



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 455

May 7, 2004

Whether the contingent fee prohibition in section 305.022 of the Government Code applies in a situation in which a lawyer seeks a legislative change that may increase the lawyer's chances of success in tax refund cases. (AOR-511)

The Texas Ethics Commission has been asked about the application of the contingent fee prohibition in section 305.022 of the Government Code to a situation in which a lawyer seeks a legislative change that may increase the lawyer's chances of success in tax refund cases. The lawyer's only compensation in the tax refund cases is a percentage of any taxes recovered.

The Texas lobby law prohibits a person from accepting any employment or rendering any service to "influence legislation or administrative action for compensation contingent on the passage or defeat of any legislation, the governor's approval or veto of any legislation, or the outcome of any administrative action." Gov't Code § 305.022(b). There is an exception to that prohibition "for legal representation before state administrative agencies in contested hearings or similar adversarial proceedings prescribed by law or administrative rules." *Id.* § 305.022(d)(2).

The lawyer in question here has been hired to pursue claims with the Texas Comptroller of Public Accounts for refunds of sales and use taxes paid in Texas. The claims are adversarial proceedings before a state administrative agency under section 111.105 of the Tax Code. Therefore, it is permissible for the lawyer to accept employment or render services for compensation that is contingent upon the outcome of such proceedings.

The question raised here is whether it is permissible for the lawyer to seek adoption of a statutory amendment that would likely increase the chances that the lawyer's clients would be awarded refunds. According to the request letter, no client has hired the lawyer to seek the legislative change, and no client is compensating the lawyer for seeking the legislative change.

In 1996, the commission considered a situation in which lawyers who had been hired to pursue litigation on a contingent fee basis sought legislation that would achieve an end similar to the relief sought in the lawsuit.¹ In response to the question of whether the attorneys would be rendering services for compensation contingent on the passage or defeat of legislation by seeking a legislative resolution, the commission wrote:

[S]uccessful efforts by the plaintiffs' attorneys to influence the passage of legislation may lead to a payment to the plaintiffs' attorneys. Failure to influence the passage of legislation, however, does not mean that the plaintiffs' attorneys will not be paid. Rather, the parties will proceed with the lawsuit. Whether the plaintiffs' attorneys receive a fee will depend on the outcome of the lawsuit. We conclude, therefore, that the compensation the plaintiffs' attorneys have agreed to in this case is not contingent on the passage of legislation. Therefore, the plaintiffs' attorneys would not violate section 305.022(b) by acting in accordance with the judge's order in this situation.

The same analysis applies in the situation at hand. A successful effort to influence adoption of amendments to laws governing tax refunds might increase the lawyer's chances of ultimately receiving payment in tax refund cases, but failure would not necessarily mean that the lawyer would not be paid. Therefore, the lawyer's

compensation in the tax refund suits is not contingent on the passage of legislation and the lawyer would not violate section 305.022 of the Government Code in the situation described in this opinion.

SUMMARY

The compensation described in this opinion is not contingent on the passage of legislation.

¹ The court had directed the lawyers to seek a legislative solution.