



# TEXAS ETHICS COMMISSION



## ETHICS ADVISORY OPINION NO. 441

*December 14, 2001*

*Whether a law firm may pay a signing bonus to an individual who is currently a state employee, and related questions. (AOR-481)*

The Texas Ethics Commission has been asked to issue an advisory opinion in response to a number of questions about the relationship between Texas state employees and possible future employers. The Texas Ethics Commission has authority to issue advisory opinions only in regard to certain statutes. Gov't Code § 571.091. Several of those statutes regulate conduct between state employees and possible future employers. *Id.* ch. 305 (lobby law); *id.* § 572.054 (revolving door provisions); Penal Code ch. 36 (bribery, gifts, and honoraria); *see also* Gov't Code § 572.051 (standards of conduct for state employees). It is important to note, however, that many state employees are subject to additional regulations that apply only to employees in specific agencies. The Texas Ethics Commission does not have jurisdiction over those regulations. Consequently, an individual state employee must be certain that his or her conduct is permissible not only under the statutes listed in chapter 571 of the Government Code, but also under any other regulations applicable to that particular state employee.

A number of the questions in the request letter are in regard to employees of the judicial branch of Texas state government. Unlike employees of the executive and legislative branches of state government, employees of the judicial branch are not subject to the restrictions in the lobby law in chapter 305 of the Government Code. Nor are employees of the judicial branch subject to the revolving door provisions in section 572.054 of the Government Code, which apply to employees of regulatory agencies in the executive branch. Therefore, we will address the requestor's questions about judicial branch employees separately from the questions about employees of the executive and legislative branches.

## JUDICIAL EMPLOYEES

### Interviews

One question raised in the request letter is whether a staff attorney who works for a state appellate court may interview for a job with a Texas law firm. There is nothing in the statutes under the Ethics Commission's jurisdiction that would prohibit a judicial branch employee, or any other state employee, from participating in an employment interview with a law firm.

Although the laws under the jurisdiction of the Ethics Commission do not apply to job interviews, those laws are relevant to the acceptance of benefits in connection with job interviews. In some cases, a law firm may offer to pay transportation and lodging expenses or to provide food and entertainment in connection with an interview. Section 36.08 of the Penal Code contains a number of provisions that prohibit public servants from soliciting, accepting, or agreeing to accept "benefits" from certain sources.<sup>1</sup> Section 36.09 of the Penal Code prohibits the offer of a prohibited benefit.<sup>2</sup> *See infra* App A (text of Penal Code §§ 36.08, .09, .10). Section 36.08(e) prohibits a public servant from accepting a benefit "from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or tribunal." Under that section, an employee of a state appellate court would be prohibited from accepting a benefit from many Texas law firms. Nonetheless, a benefit provided in connection with an interview may be permissible because there is an exception to the

prohibitions in section 36.08 for a benefit “conferred on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient.” Penal Code § 36.10(a)(2). The relationship between a state employee and a possible future employer is a business relationship. Whether the relationship is independent of the official status of the recipient is a fact question. Additionally, there is another exception to the prohibitions that applies to food, transportation, lodging, and entertainment accepted “as a guest.” *Id.* § 36.10(b). See generally [Ethics Advisory Opinion No. 261](#) (1995) (applying exception for “acceptance as a guest”).

### **Job Offers**

The request letter also raises a question about whether an employee of a state court may accept an offer of future employment with a law firm. Under chapter 36 of the Penal Code, a private employer may offer a state employee a job as long as the offer is for legitimate consideration for work to be performed in a capacity other than as a public servant. See Penal Code § 36.10(a)(1). Legitimate consideration means compensation commensurate with the value of the services provided. [Ethics Advisory Opinion No. 358](#) (1997) at 2. An offer that purported to be an offer of pay for future work but was in reality an offer to pay a state employee to perform his or her state job in a particular way would be a bribe. Penal Code § 36.02.

### **Hiring Bonuses**

The request letter also raises questions about hiring bonuses paid by law firms to court employees. In some situations, the exception for a benefit “conferred on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient” may allow a court employee to accept a hiring bonus that would otherwise be prohibited under section 36.08(e). That exception would not apply in a case in which a law firm paid a hiring bonus, in whole or in part, because of the court employee’s position or official status. Whether that exception would apply in any other case is a fact question, the resolution of which would depend on all of the relevant facts.<sup>3</sup>

The Ethics Commission has received a number of briefs that raise policy arguments about the acceptance of hiring bonuses by court employees. The Ethics Commission does not have authority to issue advisory opinions in order to resolve policy questions.

### **NON-JUDICIAL EMPLOYEES**

The request letter also raises questions about the relationship between employees of the executive or legislative branch of state government and possible future employers. The foregoing discussion regarding judicial employees is also generally applicable to employees of the executive and legislative branches of state government.<sup>4</sup> In addition, employees of the executive and legislative branches of state government are subject to provisions restricting the acceptance of various gifts and favors from a person registered as a lobbyist. Therefore, in evaluating whether it is permissible to accept something from a law firm, an employee of the executive or legislative branch of state government must determine whether the law firm is a lobby registrant and, if so, whether the lobby law permits acceptance.

Also, employees of regulatory agencies in the executive branch are subject to the revolving door provisions in section 572.054 of the Government Code. Before accepting any job offer, a state employee subject to those revolving door provisions should make sure that the prospective employment would not involve work that would result in a violation of the revolving door law.

### **SUMMARY**

There is nothing in the statutes under the Ethics Commission’s jurisdiction that would prohibit a state employee from participating in an employment interview. As our opinion states, the remaining questions presented cannot be resolved without a consideration of all relevant facts.

## Appendix A

### § 36.08. Gift to Public Servant by Person Subject to His Jurisdiction

- (a) A public servant in an agency performing regulatory functions or conducting inspections or investigations commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency.
- (b) A public servant in an agency having custody of prisoners commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be in his custody or the custody of his agency.
- (c) A public servant in an agency carrying on civil or criminal litigation on behalf of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person against whom the public servant knows litigation is pending or contemplated by the public servant or his agency.
- (d) 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.
- (e) A public servant who has judicial or administrative authority, who is employed by or in a tribunal having judicial or administrative authority, or who participates in the enforcement of the tribunal's decision, 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 matter before the public servant or tribunal.
- (f) A member of the legislature, the governor, the lieutenant governor, or a person employed by a member of the legislature, the governor, the lieutenant governor, or an agency of the legislature commits an offense if he solicits, accepts, or agrees to accept any benefit from any person.
- (g) A public servant who is a hearing examiner employed by an agency performing regulatory functions and who conducts hearings in contested cases commits an offense if the public servant solicits, accepts, or agrees to accept any benefit from any person who is appearing before the agency in a contested case, who is doing business with the agency, or who the public servant knows is interested in any matter before the public servant. The exception provided by Section 36.10(b) does not apply to a benefit under this subsection.
- (h) An offense under this section is a Class A misdemeanor.
- (i) A public servant who receives an unsolicited benefit that the public servant is prohibited from accepting under this section may donate the benefit to a governmental entity that has the authority to accept the gift or may donate the benefit to a recognized tax-exempt charitable organization formed for educational, religious, or scientific purposes.

### § 36.09. Offering Gift to Public Servant

- (a) A person commits an offense if he offers, confers, or agrees to confer any benefit on a public servant that he knows the public servant is prohibited by law from accepting.
- (b) An offense under this section is a Class A misdemeanor.

### § 36.10. Non-Applicable

- (a) Sections 36.08 (Gift to Public Servant) and 36.09 (Offering Gift to Public Servant) do not apply to:

- (1) A fee prescribed by law to be received by a public servant or any other benefit to which the public servant is lawfully entitled or for which he gives legitimate consideration in a capacity other

than as a public servant;

(2) a gift or other benefit conferred on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient; or

(3) a benefit to a public servant required to file a statement under Chapter 572, Government Code, or a report under Title 15, Election Code,<sup>1</sup> that is derived from a function in honor or appreciation of the recipient if:

(A) the benefit and the source of any benefit in excess of \$50 is reported in the statement; and

(B) the benefit is used solely to defray the expenses that accrue in the performance of duties or activities in connection with the office which are nonreimbursable by the state or political subdivision;

(4) a political contribution as defined by Title 15, Election Code;

(5) a gift, award, or memento to a member of the legislative or executive branch that is required to be reported under Chapter 305, Government Code;

(6) an item with a value of less than \$50, excluding cash or a negotiable instrument as described by Section 3.104, Business & Commerce Code; or

(7) an item issued by a governmental entity that allows the use of property or facilities owned, leased, or operated by the governmental entity.

(b) Section 36.08 (Gift to Public Servant) does not apply to food, lodging, transportation, or entertainment accepted as a guest and, if the donee is required by law to report those items, reported by the donee in accordance with that law.

(c) Section 36.09 (Offering Gift to Public Servant) does not apply to food, lodging, transportation, or entertainment accepted as a guest and, if the donor is required by law to report those items, reported by the donor in accordance with that law.

<sup>1</sup>V.T.C.A., Election Code § 251.001 et seq.

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<sup>1</sup> The prohibitions in sections 36.08 and 36.09 apply to a benefit solicited or accepted by or offered to a “public servant.” An employee of state or local government in Texas is a public servant. Penal Code § 1.07(a)(41)(A). The term “public servant” also includes an individual who has been selected for a position but has not yet assumed the duties of the position. *Id.* § 1.07(a)(41). The request letter raises questions about payments from law firms to individuals who have not even been offered a position as a government employee and are therefore not public servants. By definition, the provisions in section 36.08 do not apply to a payment to an individual who is not a public servant.

<sup>2</sup> In addition to the prohibitions in sections 36.08 and 36.09, chapter 36 of the Penal Code contains provisions regarding bribery and honoraria. Although the bribery law is relevant to any benefit offered or given to a public servant, the questions raised in the request letter do not suggest the necessary quid pro quo that is an element of the offense of bribery. *See generally Id.* § 36.02. The honorarium prohibition applies to a payment for a service that a public servant would not have been asked to perform but for his or her status as a public servant. *See generally id.* § 36.07. The premise of the request letter, however, is that any payment offered for specific services would be offered for services performed in the future as a law firm employee. Of course, as noted in the section regarding job offers, an offer that purported to be an offer of pay for future work but was in reality an offer to pay a state employee to perform his or her state job in a particular way would be a bribe. *Id.* § 36.02.

<sup>3</sup> The request letter posits a number of different situations in which a law firm offers to pay a signing bonus to an individual who is a public servant if the individual agrees to accept the law firm’s offer of employment. In each situation, the request letters states that the

signing bonus is part of every offer of employment from the firm and that the signing bonus has no connection to an individual's status as a public servant. A determination of the permissibility under chapter 36 of the Penal Code of any such offer would necessarily require a consideration of all of the relevant circumstances. A judge or jury would consider a law firm's practices, policies, and reasons for offering to pay a bonus, along with all other available evidence.

<sup>4</sup> In any particular case, the analysis of whether a state employee may accept a benefit requires a determination of whether one of the prohibitions in section 36.08 is applicable and, if so, whether there is an applicable exception in section 36.10(a) or (b).