

**THE PROFESSIONAL ETHICS COMMITTEE  
FOR THE STATE BAR OF TEXAS  
Opinion No. 574**

**September 2006**

**QUESTION**

Is it permissible under the Texas Disciplinary Rules of Professional Conduct for a former employee of a Texas regulatory agency to represent a client before the agency in a matter that originated during the lawyer's employment but in which the lawyer did not participate personally and substantially?

**STATEMENT OF FACTS**

Less than a year after terminating employment with a Texas regulatory agency, a lawyer appeared before the same regulatory agency as the representative of a client who was involved in a matter pending before the agency. The matter originated while the lawyer was employed by the agency but the lawyer had not participated personally or substantially in the matter when he was employed by the agency.

With respect to other contested cases unrelated to the matter in question, the lawyer while employed by the agency had conducted discovery, evaluated evidence, participated in rule changes, filed formal charges against licensees, reviewed orders, and attended settlement conferences. The agency took the position that, under Rule 1.10 of the Texas Disciplinary Rules of Professional Conduct and under section 572.054(b) of the Texas Government Code, the lawyer was not permitted to represent the client in the pending matter.

**DISCUSSION**

Rule 1.10(a) of the Texas Disciplinary Rules of Professional Conduct specifically deals with successive government and private employment of lawyers and provides as follows:

“(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.”

Thus, unless the government agency consents, a lawyer who has been employed by a government agency may not after leaving the agency represent a client with respect to a matter in which the lawyer had “participated personally and substantially” while an employee of the agency.

Rule 1.10(f) specifies the meaning to be given to the term “matter” for purposes of the provisions of Rule 1.10:

“(f) As used in this rule, the term “matter” does not include regulation-making or rule-making proceedings or assignments, but includes:

(1) Any adjudicatory proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge accusation, arrest or other similar, particular transaction involving a specific party or parties; and

(2) any other action or transaction covered by the conflict of interest rules of the appropriate government agency.”

Although the scope of the term “matter” for purposes of Rule 1.10 may be greater under Rule 1.10(f)(2) as a result of a particular agency’s conflict of interest rules, the personal and substantial participation standard of Rule 1.10(a) would not be affected. Hence, even if the term “matter” in the case of a particular agency has a wider scope because of the terms of the agency’s conflict of interest rules and the operation of Rule 1.10(f)(2), Rule 1.10(a) would still not apply to a former agency lawyer in connection with a matter, however defined, unless the personal and substantial participation standard included in Rule 1.10(a) was met with respect to the lawyer’s relationship to such matter.

In the circumstances presented, the only apparent connection between the matter in question and the lawyer while an employee of the agency was the lawyer’s employment by the agency. Personal and substantial participation cannot be imputed based on title of office or the existence of statutory authority. *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 657 (Tex. 1990).

Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct governing conflicts of interest with respect to former clients is not applicable to the circumstances considered. Issues concerning successive government and private employment are governed by Rule 1.10 rather than Rule 1.09. See Comment 1 to Rule 1.09.

In connection with this opinion, the Committee notes that the Texas Ethics Commission has recently ruled that section 572.054(b) of the Texas Government Code does not prohibit representation in a case opened while a lawyer was employed by a government agency if the lawyer did not personally participate and the case was not within the lawyer’s official responsibility. Texas Ethics Commission, Ethics Advisory Opinion 470, May 12, 2006.

## **CONCLUSION**

Under the Texas Disciplinary Rules of Professional Conduct, a former employee of a Texas regulatory agency is permitted to represent a client in proceedings before the agency in a matter that originated during the lawyer’s employment with the agency but with respect to which the lawyer had no personal and substantial participation as an employee of the agency.