TEXAS LAWYERS' INSURANCE EXCHANGE

RECENT LEGISLATION CONCERNING ATTORNEYS

By Kenneth R. Breitbeil and Richard G. Wilson

The 77th regular session of the Texas Legislature concluded May 28, 2001. Its activities included bills that could potentially change the duties attorneys owe to clients, or expand the number and type of individuals to whom attorneys may actually owe a duty. Two bills affecting attorney responsibility passed both the House and the Senate, namely SB 1654 and HB 792. Only HB 792 will become law, SB 1654 having been vetoed on June 17 by Governor Perry. The responsibilities of lawyers to their clients arguably will be changed by the new law, giving rise to new potential pitfalls for lawyers to consider. Changes proposed in the failed bills offer insight into issues that may recur in future legislative sessions.

Governor Perry has approved House Bill 792 by default, not having signed or vetoed it. House Bill 792 becomes effective September 1, 2001, adding provisions (h)-(o) to Sec. 81.072 of the Government Code, relating primarily to procedural aspects of state bar disciplinary proceedings.[1] The bill sets a ratio for public members in a quorum of a panel, limits substitution on panels without notice, and requires attendance at hearings in order for panel members to vote on grievances heard.[2] The bill also changes what evidence the Bar or a Court can compel an attorney to disclose in certain proceedings brought by third parties, and allows attorneys to request expunction of unsuccessful grievance proceedings as well as deny certain dismissed proceedings.[3]

House Bill 792 may free attorneys from the potential cloud on an otherwise good reputation that can be created by a baseless grievance. Under this bill, attorneys could properly deny that a grievance was pursued if the grievance were dismissed as an inquiry or complaint, if the dismissal becomes final after an investigatory hearing in accordance with the Texas Rules of Disciplinary Procedure.4 An attorney could also seek expunction of a file in a disciplinary proceeding where a take-nothing judgment is entered that becomes final.[5]

House Bill 792 is not limited to grievance proceedings, and it provides, in part: "The state bar or a court may not require an attorney against whom a disciplinary action has been brought to disclose information protected by the attorney-client privilege if the client did not initiate the complaint that is the subject of the action."[6] Apparently, the way the bill reads, if an attorney has been the subject of a grievance proceeding and another client files a malpractice lawsuit against the attorney on an unrelated matter, the court in the malpractice proceeding cannot compel the attorney to disclose attorney-client privileged communications with the former client whose matter led to the grievance proceeding. The bill restricts the state bar from compelling disclosure of attorney-client privileged information in a grievance proceeding which may concern the representation of a client, but is instituted by someone else.

While the bill protects the attorney from being compelled to disclose attorney-client privileged information in third party proceedings, the current Texas Disciplinary Rules of Professional Conduct read differently as to whether the attorney can choose to disclose the privileged information that establishes a defense. Disciplinary Rule 1.05 (c)(6) may allow the lawyer to disclose privileged information in third party proceedings if it helps the lawyer. That rule reads:

A lawyer may reveal confidential information:

> * * *
>
> (6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.[7]

While Rule 1.05 limits disclosure to cases involving the client or representation of the client, the rule is not limited to civil claims or disciplinary complaints brought by the client. It is not clear why this limitation is absent. The drafters of this rule may have chosen not to limit disclosure to proceedings initiated only by the client so that a lawyer can disclose attorney-client privileged information that establishes a lawyer's defense regardless of who initiates a civil claim or disciplinary complaint against the lawyer. This interpretation of Rule 1.05(c)(6) permits a lawyer to disclose attorney-client privileged information beneficial to defense of a proceeding brought by a third party, without gaining the client's consent first.

However, it may be that Rule 1.05(c)(6) was drafted without limiting disclosure to those circumstances where the proceeding is brought by the client, in order to make it clear that disclosure of attorney-client privileged information is allowed in criminal proceedings, which are brought by the government. Under this interpretation of the rule, the attorney may be violating obligations owed to a client by choosing to disclose, without the client's consent, attorney-client privileged information that establishes a defense to a claim brought by a third party. By disclosing privileged information without the client's consent in order to defend the complaint, an attorney actually might be violating a disciplinary rule.

Currently, a lawyer can look to the court or the state bar to compel disclosure when the privileged information helps the attorney's defense. If the lawyer is compelled to disclose attorney-client privileged information, Texas Disciplinary Rule of Professional Conduct 1.05(c)(4) makes it clear that the lawyer has not violated the obligations to a client. After House Bill 792 becomes law, it appears courts and the state bar will no longer be able to compel disclosure in circumstances where the attorney is involved in a proceeding related to representation of a client, if the proceeding is initiated by a third party. Under these circumstances, a lawyer has no clear guidance whether disclosing attorney-client privileged information without the client's authorization, in order to establish a defense in grievance proceedings initiated by a third party, will be treated as a violation of the Texas Disciplinary Rules of Professional Conduct. Given the difference between House Bill 792 and Texas Disciplinary Rule of Professional Conduct 1.05 (and the apparent ambiguity in the disciplinary rule), the most risk-averse course for an attorney confronted by this dilemma is to gain the client's consent before disclosing any privileged information in a proceeding instituted by a third party.

However, what about the situation where the client will not, or perhaps as a result of some legal disability, cannot allow disclosure? There are numerous situations where the attorney may know why the client's chosen course of action led to the third party's complaint against the attorney, but the client would prefer to keep the information private, for whatever reason. If a client will not or cannot permit the disclosure, there is no clear answer as to how to resolve the differences between House Bill 792 and Rule 1.05.

Senate Bill 1654 was vetoed by the Governor on June 17, and would have amended Title 2B of the Insurance Code by adding Chapter 104. It concerned the use of guidelines or suggestions from insurance companies, which have become common regarding the handling of defense matters in a general or automotive liability context. Arguably, that bill would not have created any new duties between the attorney and client that do not already exist. Ideally, attorneys listen solely to their client (the insured in the insurance defense context), without any risk of confusion as to who is the client. However, had it become law, Senate Bill 1654 would have created new issues of concern for those attorneys whose practice consists of general or automotive liability insurance defense work; similar legislation may be the subject of future sessions. SB 1654 would have served to remind attorneys that, despite the financial machinations of the practice of law, attorneys owe the duty of loyalty to the individual being represented, the client. In those instances where a tripartite relationship exists between a lawyer, insured, and insurance company, the duty extends to the insured, not

the insurance company.

At the heart of the matter is the potential for a conflict of interest to arise, if an attorney is "retained or engaged" by an entity whose pecuniary interests regarding the cost of a defense may be at odds with providing a complete defense to the client.[8] As Justice Gonzalez noted in his concurring and dissenting opinion in State Farm Mutual Automobile Insurance Company v. Traver, the realities of certain types of insurance defense representation may create competing considerations, as evidenced by the financial economies of scale that led insurance companies to favor "captive counsel."[9] Many law firms rely upon insurance companies for a substantial portion of their work. Certain law firms occupy the status of "captive counsel" where the lawyers in the firm may actually be employees of the insurance company.[10] If the attorney is an employee of the insurance company, possessing knowledge of privileged information, although not a "litigation-management guideline," may be problematic.[11]

Realistically, Senate Bill 1654 could have destroyed the economies of scale created by "captive counsel." It proposed to create liability for insurance companies when they limit an attorney's acts or judgment through overly intrusive "litigation-management guidelines," as defined in the bill. The failed revision of Section 104.003 (a) would have prohibited the insurer from requiring or suggesting that a defense counsel perform an activity that interferes with: "(1) (A) the counsel's duty of loyalty to the insured; (B) the counsel's duty to exercise independent professional judgment; or (C) the attorney-client relationship between the counsel and the insured; or (2) would result in a waiver of any privilege of the insured." This language reflected concepts of attorney loyalty addressed in Ethics Opinion 533, which may be reviewed online at www.txethics.org.

Under new Section 104.003 (b) as proposed, prohibited guidelines would have included those that require a defense counsel to obtain the insurer's approval before performing a task or incurring an expense to represent and protect the insured. Under new Section 104.003 (c) as proposed, the carrier would not have been prevented from disputing the reasonableness or necessity of attorney's fees or expenses after receiving a fee invoice submitted by a defense counsel.

Violations would have subjected an insurance company to actual damages, injunctive relief, and a responsibility to pay the attorneys' fees incurred in bringing a claim. SB 1654 would have enabled both counsel and the insured to seek recovery of the reasonable value of any unpaid legal services or expenses provided by the counsel in the representation of the insured. Section 104.006 as proposed would have empowered the Insurance Commissioner to request enforcement litigation by the Attorney General, seeking civil penalties of $5,000 for the first and second such violations, or $10,000 for third and subsequent violations.

Many bills concerning attorney-client relationships and an attorney's duties never made it out of the respective committees or subcommittees to which they were referred. Still, the failed bills provide insight into some areas of potential change or debate in upcoming legislative sessions. House Bill 19, which remained in subcommittee, would have created a duty for the attorney of the personal representative of an estate to inform beneficiaries of misconduct by the personal representative. House Bill 1160, which would have created a duty of care between the attorney drafting a will and the beneficiaries of that will, also remained in a legislative subcommittee. Both bills indicate a movement to create duties for probate attorneys toward individuals other than their client (such as an executor), which would create a potential conflict between the duties an attorney owes a client when one of those duties contradicts a statutory duty toward others.

Another active area of consideration concerned settlement offers and attorney's fees. Several bills were designed, at least in part, to reduce protracted litigation by encouraging reasonable settlement offers early in litigation. House Bill 2843 would have provided that if a settlement offer were made in a property damage claim, the defendant could recover its litigation costs (including attorney's fees), if there should be a judgment for no liability.[12] In fact, the defendant could even recover its litigation costs if found liable, but the

damages did not exceed the settlement offer.[13] Also, the plaintiff could recover its attorney's fees if it recovered an amount in excess of a rejected settlement offer.[14] House Bill 61 also would have entitled a litigant to recover attorney's fees if the judgment entered after trial proved more favorable to the litigant, monetarily or in relation to injunctive relief, if applicable, than the offer made.[15] House Bill 1424 also contained a provision for similar relief in Article 4590i of the Texas Civil Statutes, the Medical Liability and Insurance Improvement Act.[16] House Bill 24 would have limited contingency fees where settlement offers were rejected and the amount of a judgment, if any, did not exceed the settlement offer. House Bill 24 also sought to limit contingency fees where the plaintiff's attorney does not make a demand for compensation.

While none of the above-mentioned bills made it out of the legislature except HB 792, it appears that privileged information, attorney's fees and settlement offers will continue to be active areas for proposed legislation in 2003.

TLIE greatly appreciates the contribution of this timely article by Ken Breitbeil and Richard Wilson, shareholder and associate respectively of McFall Sherwood & Breitbeil, P.C., a Houston firm specializing in the defense of professional liability and disciplinary matters.

[1] See Tex. H.B. 792, 77th Leg., R.S. (2001).

[2] See Tex. H.B. 792, §81.072(j), (k), (n), 77th Leg., R.S. (2001).

[3] Tex. H.B. 792, §81.072(h), (i), (o), 77th Leg., R.S. (2001).

[4] Tex. H.B. 792, §81.072(o), 77th Leg., R.S. (2001).

[5] Id.

[6] Tex. H.B. 792, §81.072(h), 77th Leg., R.S. (2001).

[7] TEX. DISCIPLINARY RULE OF PROF'L CONDUCT 1.05(c)(6) (2001).

[8] See TEX. DISCIPLINARY RULE OF PROF'L CONDUCT 1.06(b)(2) (providing that there is a conflict of interest where the attorney's representation of a client (insured) is limited by his responsibilities to a third party (insurance company/employer)).

[9] State Farm Mutual Automobile Ins. Co. v. Traver, 980 S.W.2d 625 at 632-33 (Tex. 1998).

[10] See State Farm Mutual Automobile Ins. Co. v. Traver, 980 S.W.2d at 633 (discussing the existence and use of a "captive law firm" by insurance companies).

[11] See Tex. S.B. 1654, §104.003(a)(2), 77th Leg., R.S. (2001) (prohibiting a "litigation-management guideline" that requires or suggests that the attorney disclose privileged information).

[12] Tex. H.B. 2843, §42.007, 77th Leg., R.S. (2001).

[13] Id.

[14] Id.

[15] Tex. H.B. 61, §42.025, 77th Leg., R.S. (2001).

[16] Tex. H.B. 1424, §8.07, 77th Leg., R.S. (2001).

Home Return to Contents