility of all trial and appellate courts to carry out this policy. And to facilitate such alternative dispute resolution, all communications by a participant in such procedures relating to the subject matter of the dispute are confidential. Through its adoption of the Rules of Professional Conduct, the Texas Supreme Court has placed the burden of ensuring such confidentiality on mediators and their firms. Were we to allow Looper Reed to continue its representation on the facts presented here, we would seriously undermine that policy.”
- *Id.* at 407-8.

Mediator Issues

- So, if a mediator cannot participate as an attorney, can the mediator later participate as an arbitrator in the same dispute?
- Once again, the exchange of confidential information and honest case assessments would create a problem.

Mediator Issues

- Rule 1.11 (b) also provides that “a lawyer who is an adjudicatory official shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a pending matter in which that official is participating personally and substantially.”
- So, if a mediation is ongoing, the mediator should not be negotiating employment with one of the attorneys.
- Same issue for judges.

LAWYER AS WITNESS

- Scenario: Lawyer drafting contract, will or trust instrument represents a party in litigation.
- Question: Can lawyer ethically continue representation if he/she is likely witness?

TRDC 3.08 Prohibits a lawyer from accepting or continuing representation if:

- appearing as advocate, when
- knows or believes his/her testimony is necessary to establish essential fact on client's behalf, UNLESS

Testimony is on:

- uncontested issue
- relates to formality and no opposition testimony
- testimony relates to fees
- lawyer is *pro se* party
- lawyer has promptly notified opponent of fact that lawyer will be witness AND disqualification would work a substantial hardship on lawyer's client

Rule 3.08(c): Another lawyer in firm cannot be advocate if testifying lawyer prohibited UNLESS client gives informed consent.

Cmt. 2: “One important variable is the anticipated tenor of lawyer’s testimony”

- if testimony adverse, to client, lawyer is OUT (3.08(b))
- otherwise, 3.08(a) and (c) govern

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- Rationale:
- To avoid confusion (Cmt. 4)
 - To avoid prejudice to client's case (Cmt. 3)

LAWYER CAN BE ADVOCATE AND WITNESS
IF CLIENT GIVES INFORMED CONSENT

Ask yourself: Will it hurt client's case?

Risk: Attorney/Client privilege could be waived

Opponent's strategy call: Better not to challenge
testifying lawyer?

WHERE RULE 3.08 IS INAPPLICABLE

- Disqualification on other grounds
e.g., Rule 1.09 [former client, substantially related matter]
- Lawyer implicated as actor whether named as party or as unnamed conspirator (claims of undue influence, tortious interference)

SUMMARY

Make early assessment of whether lawyer is:

- necessary witness for case
- materiality of testimony
- assessment of prejudicial effect
- assurance of client getting impartial advice

Usually not a problem, since there are other means of providing or corroborating testimony

Attorney As Witness

- In *Matthews v. Stolier*, litigation arose regarding several transactions, including a power of attorney document. No. 13-6638, 2015 U.S. Dist. LEXIS 171752 (D.C. La. December 23, 2015).
- Some of the parties retained an attorney that assisted in drafting some of those documents.
- The opposing party filed a motion to disqualify that attorney due to her participation as a witness in the case.

Attorney As Witness

- The trial court granted the motion based on Rule of Professional Conduct 3.7, which provides that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

Attorney As Witness

- The court held that the circumstances of the negotiations of the transactions would be key to proving several of plaintiffs' claims, including their fraud, malpractice, and breach of fiduciary duty claims.
- As the attorney had unique personal knowledge of the circumstances of these negotiations, the court held that she would be a necessary witness.
- Finding no applicable exception, the court granted the motion to disqualify the attorney.

Conflicts of Interest

- An attorney commits a fiduciary breach when he or she benefits improperly from the attorney-client relationship by, among other things, subordinating his or her client's interests to his or her own, retaining the client's funds, engaging in self-dealing, improperly using client confidences, failing to disclose conflicts of interest, or making misrepresentations to achieve those ends. *Gibson v. Ellis*, 126 S.W.3d 324, 330 (Tex. App.—Dallas 2004, no pet.).

Conflicts of Interest

- In *Macias v. Gomez*, a client sued his attorney for breach of fiduciary duty arising from the attorney's conflict of interest. No. 13-14-00017-CV, 2015 Tex. App. LEXIS 12967 (Tex. App.—Corpus Christi December 29, 2015, no pet. history).
- The client paid the attorney by transferring a one percent interest in a business to the attorney's trust.

Conflicts of Interest

- The client then learned that the attorney may have to engage in conduct that negatively affected the other owners of the business.
- The attorney then withdrew from representing the client, and the client signed a waiver-of-conflict-of-interest document that stated:
 - As per our discussion, I have been explained by your firm that you will continue with your representation of [my fellow Border Furniture business owners] in this matter and I have agreed to waive any conflict of interest that may exist with you and your firm in the matter including but not limited to any conflict that might arise if you or your clients file suit against me or any of my entities.

Conflicts of Interest

- After the client signed the waiver, the attorney's trust sued the client alleging claims of breach of contract, fraud, and breach of fiduciary duty in relation to the business.
- The client then sued the attorney for breach of fiduciary duty in a separate proceeding.
- The trial court entered summary judgment for the defendant/attorney.

Conflicts of Interest

- On appeal the client first claimed that the waiver was not enforceable because it was not acquired prior to the attorney representing the client.
- The court affirmed the summary judgment on this issue because no evidence created a fact issue that the attorney knew of the conflict before beginning the representation.

Conflicts of Interest

- The client also argued that the attorney breached a fiduciary duty by acquiring the waiver under a false pretense, i.e., the attorney allegedly told the client, prior to signing the waiver, that he would not sue him or represent anyone in a suit against him.
- The court rejected this argument, however, because the waiver expressly stated that the attorney may sue the client in the future. The court of appeals affirmed the summary judgment for the attorney.

Conflicts of Interest

- In *Fitts v. Richards-Smith*, three brothers were riding in a car when the car hit another vehicle properly stopped in the road. 2016 Tex. App. LEXIS 1542 (Tex. App.—Texarkana February 17, 2016, no pet. history).
- The driver was killed and the two other brothers were seriously injured.
- The family of the killed driver and the two other brothers and their families all hired counsel to pursue a claim against the car manufacturer.

Conflicts of Interest

- After counsel was retained, the counsel allegedly did not (1) advise the clients that they might have had a cause of action against the driver's estate for negligence, (2) disclose a conflict of interest arising from their joint representation of the entire family, and (3) advise them about and preserve the statute of limitations on their viable claims.

Conflicts of Interest

- Without their attorneys' knowledge, some of the family made a claim under the driver's primary liability insurance and settled their claims against the driver for policy limits.
- They then attempted to collect under an umbrella policy, but their claim was denied based on the settlement with the primary insurance carrier and the resulting written release of claims.

Conflicts of Interest

- After a nominal settlement with the automobile manufacturer, the family sued their attorneys for breach of fiduciary duty and malpractice.
- The family alleged that the malpractice prevented them from recovering under the umbrella policy.
- The trial court granted summary judgment for the attorneys, and the family appealed.
- The court of appeals first addressed whether the family had a breach of fiduciary duty claim.

Conflicts of Interest

- Legal malpractice is not the only cause of action under which a client can recover from his or her attorney.
- When the facts of a case support claims against a lawyer for something other than professional negligence, the claims may be allowed.
- However, unless the claim cannot be characterized as advice, judgment, or opinion arising from the attorney-client relationship, the cause of action is for malpractice.
- Courts do not allow a case arising out of an attorney's bad legal advice or improper representation to be split out into separate claims for negligence, breach of contract, or fraud, because the real issue remains whether the professional exercised that degree of care, skill, and diligence that professionals of ordinary skill and knowledge commonly possess and exercise.

Conflicts of Interest

- The question is not so easily determined where there is an allegation of failing to disclose a conflict of interest.
- While "some Texas courts have recognized that breach-of-fiduciary-duty claims alleging the lawyer obtained an improper benefit from his representation or improperly failed to disclose his own conflict of interest are not professional negligence claims[,] . . . other courts have held the claim is a professional negligence claim if the claim is really that the lawyer's conflict of interest prevented him from adequately representing the client."

Conflicts of Interest

- In order to determine whether the breach of fiduciary duty claim in a case is really a malpractice claim, one should look to the difference between the two causes of action.
- "A cause of action for legal malpractice arises from an attorney giving a client bad legal advice or otherwise improperly representing the client."
- On the other hand, "[t]he essence of a breach of fiduciary duty involves the 'integrity and fidelity' of an attorney."
- Its focus "is whether an attorney obtained an improper benefit from representing a client, while the focus of a legal malpractice claim is whether an attorney adequately represented a client."

Conflicts of Interest

- "A breach of fiduciary duty occurs when an attorney benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interests to his own, retaining the client's funds, using the client's confidences improperly, taking advantage of the client's trust, engaging in self-dealing, or making misrepresentations."
- "Unlike a claim for breach of fiduciary duty, legal malpractice is based on negligence, because such claims arise from an attorney's alleged failure to exercise ordinary care."

Conflicts of Interest

- The family's complaints supporting their breach of fiduciary duty and malpractice claims were the exact same.
- The court held that the family's allegations challenge "the degree of care, skill, or diligence in performing [the] duty to inform appellants about issues that could arise during the representation of multiple clients and [the lawyers'] duty to communicate with and among the clients [they] represented" and were solely legal malpractice claims.

Conflicts of Interest

- The court, therefore, affirmed the summary judgment on the family's breach of fiduciary duty claim.
- The court then turned to the malpractice claim.
- The court held that a plaintiff asserting a malpractice claim must prove damages.
- This is important because a fiduciary breach claim does not require damages; a plaintiff can seek profit disgorgement or fee forfeiture.

Conflicts of Interest

- The court held that the family's release was effective to bar their claim against the umbrella policy.
- The court also held that the attorneys did not know about the release and were not at fault for same.
- The family also did not provide evidence that they could avoid the release due to a defense like mistake.
- The court affirmed the summary judgment on the malpractice claim due to no damages – specifically noting that there may have been malpractice.

Confidentiality

- To whom does a client's file belong?
- The client's file belongs to the client. *In re McCann*, 422 S.W.3d 701 (Tex. Crim. App. 2013).
- The right to claim or waive the attorney-client privilege belongs to the client, his guardian, or his conservator – not the attorney. *Id.*

Confidentiality

- In *McCann*, a defendant was charged with capital murder, and he was found guilty and sentenced to death. *Id.*
- The trial court then appointed counsel for the defendant from the Office of Capital Writs (“OCW”) to handle the post-conviction writ practice.
- The defendant refused to sign the release allowing his trial counsel to turn over the file to the OCW attorney.

Confidentiality

- The trial counsel refused to turn over the file without the release.
- The writ attorney would have to submit his initial state habeas application—which would set the tone of his entire post-conviction pursuit of relief—with claims of the ineffectiveness of trial counsel that lacked meaningful substantiation.
- The OCW attorney filed a motion to order the attorney to turn over the file, which the trial court granted.
- A new attorney was appointed, but the defendant still did not want the file turned over.

Confidentiality

- When trial counsel would not turn it over, the new attorney filed a second motion to order him to turn over the file.
- The trial court granted that motion and held the attorney in contempt when he did not comply.
- The trial counsel filed a petitions for writ of mandamus and prohibition to compel the trial court to not order him to turn over the file.
- Court of Criminal Appeals granted the trial attorney's petitions because the client had the right to not allow the file to be turned over to his new attorney.

Confidentiality

- The court discussed the competency of the client:
 - If an attorney has no reason to believe that his or her client is legally incompetent, the client's decision not to release his or her trial file is unassailable.
 - However, if the attorney "reasonably believes that the client lacks legal competence[,]" then the attorney "shall take reasonable action to secure the appointment of a guardian or other legal representative."

Confidentiality

- If a guardian or other legal representative has already been appointed, the client's attorney "should ordinarily look to that representative for decisions on behalf of the client."
- Further, an attorney can seek to have an appointed guardian replaced if he or she is not acting in the best interest of the client.

Confidentiality

- The trial court rejected repeated motions by trial counsel to have defendant declared incompetent pretrial and at trial.
- “[T]he trial judge is correct that certain deadlines have been triggered in this death-penalty case that cause Turner's decision to severely damage his chances of success in post-conviction proceedings, but if Turner is competent to stand trial, then his choice to undermine the ability of his post-conviction attorney to represent him effectively may be a poor one, but it is one the law allows him to make.”

Conclusion

- The legal profession has a lot of interesting issues in ethics.
- Sometimes, the hard part is identifying them.
- I hope that this has been helpful and interesting.