

RECEIVED

By Opinion Committee at 10:15 am, Aug 10, 2021

RQ-0423-KP

August 2, 2021

File# ML-48987-21

I.D.# 48987

VIA Email to: opinion.committee@oag.texas.gov

Office of the Attorney General

Attn: Opinion Committee

P.O. Box 12548

Austin, Texas 78711-2548

Re: Whether a part-time assistant county attorney representing the Department of Family of Protective Services can maintain a private practice representing parents and/or children in child protection cases in other counties

Dear Attorney General Paxton:

I am writing to request an opinion as to whether the Professional Prosecutors Act or conflict of interest rules would prohibit a part-time assistant county attorney from representing the Department of Family and Protective Services in child protection cases in Burleson County while that 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. I believe that neither of these sources of law would prohibit this arrangement.

Background

The County Attorney of Burleson County (the "Burleson CA") exercises authority to, among other things, prosecute misdemeanor cases, prosecute felony cases, and represent the Department of Family of Protective Services ("DFPS") in child protection cases in Burleson County. The Burleson CA would like to hire a part-time assistant county attorney whose sole function would be to represent DFPS in such cases; the part-time assistant county attorney would not work on any other matters. The Burleson CA is familiar with other counties that have employed a part-time assistant county attorney in this way. After interviewing multiple candidates for the job, the Burleson CA offered the position to attorney Carah-Beth Bass. Ms. Bass maintains a private practice in Travis County and represents parents and children in child protection cases in the Central Texas area, but not in Burleson County or its contiguous counties.

Professional Prosecutors Act

A county prosecutor or an assistant of a prosecutor "may not engage in the private practice of law" if he or she (1) "receives a salary that is equal to or more than 80 percent of the benchmark salary," *See* TEX. GOV'T CODE § 46.005(a)-(c), or (2) receives "longevity pay under [Chapter 41, Subchapter D of the Government Code] [and] from all funds received, . . . receives a salary that is equal to or more than 80 percent of the salary paid by the state to a district judge," *Id.* at § 41.254(a); Tex. Att'y Gen. Op. No. GA-0241(2003) at 2. At this time, both the "benchmark salary" and the "salary paid by the state to a district judge" is an annual base salary

of \$140,000. *Id.* at § 46.001, 659.012. Accordingly, these prohibitions on private practice apply to attorneys receiving an annual salary, including any longevity pay¹, of \$112,000 or more.

Here, The Burleson CA offered Ms. Bass an annual salary of \$35,000. Based on her previous years of lifetime service in other counties, Ms. Bass would be entitled to longevity pay after seven (7) months of employment. Even with the addition of longevity pay after seven (7) months of employment, Ms. Bass's total funds received would be less than \$112,000. Therefore, the Professional Prosecutors Act would not bar Ms. Bass from engaging in the private practice of law.

Conflict of Interest

Generally, a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer ...; or (2) 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. R. PROF. CONDUCT 1.06(b). However, a lawyer may represent a client in these circumstances "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." *Id.* at 1.06(c).

Beyond these general conflict of interest provisions, two rules regarding successive government and private employment potentially relate to Ms. Bass's employment with Burleson County.² Specifically, 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." *Id.* at 1.10(a). In addition, a lawyer may not represent a private client whose interests are adverse to a government agency if the lawyer gained "confidential government information" during his or her prior employment with the government agency. *Id.* at 1.10(c),(g).

Here, Ms. Bass would represent DFPS as an assistant county attorney while in Burleson County, and defend parents and/or children who are adverse to the Department as a private attorney in other counties. Both the Burleson CA and Ms. Bass do not find that a conflict of interest exists in these roles. Each child protection case depends on the circumstances of the family members at

¹ See GOV'T CODE § 41.252(a) (defining when an assistant prosecutor becomes eligible to receive longevity pay); *id.* at 41.257(a) (specifying the periods for which an assistant prosecutor accrues lifetime service credit).

² Other conflict of interest provisions may apply to particular child protective matters, such as if one of the parents in a Burleson County child protective case was a former client of Ms. Bass's. TEX. R. PROF. CONDUCT 1.10(e).

issue and DFPS's relationship with those parties. Therefore, absent exceptional circumstances, each child protection case can generally be considered a "matter" for purposes of Rules 1.06 and 1.10, and substantially unrelated to other child protection cases. Likewise, Ms. Bass and the Burleson CA believe that neither Ms. Bass's representation of DFPS nor of private parties would be materially affected by her two roles. Ms. Bass has previously represented DFPS in two other counties and cannot identify confidential government information that could be obtained in the course of her duties as an assistant county attorney in Burleson County that could be unintentionally disclosed or that could present a conflict of interest in cases in which the attorney serves as a defense attorney for a parent or as an attorney or guardian ad litem for a child. This does not preclude Ms. Bass from her legal and professional obligations to diligently check and identify conflicts of interest as required in the normal course of professional conduct.

Conclusion

I am writing to request an opinion as to whether the Professional Prosecutors Act or conflict of interest rules would prohibit a part-time assistant county attorney from representing the Department of Family and Protective Services in child protection cases in Burleson County while that 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. I believe that neither of these sources of law would prohibit this arrangement.

Sincerely,



Susan Deski
Burleson County Attorney