



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 492

October 21, 2010

Whether a member of the Texas Board of Professional Land Surveying may testify as an expert witness on whether a person had committed a violation of laws, rules, or standards within the jurisdiction of the board. (AOR-556)

The Texas Ethics Commission has been asked to consider whether a member of the Texas Board of Professional Land Surveying (TBPLS) may, as an expert witness in a court action, testify on whether a person had committed a violation of laws, rules, or standards within the jurisdiction of the TBPLS. The TBPLS is a state agency that regulates the profession of land surveying in Texas and has statutory authority to issue and revoke licenses, consider complaints, order probation, assess administrative penalties, and take other actions regarding the profession. *See generally* Chapter 1071, Occup. Code.

The requestor of the opinion states that members of the TBPLS are often requested to serve as expert witnesses in court actions and asks whether a member would violate section 572.051 of the Government Code by answering questions regarding whether surveyors involved in such court actions had committed violations of the board's rules or standards as evidenced by documents furnished to the court or depositions prepared for the court.

Section 572.051 of the Government Code states that a state officer or employee should not accept other employment or compensation that could reasonably be expected to impair the officer's or employee's independence of judgment in the performance of the officer's or employee's official duties. Gov't Code § 572.051(3).

In Ethics Advisory Opinion No. 410, we determined that a conflict of interest arises when a state board member teaches courses intended for prospective or current licensees. Ethics Advisory Opinion No. 410 (1999). Our opinion was consistent with Ethics Advisory Opinion No. 318, in which we addressed a member of a licensing board offering courses in a private capacity for board licensees and stated, "[t]he arrangement intertwines the private interest of the board member in promoting his professional expertise with the interest of the board in continuing education for its licensees." Ethics Advisory Opinion No. 318 (1996).

In our view, the service of a member of the TBPLS as an expert witness in the circumstances presented by the requestor would intertwine the member's private interest in promoting his professional expertise with the regulatory interests of the TBPLS. The act of testifying on whether a violation of a law or rule within the TBPLS's jurisdiction had occurred may also hamper the member's ability to render an independent judgment if the matter were subject to the TBPLS's administrative action. Therefore, in our opinion the proposed service by a member could reasonably be expected to impair the member's independence of judgment in the performance of the member's official duties as a member of the TBPLS.¹

The requestor also asks whether any other laws under the jurisdiction of the Texas Ethics Commission would prohibit the proposed service as an expert witness. We note that a public servant may not 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. Section 36.07(a), Penal Code. *See generally* Ethics Advisory Opinion No.

312 (1996). In addition, the Penal Code prohibits a public servant in an agency performing regulatory functions or conducting inspections or investigations from soliciting, accepting, or agreeing 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 unless an exception under section 36.10 of the Penal Code also applies to the benefit. Penal Code § 36.08(a). *See generally* Ethics Advisory Opinion No. 192 (1994).²

SUMMARY

A member of the Texas Board of Professional Land Surveying should not serve as an expert witness to testify on whether a person had committed a violation of laws, rules, or standards within the jurisdiction of the board.

¹ A member of the TBPLS also should not serve as an expert witness as proposed by the requestor if the member might reasonably expect that it would require or induce the member to disclose confidential information acquired by reason of the member's official position. Gov't Code § 572.051(a)(2).

² We note that Section 39.06 of the Penal Code prohibits a public servant from using or disclosing certain confidential information in some circumstances. *See* Penal Code § 39.06. We also note that Section 659.005(d) of the Government Code, a law outside of our jurisdiction, provides that a state officer who appears as an expert witness in a judicial proceeding or legislative hearing may accept compensation for the appearance only if the person is not also compensated by the state for the person's time in making the appearance and may accept reimbursement for travel expenses only if the expenses are not reimbursed by the state. *See* Gov't Code § 659.005. This opinion is not intended to interpret a law outside our jurisdiction.