



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 1, 2022

The Honorable Susan Deski
Burlleson County Attorney
100 West Buck Street, Suite 402
Caldwell, Texas 77836

Opinion No. KP-0400

Re: Whether a part-time assistant county attorney representing the Department of Family and Protective Services may maintain a private practice representing parents or children in child protection cases in other counties (RQ-0423-KP)

Dear Ms. Deski:

You ask whether a part-time assistant county attorney is prohibited by the Professional Prosecutors Act or conflict of interest rules from representing the Department of Family and Protective Services (“Department”) in Burlleson County (“County”) child protection cases when the attorney “simultaneously maintains a private practice in other counties in which they represent both parents and children in child protection cases that may be adverse to the Department.”¹

Background

You inform us that your office, among other matters, represents the Department of Family and Protective Services in child protection cases in Burlleson County. Request Letter at 1; *see* TEX. FAM. CODE § 264.009(a) (providing, with exceptions not relevant here, that in any action under the Family Code, the Department “shall be represented in court by the county attorney of the county where the action is brought, unless the district attorney or criminal district attorney of the county elects to provide representation”). You explain that you would like to hire a part-time assistant county attorney whose “sole function” would be to represent the Department in such cases and that you are aware of other counties that have employed a part-time attorney in this manner. Request Letter at 1. You offered the position to a particular attorney who maintains a private practice in Travis County representing “parents and children in child protection cases in the Central Texas area, but not in Burlleson County or its contiguous counties.” *Id.*

¹Letter from Honorable Susan Deski, Burlleson Cnty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Aug. 2, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0423KP.pdf> (“Request Letter”).

Your question has two components: whether this attorney may maintain a private practice and whether this attorney, in that private practice, may represent parents or children in child protection cases that may be adverse to the Department. We consider each component in turn.

Attorney's maintenance of a private practice generally

The Professional Prosecutors Act (the "Act") found in Government Code chapter 46 addresses the first component of your question. *See* TEX. GOV'T CODE §§ 46.001–.007; *see also id.* § 46.002(3) (making the Act applicable to county attorneys performing the duties of district attorneys in particular counties, including Burleson County). Chapter 46 governs state and county prosecutors and generally prohibits a state prosecutor from engaging in the private practice of law. *See id.* § 46.005(a). The primary purpose of the prohibition on the private practice of law is to "prevent prosecutors from spending their time attending to the business of private clients rather than public business." Tex. Att'y Gen. Op. No. JC-0380 (2001) at 1 (internal quotation marks omitted). The Act's prohibition also "applies to a county prosecutor and any assistant of a prosecutor if, from all state and county funds received, the county prosecutor or assistant receives a salary that is equal to or more than 80 percent of the benchmark salary." TEX. GOV'T CODE § 46.005(c). A similar provision, found in Government Code chapter 41 containing general provisions relating to prosecuting attorneys, prohibits an assistant prosecutor who receives longevity pay from engaging in the private practice of law if the assistant prosecutor receives a salary equal to or more than 80 percent of the salary the state pays a district judge. *See id.* § 41.254(a).

The "benchmark salary" is the "state annual salary as set by the General Appropriations Act in accordance with Section 659.012 paid to a district judge with comparable years of service as the county prosecutor." *Id.* § 46.001(2). Currently, that salary is \$140,000. *See id.* § 659.012(a)(1). Eighty percent of \$140,000 is \$112,000. You assert that you offered the part-time attorney a salary of \$35,000, and that even with their expected longevity pay, the attorney's total annual salary would be less than \$112,000. *See* Request Letter at 2. If in fact the part-time attorney's salary does not exceed the salary specified in these provisions, neither provision applies to prohibit the attorney here from engaging in the private practice of law. *See generally* Tex. Att'y Gen. Op. Nos. GA-0241 (2004) at 2 ("County attorneys who do not receive a salary in excess of the benchmark are not subject to the prohibition in the Professional Prosecutors Act against maintaining a private law practice."), GA-0094 (2003) at 2 (concluding that because county attorney's salary was less than "80 percent of the benchmark salary," section 46.005 was not applicable and county attorney could engage in the private practice of law). Accordingly, a court would likely conclude that neither Government Code section 46.005(a) nor Government Code section 41.254 prohibit the assistant county attorney you describe from maintaining a private practice.

Attorney's representation of parents or children in child protection cases

The Texas Disciplinary Rules of Professional Conduct ("Disciplinary Rules") govern lawyers in Texas and address the second component of your question. *See* TEX. GOV'T CODE § 81.071 ("Each attorney admitted to practice in this state . . . is subject to the disciplinary and disability jurisdiction of the supreme court and the Commission for Lawyer Discipline, a

committee of the state bar.”). Disciplinary Rule 1.06 prohibits an attorney from representing opposing parties to the same litigation. TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.06(a), *reprinted in* TEX. GOV’T CODE, tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9). You do not suggest circumstances exist that make this rule applicable, but to the extent such circumstances arise, this attorney could not represent children or parents and the Department as opposing parties in the same matter. *See In re Seven-O Corp.*, 289 S.W.3d 384, 390 (Tex. App.—Waco 2009, orig. proceeding [mand. denied]) (reciting comment 2 to Rule 1.06(a) noting that the term “‘opposing parties’ . . . contemplates a situation where a judgment favorable to one of the parties will directly impact unfavorably upon the other party”).

Beyond prohibiting direct adversarial opposition, Disciplinary Rule 1.06(b)(1) also generally prohibits an attorney from representing two persons in a “substantially related matter” whose interests are “materially and directly adverse.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.06(b)(1). The Disciplinary Rules do not define “substantially related.” *See id.* The Texas Supreme Court defined the term for purposes of Disciplinary Rule 1.09, and some courts have used that same definition for Disciplinary Rule 1.06. *See, e.g., In re Houston Cnty. ex rel. Session*, 515 S.W.3d 334, 342 (Tex. App.—Tyler 2015, orig. proceeding); *State Bar of Tex. v. Dolenz*, 3 S.W.3d 260, 270–71 (Tex. App.—Dallas 1999, no pet.). Accordingly, two matters are “substantially related” when “a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar.” *In re Houston Cnty., ex rel. Session*, 515 S.W.3d at 342, citing *In re EPIC Holdings, Inc.*, 985 S.W.2d 41, 51 (Tex. 1998).

Also, Disciplinary Rule 1.06(b)(2) generally prohibits an attorney from representing a person if such representation “reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer’s or law firm’s own interests.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.06(b)(2). This section addresses a “situation 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 . . . responsibilities to others.” *Id.* cmt. 4; *see also In re Thetford*, 574 S.W.3d 362, 376 (Tex. 2019) (original proceeding) (stating “a lawyer’s representation of one client is adverse to another client if the lawyer’s ability to faithfully and loyally represent his other client is compromised”). Thus, to the extent this attorney’s representation of parents and children implicate matters that are substantially related to matters in which she represents the Department, or the representation of one client compromises representation of another, such representation would implicate Disciplinary Rule 1.06(b).²

This attorney’s representation may also implicate Disciplinary Rule 1.10. Disciplinary Rule 1.10, relating to successive government and private employment, provides that 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

²An exception to the prohibition applies if (1) the attorney reasonably believes that “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.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.06(c). The burden of proving the application of the exception would be on the attorney raising the exception. *See State Bar of Tex. v. Dolenz*, 3 S.W.3d at 270.

agency consents after consultation.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.10(a). But the comments to Disciplinary Rule 1.10(a) state that the rule does not “prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.06 and is not otherwise prohibited by law.” *Id.* cmt. 8. Disciplinary Rule 1.10 prohibits a lawyer from representing a private client whose interests are adverse to a governmental agency if the lawyer gained confidential government information during his or her prior employment with the government agency. *Id.* R. 1.10(c), (g). The comments to Disciplinary Rule 1.10 advise that “[a] lawyer should not be in a position where benefit to a private client might affect performance of the lawyer’s professional functions on behalf of public authority” and that there could be “unfair advantage” to the “private client by reason of access to confidential government information about the client’s adversary obtainable only through the lawyer’s government service.” *Id.* cmt. 3.

Ultimately, we cannot advise you that the representation of this attorney as you describe it is proper as a matter of law. Conflict-of-interest questions involve issues of fact and are not ones we can answer in an Attorney General opinion.³ *See, e.g.,* Tex. Att’y Gen. Op. No. GA-0557 (2007) at 3 (recognizing that resolution of issues under the Disciplinary Rules involve the investigation and resolution of fact questions which is beyond the scope of an Attorney General opinion). “Violations of, or sufficiency of actions taken under, the rules of professional conduct are to be decided in the first instance by the lawyer, or by the disciplinary arm of the Supreme Court of Texas and the State Bar of Texas.” *Id.* (citing Tex. Disciplinary Rules of Professional Conduct preamble ¶ 15). Accordingly, we cannot conclusively answer your second question and instead refer you to the Committee on Professional Ethics, whose functions include opining on the propriety of attorney conduct under the Disciplinary Rules. *See* TEX. GOV’T CODE §§ 81.091 (creating the Committee on Professional Ethics); 81.092(a) (providing that the committee shall “express its opinion on the propriety of professional conduct”); *see also* Tex. Att’y Gen. Op. Nos. GA-0716 (2009) at 2, GA-0557 (2007) at 3, JC-0033 (1999) at 3.

³While you describe certain facts that lead you and this attorney to conclude that there is no conflict, the Department offers differing facts suggesting potential areas of conflict. *Compare* Request Letter at 2–3, *with* Letter from Brenda L. Kinsler, Managing Att’y, Office of Gen. Couns., Tex. Dep’t of Fam. & Protective Servs., to Honorable Ken Paxton, Tex. Att’y Gen. at 2–4 (Aug. 27, 2021) (on file with the Op. Comm.). This office does not resolve disputed facts. *See* Tex. Att’y Gen. Op. No. KP-0240 (2019) at 1. To the extent the Department were to seek the disqualification of this attorney in any particular matter, it would have the burden of establishing a violation of one or more of the disciplinary rules. *See generally In re Houston Cnty.*, 515 S.W.3d at 342.

S U M M A R Y

A court would likely find that an assistant county attorney with the salary you describe may maintain a private practice.

Attorney conflicts of interest are governed by the Texas Disciplinary Rules of Professional Conduct. The representation you describe may implicate Rules 1.06 and 1.10, but violations thereof are to be determined, in the first instance, by the attorney and the Committee on Professional Ethics. Questions about potential violation of these rules involve questions of fact and cannot be answered in an Attorney General opinion.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

KEN PAXTON
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