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## **CONFLICTS OF INTEREST**

**PETER K. RUSEK**

Author contact information:  
Peter K. Rusek  
Sheehy, Lovelace & Mayfield, PC  
Waco, TX

[prusek@slmpc.com](mailto:prusek@slmpc.com)  
254.772.8022

I'd like to thank Chris Gilbert for both his work on the following article, Attorneys as Board Members and, most importantly, his permission to use his work. Chris wrote the article in 2005 for presentation at the School Law Section summer retreat. Although the article has been updated and new cases cited, the vast majority of the work was done by Chris.

Mr. Gilbert received his law degree from the University of Michigan in 1993. His primary practice area is school law and he is currently a partner at Thompson & Horton, LLP in Houston, Texas.

# ATTORNEYS AS BOARD MEMBERS

## What ethical considerations arise when lawyers serve on school boards?

### Hypothetical #1: The "Know-It-All"

Ms. Ila F. Dalaw is a corporate attorney who has dabbled in labor and employment issues for some of her corporate clients. She is a resident of the Inner Peace Independent School District and has worked for the last five years as an associate for Bigg, Biguer & Bighest, a large law firm. After a recent spat with the firm's managing partner, Ms. Dalaw decided to take a one-year "leave of absence" to "give something back to the community." She ran for and was elected to a seat on the Board of Trustees of the IPISD. Ms. Dalaw is a bit of a "know-it-all" and has been free with her advice on legal issues to her fellow trustees, the superintendent, and the poor, down-trodden school attorney, Stanley Sigh.

**Q Does the attorney-client privilege protect Ms. Dalaw's advice and general discussions with the Board from disclosure?**

**A. Generally, no.**

TEX. R. EVID. 503(b)(1): "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client...."

Client: "a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer."  
TEX. R. EVID. 503(a)(1).

- "We note that the existence of an attorney-client relationship does not depend upon the payment of a fee, but may exist as a result of rendering services gratuitously." *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 404 n.15 (Tex.App.-Houston [14 Dist.] 1997, dism. agr.); *see also Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex.App.-Corpus Christi 1991, writ denied)
- "For a communication to be privileged, it must appear that the communication was made by a client seeking legal advice from a lawyer in her capacity as such and the communication must relate to the purpose for which the advice is sought; the proof, express or circumstantial, must indicate the client's desire for confidence and secrecy." *State v. DeAngelis*, 116 S.W.3d 396, 404 (Tex.App.-El Paso 2003, no pet.).
- "An attorney's involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all the incidents of such a transaction." *United States v. Freeman*, 619 F.2d 1112, 1120 (5th Cir. 1980).

- Q. Can Ms. Dalaw represent a school district employee in a grievance? Can another attorney in her law firm represent the employee in the grievance? (assume for purposes of this question that Ms. Dalaw is still working for Bigg, Biguer & Bighest)**
- A. Probably not.** In Ethics Op. 497 (1994), the question was asked whether a city commissioner who was an attorney could represent defendants in criminal matters in the county and district courts, where members of the city police department were involved (either as witnesses or victims) or where the city judge had issued the arrest or search warrants. The city commission only hired the city manager, city judge, and city attorney; all other positions were filled by the city manager. The city commissioner did set the police budget and appoint members to the civil service commission, which heard police disciplinary appeals, but otherwise did not have any direct oversight of the police department. The attorney/city commissioner was prohibited from representing the employee under Disciplinary Rule 1.06(b)(2), as it was determined that the attorney/commissioner, the police officers, and the city judge would all have conflicting loyalties and interests. Because Ms. Dalaw cannot represent the employee, neither can other attorneys in her firm. Disciplinary Rule 1.06(f). However, the representation could occur if all parties consent to the representation after full disclosure. Disciplinary Rule 1.06(c). *See also* Ethics Opinion 530 (1999) (county commissioner and all attorneys at his firm prohibited from practicing law in any justice, county, or district courts of that county under Disciplinary Rules 1.06(b)(2) and 1.06(f), absent informed consent under Disciplinary Rule 1.06(c).)
- Q. While Ms. Dalaw worked as an associate at Bigg, Biguer & Bighest, one of the firm's clients was Bricks 'R' Us Architects. Ms. Dalaw never actually did any work for Bricks 'R' Us, and received no confidential information related to Bricks 'R' Us. Bricks 'R' Us is now negotiating with the school district to design the new high school. Can Ms. Dalaw continue to participate in discussions and votes on the high school project?**
- A. Yes.** Disciplinary Rule 1.10(e) states that a lawyer serving as a public officer may not participate in a matter involving a former client that the lawyer had represented while in private practice. In Ethics Opinion 544 (2002), which involved roughly the same facts as above, it was confirmed that Disciplinary Rule 1.10(e) does not contain a "same law firm" provision, such that Ms. Dalaw would not be disqualified from participation simply because another attorney in her firm once represented Bricks 'R' Us. However, if Ms. Dalaw did acquire confidential information about Bricks 'R' Us while she was at the law firm, even though she never did any work for Bricks 'R' Us, she would be prevented by Disciplinary Rule 1.05(b)(3) from using the confidential information as a member of the school board to the disadvantage of Bricks 'R' Us (unless (1) Ms. Dalaw consults with and obtains consent from Bricks 'R' Us or (2) the confidential information has become generally known).
- Q. Can Ms. Dalaw use her official school district stationery for letters sent as part of her private law practice?**
- A. No.** Ethics Opinion No. 356 (1971).

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