

**Philadelphia Board of Ethics**  
**Meeting Minutes**  
November 18, 2009  
Board of Ethics  
Packard Building  
1441 Sansom Street, 2<sup>nd</sup> Floor  
1:00 pm

**DRAFT**

**Present:**

Board

Richard Glazer, Esq., Chair  
Rich Negrin, Esq., Vice Chair  
Kenya Mann, Esq.

Staff

J. Shane Creamer, Jr., Esq.  
Nedda Massar, Esq.  
Evan Meyer, Esq.  
Michael Cooke, Esq.  
Maya Nayak, Esq.  
Tina Formica

**I. Call to Order**

Mr. Glazer recognized that a quorum was present and called the meeting to order.

**II. Approval of Minutes**

The Board approved the meeting minutes, as corrected, for the public meeting that was held on October 21, 2009.

**III. Executive Director's Report**

**A. Enforcement Update**

**1) Appreciation Fund**

Mr. Creamer reported that he was pleased to report that the Ethics Board has entered into a Settlement Agreement with Judge Thomas Nocella and Ernesto DeNofa in which they have agreed to pay a total of \$16,440 toward satisfaction of the Contempt Order issued by the Honorable Gary DiVito in *Philadelphia Board of Ethics v. Appreciation Fund, et al.* on September 9, 2009. Once the payment of \$16,440 has been received, the Board has agreed to file a Praecipe of Satisfaction of Judge DiVito's Order with the clerk of the Court of Common Pleas.

Mr. Creamer explained that the Settlement Agreement arises from the Board's 2007 enforcement action against the Appreciation Fund, a political action committee, in which Judge DiVito issued an Order on June 1, 2007 directing the Appreciation Fund PAC to pay a statutory penalty of \$39,000 to the Ethics Board for failing to file a required campaign finance report even after it was given additional time to do so by the Board. On September 21, 2007, Judge DiVito issued a second Order holding the PAC in contempt of Court for failing to pay the fine levied under the Court's June 1<sup>st</sup> Order.

He also explained that in March of this year, the Philadelphia Board of Ethics filed a Petition for Contempt and to Enter Judgment Against Judge Thomas Nocella, who had been the PAC's attorney, and Ernesto DeNofa after discovering that they had engaged in what the Petition alleged was a deliberate and fraudulent scheme to drain the assets of the Appreciation Fund, rather than satisfy the Board's judgment against it. The PAC had \$16,440 in its bank account before the alleged depletion.

Mr. Creamer further explained that the Board's Petition alleged that between December 2007 and March 2008, with full knowledge of the Court's prior Orders and the Ethics Board's efforts to execute on those Orders, DeNofa and Nocella deliberately and systematically depleted the PAC's bank account and delayed and obstructed the Board's efforts to execute on the Court's Orders. The Agreement describes in detail how they did this by using most of the PAC's remaining funds (\$13,940) to pay two vendors to whom the Appreciation Fund did not owe money. On September 9, 2009, Judge DiVito granted the Board's Petition for Contempt against DeNofa and Nocella.

Mr. Creamer said it is important to note that the Settlement Agreement does not satisfy the separate judgment for \$39,000 against the Appreciation Fund PAC, of which \$22,560 remains due and owing by the PAC, after payment is received from Nocella and DeNofa.

## **B. 2009 Training Continues**

Mr. Creamer reported that staff conducted 17 ethics training sessions and has 7 sessions remaining on our calendar between now and December. The Board's first Campaign Finance training session was conducted on October 23<sup>rd</sup> and two more sessions are scheduled for this year. Staff expects to offer additional campaign finance training sessions in 2010 in anticipation of candidates preparing for 2011 City elections.

He also reported that staff continues to work on our online ethics training project and hope to launch a pilot project in early 2010. They are working with the Department of Technology on the technical requirements for an email verification process so both the Board and the user will receive confirmation when a user has completed the training.

Mr. Glazer asked about the attendance at the Campaign Finance training sessions. Mr. Cooke responded that they have been well attended.

## **C. Office Update**

Mr. Creamer said he hoped that our guests noticed the wonderful new art work that that is on display in our office. The Board is proud to have Nancy Bea Miller's collection, entitled "Faces,

Flowers, Food,” on display through April. As she has explained in her Statement of Purpose, Ms. Miller’s desire is “to paint the humor, beauty and feeling of this world as simply as I can.”

Mr. Creamer explained that Nancy Bea Miller's oil paintings, drawings and prints have been exhibited in solo and group exhibitions in galleries and museums throughout the Northeast and Mid-Atlantic, including the Michener Art Museum in Doylestown, PA, the Woodmere Art Museum in Philadelphia, PA, The State Museum of Pennsylvania in Harrisburg, PA, The Cape May County Arts League in Cape May, NJ, and the Washington Gallery of Photography in Bethesda, MD.

Mr. Creamer said that Ms. Miller received her B.A. from the University of Pennsylvania where she majored in English. She briefly attended Tyler School of Art in Elkins Park, PA, and then completed a four-year certificate from the Pennsylvania Academy of the Fine Arts here in Philadelphia.

He encouraged the guests to enjoy Nancy Bea’s work each time they visit our office. The Board is delighted to have her work around us every day.

Mr. Creamer said the Board would especially like to thank Ed Bronstein, a local artist and architect, whose collection “Home and Away” was on display since April of this year and who introduced us to Nancy Bea Miller. Many of Ed’s works that we enjoyed during the past months are now on display at the Twenty-Two Gallery, in an exhibit called “Explorations in the Neighborhood.”

#### **D. Conferences:**

1) **PBI Session:** Mr. Creamer reported that he served as a panelist yesterday in a CLE program called “Pennsylvania Election Law and Campaign Finance.” His segment of the program was called “The Broad Impact of the City of Philadelphia’s Campaign Finance Law.” The panel was moderated by Gregory Harvey of Montgomery McCracken, and included John Contino from the State Ethics Commission, Larry Boyle and Greg Dunlap from the Department of State, Fred Voigt from the City Commissioners Office, Cliff Levine, from Thorp, Reed & Armstrong in Pittsburgh and Lawrence Tabas, of Obermayer, Rebmann, Maxwell & Hippel.

2) **COGEL Conference:** Mr. Creamer stated that staff will report next month on their participation in the December 2009 Conference of the Council on Governmental Ethics Laws (COGEL). COGEL is a voluntary international organization comprised primarily of local, state, and national government officials who regulate ethics, campaign finance, lobbying, freedom of information, and election administration laws.

#### **IV. General Counsel’s Report**

1. Formal Opinions. Mr. Meyer reported that two Formal Opinions<sup>1</sup> were issued since the last report.

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<sup>1</sup> A third advisory, Nonpublic Formal Opinion No. 2009-005, will be made public once the Board approves the edited, public version.

a. Nonpublic Formal Opinion No. 2009-004 (September 21, 2009).

An employee in the Executive and Administrative Branch of City government advised that he/she wished to form an exploratory committee “to see if there is support for my potential candidacy before I decide whether I am going to run” for local elective office, and also to raise money for these exploratory efforts. The requestor asked whether formation of an exploratory committee or development of a personal website would constitute a declaration for political office, such that he/she might be required to resign the City office; whether the exploratory committee would be allowed to fundraise; and whether any such activities would be restricted under the ethics laws.

The Opinion interpreted the meaning of a number of terms, including “candidate,” “political purpose,” and “exploratory committee.” The requestor was advised that none of the proposed activities would constitute a declaration of candidacy for elective office, provided that any exploratory committee and PAC associated with it make it clear in their activities and communications that the requestor is not yet a candidate for any office, but is merely exploring whether there is sufficient interest among the electorate, and/or among potential donors of campaign contributions, for that individual to consider such a candidacy, and unless and until the requestor makes a public announcement of candidacy or file nomination papers or petitions for elective office. Thus, the requestor would not be required to resign his/her City position, and no issues were raised under the ethics laws.

b. Formal Opinion No. 2009-006 (October 21, 2009).

Councilman Curtis Jones, Jr. requested public advice on whether any issue under the ethics laws would arise if his office were to send out a letter to his constituents in the Councilmanic 4<sup>th</sup> District, regarding the availability to eligible families to enroll in Pennsylvania’s Children’s Health Insurance Program (CHIP), if the “cost for the letter” will be borne by one of the providers in that Program, AmeriChoice. Since this was a public request, it was discussed at the public session of the Ethics Board’s October 21, 2009 meeting and approved. The Board advised that sending the letter would violate no ethics laws, but suggested a number of clarifying changes to the proposed letter.

Both Opinions are attached to this report and are available on the Board’s website.

2. Advices of Counsel. Mr. Meyer reported that two Advices of Counsel were issued since the last report:

a. Nonpublic Advice of Counsel No. GC-2009-512 (November 13, 2009).

An employee for a City department, who is an attorney, asked to be advised on procedures that she must take to ensure compliance with the ethics laws, because she may be faced with taking official action reviewing responses to a City RFP for outside counsel, to which her former law firm may respond. The requestor was advised that there was no “financial interest” as defined in Nonpublic Formal Opinion No. 2009-003 and hence no actual conflict of interest, but that there may be an appearance of impropriety if the requestor takes official action on the contract award.

Nonpublic Advice of Counsel No. GC-2009-512 should be available on the Board's website soon.

b. Nonpublic Advice of Counsel No. GC-2009-513 (November 18, 2009).

A City employee requested nonpublic advice on whether any issue under the ethics laws would arise if he were to accept an offer of employment from a private company that contracts with the City agency that currently employs him. This was a mixed question of conflict of interest while the requestor is still a City employee, and a question of restrictions after leaving City service.

While the requestor is still a City employee, he may be required to disclose a conflict of interest and disqualify himself from taking certain official action for the City, if his pursuit of employment with a certain potential employer reaches the level that he has a "financial interest" in the company, as defined in Opinion No. 2007-001, including receipt of an offer of employment. The Advice gave the standard advice on post-employment restrictions.

Nonpublic Advice of Counsel No. GC-2009-513 should be available on the Board's website soon.

3. Informal e-mail guidance. Mr. Meyer reported that through Friday, November 13, 2009, there were three of these since the October report.

a. Received an inquiry from a citizen volunteer for a nonprofit that has a City contract, regarding fund-raising for the nonprofit. Advised that the Board of Ethics does not have jurisdiction over this question, because it does not concern the effect of the ethics laws on the conduct of a City officer or employee. Provided general information about fund-raising for local nonprofits, such as "Friends of" organizations that support City programs. Suggested that the inquirer contact the City official responsible for oversight of the City contract involved.

b. Received an inquiry from a person who did not identify their status, but apparently not a City employee, regarding an email sent out by Mayor Nutter, endorsing certain candidates in the recent election. The message asked "Just wondered how that is possible, when in the city political activity guide it clearly states this is not permitted." Pointed out that we generally do not advise about the conduct of third parties, but noted that the provision of the Charter that restricts campaign activity, subsection 10-107(4), applies only to appointed officials, not elected officials, and that therefore elected officials are free to engage in campaign activity such as endorsing candidates.

c. Received an inquiry about how to file a complaint about police misconduct. (This was on a day when it was reported that the City's 3-1-1 line was overloaded.) Directed the inquirer how to locate the Police Advisory Commission from the City's website.

## **V. Discussion of a Memorandum concerning “Walls of Division” Between Adjudicative and Prosecutorial Functions for Administrative Enforcement Proceedings**

Mr. Meyer explained that Regulation No. 2 was adopted early in the Board’s existence and sets out the rules and proceedings on how investigative and enforcement proceedings will take place. The Regulation mentions the separation of functions between investigative and adjudicative functions which are the prosecutor and judge functions that must be separate under Pennsylvania law. Therefore, we need walls of separation.

He also explained that the Board looked at the Regulation because it may wish to do administrative adjudications in the future, and until now, adjudication has been done exclusively through the Court of Common Pleas.

Regulation No. 2 permits in-house adjudication but the Board wanted to be sure of walls of separation before they proceed with any internal adjudication. Mr. Meyer explained that he therefore prepared a draft memo for the Board to issue to the staff outlining how the walls will be constructed. The prosecutorial function will be the Executive Director and Staff and the judicial function will be the Board who will receive advice from the General Counsel and Associate General Counsel.

Mr. Glazer stated that this is a memo, not a regulation. What effect will it have?

Mr. Meyer responded that some Board operations do not require a regulation. He said that he believes it is important to have guidelines for staff in writing in the event that of a challenge.

Mr. Glazer asked how settlements fit into the process. Associate Counsel Nayak responded that staff is currently considering this issue.

Ms. Mann asked what if people send their complaints directly to the Board Members. Mr. Cooke responded that complaints should be forwarded by the Board member to Mr. Creamer and they will be dealt with on a case by case basis.

Vice Chair Negrin asked who decides whether a matter will be handled as an internal adjudication or sent to court. Mr. Creamer responded that it is the Executive Director per Regulation No. 2.

Mr. Glazer asked for a vote on the memo, which was passed by a 3-0 vote. The memo will be posted on the Board’s website as part of the November minutes.

## **VI. Discussion of Possible Amendment to Regulation No. 5 Confidentiality of Enforcement and Investigative Matters and Prohibited Disclosures**

Mr. Cooke stated that at the October hearing on Regulation No. 5, Mr. Warner raised a question. The Board adopted Regulation No. 5, reexamined it and determined that it would be appropriate to amend Section 5.2 of the Regulation.

Mr. Glazer asked whether this amendment will be the same process, under Charter Section 8-407, as for a Regulation. Mr. Meyer responded yes.

Mr. Glazer called for a vote on the amended Regulation, which passed 3-0.

## **VII. New Business**

There was no new business to discuss.

## **VIII. Questions/Comments**

Lauren Vidas asked what prompted the memo regarding the Walls of Separation.

Mr. Creamer responded that the Board wants the possibility to bring administration enforcement actions.

Ms. Vidas asked if it was cheaper.

Mr. Creamer said it would not be cheaper, but possibility more expensive with transcript costs. It would also require more time of the Board. The Board received some complaints from some who think they haven't had an opportunity to present their case to the Board.

Marcia Gelbart asked how the settlement occurred.

Mr. Creamer responded that after the Contempt Order, he was contacted and very quickly came to terms with a settlement.

Ms. Gelbart asked is the Board expects to recover the additional amount that is owed.

Mr. Creamer said no.

Ms. Gelbart asked if the amount was paid.

Mr. Creamer said it was due seven days from yesterday.

The public session of the Board's meeting was adjourned after public questions and comments, so that the Board could meet in executive session to discuss enforcement matters and non-public opinions.

## MEMORANDUM

**TO:** Board Staff

**FROM:** Board of Ethics

**DATE:** November 18, 2009

**SUBJECT: Walls of Division between Adjudicative and Prosecutorial Functions for Administrative Enforcement Proceedings**

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### **Introduction**

Paragraph 2.2 (“Powers of the Board”) of Board of Ethics Regulation No. 2 (“Investigations and Enforcement Proceedings”) provides, in part:

As required by law, the Board shall maintain a separation between functions related to determining whether there is probable cause to believe that a violation of the Public Integrity Laws has occurred and functions related to adjudicating final determinations. In this regard, the individual members of the Board, any hearing officer in a particular case, and the General Counsel shall be considered to be part of the “adjudicative function,” and the Executive Director and professional staff or consultants directed by the Executive Director shall be considered to be part of the “investigatory” or “prosecutorial” function.

Regulation No. 2 provides for one of two different types of enforcement proceedings: either “Administrative Enforcement” under Subpart C of the Regulation, which is an in-house administrative adjudication in which the Board determines whether a violation has occurred; or “Judicial Enforcement” under Subpart D of the Regulation, in which the Board only makes a determination of probable cause, and the adjudication of any violation is by the Court of Common Pleas. It is clear from the scheme of the Regulation

that the quoted language above from Paragraph 2.2 relates only to an Administrative Enforcement.

Paragraph 2.10 (“Public Hearings”) of Regulation No. 2 provides the citations to the applicable governing statutes:

The Board is authorized by Ethics Code § 20-606(1)(h) to conduct public hearings to adjudicate alleged violations of the Public Integrity Laws and/or Board regulations. The Board shall preside over all such hearings, and determine the conduct and order of the proceeding, subject to the Pennsylvania Local Agency Law, 2 Pa.C.S. §§551-555, the Charter, the Philadelphia Code, this Regulation, and other applicable law; provided, however, that the Board may appoint a Hearing Officer to prepare Findings of Fact and Conclusions of Law for the Board’s consideration. Respondents to an enforcement proceeding will be afforded a full and fair opportunity to be heard before the Board.

Among the law referred to in “As provided by law” in ¶2.2 or as “other applicable law” in ¶ 2.10 is the constitutional concept of due process. In addition to notice and an opportunity to be heard, persons affected by an administrative adjudication must receive a process that is fair. This is the reason behind the requirement of a “separation of functions” in ¶2.2. This concept derives from a line of court opinions beginning with *Lyness v. State Bd. of Med.*, 529 Pa. 535, 605 A.2d 1204 (1992). *Lyness*, and the cases that follow it, stand for the proposition that when substantial property rights are being adjudicated before an administrative agency, it is a violation of due process for the same individual to serve in the matter both as “prosecutor” (that is, presenting allegations) and as “judge” (that is, voting to decide the adjudication by the agency), and that even if the same individual is not involved, if more than one function is reposed in a single entity, “walls of division” must be constructed between the prosecutorial and adjudicative functions to eliminate the possibility of prejudice that might arise if the two functions are “commingled” by impermissible communication or sharing of information.

### **Purpose**

The principal purpose of this memo, which is adopted by formal vote of the Board at a public meeting, is to establish what “walls of division” will be in place for any Administrative Adjudications to be performed by the Board of Ethics. (Up to this point, any enforcement proceedings have been only Judicial Enforcement under Subpart D.)

### **The Walls of Division**

The Board of Ethics and its staff shall conduct themselves strictly as follows for any Administrative Enforcement under Subpart C of Regulation No. 2:

1. The functions to be separated will be referred to as “the prosecutorial function” and “the adjudicative function” and will relate only to those functions as performed under Subpart C of Regulation No. 2.

A. The prosecutorial function includes receiving complaints, conducting investigations, formulating charges for presentation to the Board for adjudication, and appearing at any hearing to offer evidence and/or argument for a finding of a violation of the Public Integrity Laws.

B. The adjudicative function includes hearing evidence, ruling on motions and objections, and making a determination of whether a violation of the Public Integrity Laws has occurred.

2. The following Board personnel will be considered to be part of the prosecutorial function:

The Executive Director (currently J. Shane Creamer, Jr., Esq.)

The Director of Enforcement (currently Michael Cooke, Esq.)

Any Information Specialist (currently there is one: Danielle Cheatam)

The Deputy Executive Director (currently Nedda Massar)

Any consultants retained by the Executive Director on a contractual basis, such as forensic analysts or outside investigators.

3. The following Board personnel will be considered to be part of the adjudicative function:

All Members of the Board of Ethics itself (currently Richard Glazer, Esq., Richard Negrin, Esq., Kenya Mann Faulkner, Esq., and Pastor Damone B. Jones, Sr.)

The General Counsel (currently Evan Meyer, Esq.)

The Associate General Counsel (currently Maya Nayak, Esq.)

Note that the General Counsel and Associate General Counsel report directly to the Board.<sup>2</sup>

4. It is explicitly emphasized that persons serving the prosecutorial function identified in point 2 above shall not discuss Administrative Enforcement matters with persons serving the adjudicative function identified in point 3 above, and vice-versa, unless the communication is of a non-substantive nature that involves no sharing of any allegations, factual matters, or prosecutorial theories. For example, the Director of Enforcement may inquire of the General Counsel about the timing of an administrative hearing in the same manner that a respondent may ask the General Counsel about such logistical information.

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<sup>2</sup> Some administrative supervision of all Board staff, such as approving payroll, resides in the Executive Director, but the Executive Director does not supervise the substantive functions of any staff listed in this Paragraph 3.

5. Administrative functions, which are not prosecutorial or adjudicative, such as arranging for a court reporter, may be performed by any Board Staff.

6. The following administrative Board staff will provide administrative support only to both the prosecutorial and adjudicative functions. These administrative staff will provide clerical support and will not participate in the substance of adjudicative enforcement matters. Communications concerning the adjudicative function with these administrative staff members will relate only to the logistics and administration of adjudications and will not in any case involve the substance of any adjudicative enforcement matter, such as the alleged facts:

Administrative Assistant (currently Tina Formica)  
Clerical Assistant (currently Hortencia Vasquez)

7. The prosecutorial and adjudicative functions shall not access one another's files and documents related to administrative enforcement matters. Each function's files and documents shall be maintained separately from the other function's files and documents.

Approved by vote of the Board at the public meeting of November 18, 2009.