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Cross-Border Practice for In-House Counsel

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You're in-house counsel for an international company with a presence in Texas and elsewhere around the globe. You work out of the company's Austin office handling M&A and compliance matters, and although you aren't licensed in Texas, your longstanding Ohio bar license allows you to do your work for the company under Texas' ethical rules. Your boss hands you a transaction for one of the company's affiliates, and you don't really think much about it—just another day at work, right? But, can you really represent and advise this affiliate, who is not necessarily your employer? Yes, but with qualifications.

In October 2024, Texas adopted revisions to its ethical rules, in particular Rule 5.05, establishing a new in-house counsel exception to the prohibition against the unauthorized practice of law. Rule 5.05(c) now provides that an attorney not licensed in Texas may "provide legal services solely to the lawyer's *employer* or *its organizational affiliates*" for tasks that do not require typical "pro hac vice" admission. Thus, this Rule enables businesses to look further afield when hiring in house counsel to work in Texas—but for the lawyer in that situation, there are still some ethical pitfalls to avoid. Done, right? Not so fast.

Again, under Rule 5.05(c), an out-of-state attorney may perform in-house work in Texas for the employer's "organizational affiliates." While the Rule does not define who an organizational affiliate is, commentary to the ABA Model Rule (on which Texas' Rule is based) defines that phrase as "entities that control, are controlled by, or are under common control with the employer." This approach is consistent with historical treatment of controlled entities by the Texas Committee on Professional Ethics.

As early as 1968, the Committee recognized that "[i]n the situation of subsidiary and controlled corporations may as a practical matter, in considering ethical questions, disregard the separate corporate entities. There is obviously a common interest, and there is for all practical purposes **only one client involved**." Commission Opinion No. 343. But, "[i] n the situation of related corporations, which do not technically involve a parent, subsidiary, or controlled corporation, the problems are somewhat more acute and the lawyer's duty must be somewhat more precisely defined."

There have yet to be any Texas opinions addressing this situation head-on, given Rule 5.05's infancy. Prior ethics opinions do make clear how far an attorney may go in representing its employer in some circumstances. For instance, in 1995, the Committee issued Opinion No. 512 addressing when an in-house lawyer can represent a joint venture in which his employer is involved. While finding there was no per se conflict in so doing under Rule 1.06's joint representation rule, the Opinion finds the employer could not be allowed to direct how the lawyer rendered its services to the joint venture per se, and that the attorney owed a separate duty of loyalty to the joint venture. Thus, it's unlikely a joint venture will fully qualify as an "organizational affiliate," since it would, at least in part, be subject to control by a someone other than the employer.

Some decisions have addressed when an attorney is working "for" a joint venture and when they are working for their employer in the scope of that employer's role in a joint venture. They are fact-intensive, turning on (1) the attorney's work performed, and (2) the nature of the employer's role in the venture. For example, where an attorney made regulatory filings for a pipeline owned by a joint venture, and his employer's role in that venture was to operate the pipeline, he was considered to have been working "for" his primary employer and not for the joint venturers. *In re Valero Energy Corp.*, 973 S.W.2d 453 (Tex. App.—Houston [14th Dist.] 1998). While this seemingly provides a workaround for the "organizational affiliate" issue, companies should be cautious as it is a fact-intensive, case-by-case determination.

Another issue altogether is presented by partially owned subsidiaries over which the employer does not assert total control. Again, prior decisions of the Committee are instructive. It previously opined in Opinion No. 343 that, when dealing with related corporations without shared control, an attorney's "client in th[e] matter is the corporation for whom the services are to be performed" and that "undivided fidelity is owed to that corporation." Although this Opinion doesn't speak directly about partially owned affiliates, it could perhaps set the stage for an adverse ruling construing Rule 5.05(c).

Does all this mean that you, as in-house counsel, are not qualified to work from your chair in Austin for your employer's partially owned affiliates or in your employer's joint venture? Probably not, but we don't yet know. **HN**

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