

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2010-14
(February 2011)

The inquirer has been asked if he wants to be considered as a member of the Pennsylvania Wage Appeals Board ("PWAB"). He does not know if this position is with or without compensation. The position would be as a Board member and not acting as counsel to the Board as the Commonwealth provides counsel through the Attorney General's Office.

The inquirer's law firm regularly is involved in litigation with the Commonwealth, and the inquirer routinely has matters pending before the Department of Labor and Industry ("DLI") as well as the Pennsylvania Human Relations Commission. The PWAB reviews matters on appeal from the DLI and appeals from the PWAB go to the Commonwealth Court.

The inquirer asks whether there is a conflict for him in accepting an appointment to the PWAB if one is offered. Furthermore, if that position would trigger a conflict, the inquirer asks if the answer would be the same were he to accept an appointment to some advisory committee either with or without compensation.

The Committee preliminarily notes that it is not clear from the inquiry whether the appointment would constitute one that would make the inquirer a "government officer." If not, the questions posed by the inquirer are not evaluated under the Pennsylvania Rules of Professional Conduct ("the Rules"), because based on the potential positions about which the inquirer is asking, the government agency is **not** the inquirer's client. Depending on the inquirer's exact role, what will apply are the State Ethics Act, (including applicable state agency conflict of interest rules) and possibly the Pennsylvania Code of Judicial Conduct. Since the Board involved could determine legal and factual issues in reviewing cases, both the Ethics Act and the Judicial Code must be carefully reviewed and their provisions considered by the inquirer in determining whether he may continue to represent individuals before these Boards in his private practice.

The Rules do have some applicability to this inquiry as regards the impact of the inquirer's appointment and the ability of other members of his firm to take on cases that might come before the Board. Furthermore, should the inquirer's appointment to the Board make him a "government officer," then Rule 1.11 would also apply to him.

Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees, provides in relevant part that,

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

- (1) is subject to Rules 1.7 and 1.9; and
- (2) shall not:
 - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent;...
 - (e) As used in this Rule, the term “matter” includes:
 - (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and
 - (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

The **Comment** to the Rule provides in relevant part that:

- (1) A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against current conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.
- (2) Paragraph...(d)(1) restate(s) the obligations of an individual lawyer who...is currently serving as an officer or employee of the government toward a...private client. **Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule.** [Emphasis added]...

Rule 1.10. Imputation of Conflicts of Interest: General Rule, provides in relevant part that,

- (f) The disqualification of lawyers in a firm with former or current government lawyers is governed by Rule 1.11...

Turning to the inquirer's first question, the Committee advises that whatever conflict or prohibitions may be present by the inquirer's service to the state agency and continued private practice of law, are in no way impacted by whether his service to the state agency is on a paid or volunteer basis. He is being asked to participate on the Board because of his legal expertise and experience, and the issue of compensation has no impact on whether the inquirer faces issues such as the protection of confidential information for both clients and the Board, and the avoidance of an impermissible conflict of interest by the inquirer as prohibited by the Rules. These issues among others are present regardless of whether the position on the Board is compensated.

Assuming there was a conflict of interest which would prohibit the inquirer from both serving on the Board as well as representing clients before the Board (whether that prohibition comes from the Rules, the State Ethics Act, the Code of Judicial Conduct or

some combination thereof), it is clear that under Rules 1.10(f) as well as 1.11(d) (and the relevant part of Comment 2 to that latter Rule), imputed disqualification under Rule 1.10 would not apply and thus would not prevent other lawyers in the inquirer's firm from handling cases that came before the Board.

While a literal reading of Rule 1.11(a) and (b) (since it applies to former government employees) would not even require that the inquirer be screened from any of the cases involving the Board that others in his firm might be taking on, the Committee feels quite strongly that, given the appellate nature of the Board, the inquirer should be screened from such cases *ab initio*, even if the applicable codes and acts mentioned above would not require it. Whether such screening as a practical matter could be effectively accomplished is unclear to the Committee, but that is an issue left to the firm should it decide to do so, or should the inquirer be required by other regulations to have a screen in place.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.