

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 649**

May 2015

QUESTION PRESENTED

May a Texas lawyer represent her employer, a federal government agency, in defending a claim against the agency brought by agency employees regarding an employment decision made by the agency, when that decision may also adversely affect the lawyer personally and result in the lawyer's having the same or a substantially similar claim against the agency?

STATEMENT OF FACTS

A Texas lawyer is an employee of a federal government agency (the "Agency"). The lawyer's duties include defending the Agency before administrative tribunals when Agency employees appeal the Agency's adverse employment decisions. Because of automatic spending cuts as part of the federal budget "sequestration," the Agency plans to begin furloughing employees, including possibly the lawyer. The Agency asks the lawyer to defend it in appeals by other employees who are furloughed. If the lawyer is subsequently furloughed she could appeal the decision in the same manner and on the same grounds as other employees' appeals in which she had defended the Agency.

DISCUSSION

Rule 1.06(b)(2) of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from representing a client if the representation reasonably appears to be adversely limited by the lawyer's own interests. Comment 4 to Rule 1.06 states that a lawyer's loyalty to a client is impaired when "a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests" The lawyer's loyalty to the Agency and the lawyer's ability to represent the Agency are impaired when the Agency's actions that the lawyer is defending are the same actions that the lawyer, as an employee of the Agency, may appeal herself.

Rule 1.06(c) provides exceptions to Rule 1.06(b)(2) 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.”

The facts assume the Agency has full knowledge of the conflict of interest and has consented to the lawyer’s representing the Agency. Such consent alone, however, is insufficient to allow the lawyer to represent the Agency. The lawyer must reasonably believe that the representation will not be materially affected. Whether the lawyer reasonably believes she can represent the Agency without adversely affecting the Agency will depend on the specific facts and circumstances involved. For example, if the lawyer personally plans to appeal her furlough, then the lawyer should not represent the Agency against other employees for a substantially similar action, especially if the ruling might be precedent in the lawyer’s personal appeal of her furlough.

“Loyalty is an essential element in the lawyer’s relationship to a client.” Comment 1 to Rule 1.06. “The critical questions are the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyer’s independent professional judgment in considering alternatives” Comment 4 to Rule 1.06. The Agency should be able to expect complete loyalty from the lawyer with no concern that the lawyer’s personal claim against the Agency may be influenced by a ruling in a substantially similar claim defended by the lawyer.

Furthermore, Rule 1.05(b)(2) and (4) prevents a lawyer from using “confidential information of a client to the disadvantage of the client” or using “privileged information of a client for the advantage of the lawyer . . . unless the client consents after consultation.” “Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain full benefit of the legal system.” Comment 1 to Rule 1.05. Even if all relevant information is known or discoverable, knowing that the lawyer is in the same situation as other employees appealing furlough decisions might make the Agency less forthcoming with information than if a different lawyer represented the Agency. Thus, when the lawyer plans to appeal if she is furloughed, the lawyer should reasonably believe that the representation of the Agency might be materially affected.

If the facts or applicable law related to the lawyer’s appeal are not substantially similar to those in the appeals filed by other Agency employees, the lawyer might reasonably conclude that representing the Agency in appeals involving other Agency employees would not create an irreconcilable conflict. If the facts or applicable law are substantially similar but the lawyer is not going to appeal her own furlough, the lawyer might reasonably conclude that representing the Agency in appeals involving other Agency employees would not create an irreconcilable conflict. One of the requirements of using Rule 1.06(c) to overcome a conflict is that the lawyer “reasonably believes” the representation of the client will not be materially affected. The Terminology section of the Rules provides that “reasonably believes” means “the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.” “[W]hen 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.” Comment 7 to Rule 1.06. If the

lawyer reasonably believes the representation of the Agency would be materially affected, a conflict exists and she may not represent the Agency.

If the lawyer is unable to represent the Agency because of a conflict of interest, Rule 1.06(f) prevents any other member of the lawyer's "firm" from representing the Agency in the matter. The Terminology section of the Rules provides that "firm" or "law firm" includes "lawyers employed . . . in a unit of government." If Rule 1.06 prohibits the lawyer from representing the Agency in a matter, Rule 1.06(f) would prohibit all the lawyers within that unit of government from representing Agency in the matter. However, federal law may result in Rule 1.06 (in whole or in part) not being applicable to government lawyers in this situation. See Paragraph 13 to the Preamble: Scope of the Rules (explaining that the Rules do not abrogate any authority otherwise applicable to government lawyers).

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a Texas lawyer may represent her employer, a federal government agency, in defending a claim against the agency brought by agency employees regarding an employment decision made by the agency, when that decision may also adversely affect the lawyer personally and result in the lawyer's having the same or a substantially similar claim against the agency, if the agency consents after full disclosure and the lawyer reasonably believes that her representation of the agency will not be materially affected by the lawyer's own interests.