

RECENT ETHICS OPINIONS

PROFESSIONAL ETHICS COMMITTEE

STATE BAR OF TEXAS

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OPINION NO. 649

May a lawyer represent her employer, a government agency, in defending a claims against the agency when the outcome could adversely affect the lawyer personally and result in the lawyer having a similar claim against the agency?

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Facts: Agency lawyer is tasked with defending agency furlough plan. If successful, the lawyer is successful, she may find herself furloughed as well.

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Rule 1.06(b)(2) prohibits a lawyer from representing a client if the representation reasonably appears to be adversely limited by the lawyer's own interests.

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Comment 4: A lawyer's loyalty to a client is impaired when a lawyer "may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests..."

The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially and adversely affect the lawyer's independent professional judgment in considering alternatives.

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Exception to the general prohibition:

- The lawyer reasonably believes that the representation will not be materially affected; and
- Client consents to the representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation.
- Agency should expect complete loyalty from the lawyer with no concern that the lawyer's personal claim against the agency may be influenced by a ruling in a claim defended by the lawyer.

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Confidentiality issues:

A lawyer is prohibited from using a client's confidential information to the client's disadvantage, and is prohibited from using privileged information to the lawyer's advantage (unless the client consents after consultation).

“Free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain full benefit of the legal system.”

Would agency be less forthcoming if lawyer is in same situation as plaintiff employees?

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Outcome will depend on specific facts. If the lawyer personally plans to appeal her furlough, then the lawyer should not represent the agency against other employees for a substantially similar action, especially if the ruling might be precedent in the lawyer's personal appeal of her furlough.

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If the lawyer is unable to represent the agency because of a conflict of interest, Rule 1.06(f) prevents any other member of the lawyer's "firm" from representing the Agency in the matter. The "Terminology" section of the Rules provides that "firm" or "law firm" includes "lawyers employed...in a unit of government." If Rule 1.06 prevents the lawyer from representing the Agency in a matter, Rule 1.06(f) would prohibit all the lawyers within that unit of government from representing the Agency in that matter.

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Preamble to the Disciplinary Rules of Professional Conduct:

Government lawyers “may have authority to represent the ‘public interest’ in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority.”

Apparent deference to internal agency standards when considering need to exclude all agency lawyers from representation.

OPINION NO. 667

May a prosecuting attorney represent the government in a criminal case when the prosecutor is married to the defendant's bail bondsman?

Not a conflict *per se*, but lots of problem areas:

- Spouse has to agree to collateral in order to write bonds;
- Initial bond amount, and subsequent modifications;
- Likelihood of non-appearance;
- Bond forfeiture action; adverse judgment could affect spouse.

Conclusion: If attorney's interest could be impacted, attorney can't prosecute the case (without governmental consent). Entire office would be disqualified (so consent would be required to proceed).

OPINION NO. 662

How can a lawyer ethically respond to negative reviews posted online by a former client?

“The internet allows consumers to publish instant reviews and comments about goods or services.”

A lawyer cannot publicly reveal confidential information of a former client unless expressly permitted by an exception in Rule 1.05.

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1.05(c). May reveal *confidential* information:

- (5) as necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between lawyer and client; or
- (6) to establish a defense to criminal charge, civil claim, or grievance.

1.05(d). May reveal *unprivileged* client information:

- (2) when necessary to do so in order to:
 - Defend against a claim of misconduct;
 - Respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - Prove up reasonable fees in action against another responsible for paying fees.

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CONCLUSION

- Each of these exceptions applies only in connection with formal actions, proceedings, or charges. The exceptions cannot be reasonably interpreted to allow public disclosure of former client's confidences on the internet.
- A lawyer may, however, post a response to a former client's negative review so long as the response is proportional, restrained, and does not reveal confidential information.
- Suggested language: "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point by point fashion in this form. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."