



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 425

January 14, 2000

Whether a law firm may make a severance payment, a payment of moving or relocation expenses, or a payment of other benefits to a lawyer who is currently employed by the firm and who has accepted an offer of future employment with a state agency. (AOR-468)

The Texas Ethics Commission has been asked whether a law firm may make a severance payment, a payment of moving or relocation expenses, or a payment of other benefits to a lawyer currently employed by the firm who has accepted an offer of future employment with a state agency. As a state agency employee, the former law firm employee would be representing the state in litigation.¹ The requestor also asks whether the answer depends on whether the payment is consideration for the employee's promise to return to the law firm after a defined period of time.

Chapter 36 of the Texas Penal Code contains a number of restrictions on payments to "public servants." Penal Code §§ 36.02 (bribery law), 36.07 (honorarium law), 36.08 (prohibition against certain gifts and other benefits). The term "public servant" includes an individual who has been selected as a state employee, even if the individual has not yet assumed his or her duties. *Id.* § 1.07(a)(41). Therefore the law firm employees in question here would be public servants for purposes of the provisions of Chapter 36 of the Penal Code.

The bribery law prohibits a public servant from soliciting or accepting a "benefit" in consideration for the public servant's exercise of discretion as a public servant. *Id.* § 36.02(a)(1). The proposed payments would be "benefits." [Ethics Advisory Opinion No. 192](#), n.1 (1994). The request letter states that under the proposed arrangement "there would be no relationship between the benefit conferred by the private law firm and any expectation of favorable official actions benefiting the firm or its clients." Even so, the proposed arrangement would be impermissible under the bribery law if the payment from the law firm were offered in consideration for a public servant's promise to exercise discretion as a state agency employee by limiting his or her service with the agency to a specified amount of time.

Chapter 36 of the Penal Code also contains provisions prohibiting public servants from accepting "benefits" from certain sources. Penal Code § 36.08. These prohibitions apply regardless of whether the donor seeks or expects anything in consideration for the benefit. The following section 36.08 provision is the one that is most likely to apply in the context of the proposed arrangement:

A public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.

Id. § 36.08(d). State agency litigation almost invariably involves a government contract, payment, or claim. An attorney working on such litigation is likely to exercise at least some degree of discretion in connection with the litigation. Further, many law firms are interested in or likely to become interested in state litigation. Consequently, some benefits offered as part of the proposed arrangement could be impermissible under section

36.08(d).² The request letter states that “every precaution would be taken to segregate [a former law firm employee] from an [agency] division or team which is working on a matter where an adverse party is represented by the [agency lawyer’s former law firm].” Whether those precautions would provide sufficient safeguards against violations of section 36.08(d) would depend on the specific nature of the precautions. We note, however, that the restriction in section 36.08(d) would apply even if the law firm’s interest in the matter were not adverse to the state’s interests.

Finally, we note that the proposed arrangement might also be impermissible under the honorarium law. *Id.* § 36.07. The honorarium law provides as follows:

(a) A public servant commits an offense if the public servant solicits, accepts, or agrees to accept an honorarium in consideration for services that the public servant would not have been requested to provide but for the public servant’s official position or duties.

Id. In our view, a payment would constitute a prohibited honorarium if it were made in consideration for a former law firm employee’s performance of services as a state employee (services the state employee would not--indeed could not--be requested to do but for his or her status as a public servant).³

SUMMARY

The term “public servant” includes an individual who has been selected as a state employee, even if the individual has not yet assumed his or her duties.

In some circumstances the bribery law in section 36.02 of the Penal Code, the gift restrictions in section 36.08 of the Penal Code, and the honorarium law in section 36.07 of the Penal Code, would prohibit a law firm from making a severance payment, a payment of moving or relocation expenses, or a payment of other benefits to a lawyer currently employed by the firm who has accepted an offer of future employment with a state agency.

¹ The request letter states the state agency is considering a program under which it would hire law firm lawyers for a limited period of time. The Ethics Commission does not have statutory authority to consider whether the agency is authorized to spend funds to operate such a program.

² There are exceptions to the prohibitions in section 36.08. Penal Code § 36.10. The request letter suggests that one of those exceptions, the “independent relationship” exception, would be applicable to a benefit that a law firm paid to an employee who had become a public servant. *Id.* § 36.10(a)(1). That exception is for a fee for which a public servant gives legitimate consideration “in a capacity other than as a public servant.” That exception would apply to fees paid to a law firm employee for work performed on behalf of the law firm during his tenure with the law firm. It would not apply to a fee paid to a public servant because of his or her future government employment.

³ The honorarium prohibition applies regardless of whether the person offering the honorarium is also the person requesting the services.