



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2009-507

July 9, 2009

Re: Conflict of Interest Involving Client Referrals to Private Attorney

A City employee (the “requestor”) requested advice on whether the ethics laws allow him to accept a greater percentage of settlement proceeds than he had otherwise agreed upon from an attorney representing him in a private lawsuit in exchange for referring that attorney some clients where the City employee would obtain the names for such referrals from his City position. Based on the facts presented, we advised that the ethics laws prohibit the proposed arrangement because it would create an unavoidable conflict of interest.

The Facts

The requestor advised us of his City job title and provided a detailed job description. In particular, he clarified that a portion of his responsibilities is information referrals on a variety of topics, sometimes including lawyers. The requestor was involved in a private lawsuit in which he had reached a settlement agreement. He had an agreement with the lawyer currently representing him in the case to split the settlement proceeds 60/40. That lawyer has offered to give the requestor more money, taking only one-third of the proceeds rather than forty percent, if the requestor refers the lawyer some clients. The requestor informed us that the proposed referrals would all come from his City job.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, this advice is predicated on the facts that have been provided to us. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. Although previous opinions of this Board that interpret statutes are guidance to how this Board will likely interpret the same provision in the future, previous opinions do not govern the application of the law to different facts. Ethics opinions are particularly fact-specific, and any official or employee wishing to be assured that his or her conduct falls within the permissible scope of the ethics laws is well-advised to seek and rely only on an opinion issued as to his or her specific situation, prior to acting. In that regard, to the extent that this opinion states general principles, and there are particular fact situations that the requestor may be concerned about, we encouraged him to contact the Board for specific advice on the application of the ethics laws to those particular facts.

Conflicts of Interest

The issue before us is whether the requestor may take part in the proposed arrangement under the ethics laws and specifically whether that arrangement would cause him to have a conflict of interest. The general purpose of laws against a “conflict of interest” is to prevent a City employee from having a conflict between his duty in acting honestly and capably on behalf of the public on the one hand and a personal interest in obtaining or preserving a financial benefit to himself (perhaps indirectly through an employer, relative, or gift-giver) on the other hand. It is desirable to prevent such situations because that employee may be tempted to act in a way that benefits that personal interest, to the detriment of the proper execution of his official duties. Even if the employee does not actually yield to the temptation of incurring a private benefit to himself, public confidence in the employee’s decisions and in the impartiality of government is undermined by the mere existence of such competing interests. The City Ethics Code and the State Ethics Act both contain provisions addressing conflicts of interest that are discussed below.

Philadelphia Code

The Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise from either having a personal financial interest or from being a member of a business or other entity that has a financial interest in their official decisions. As to a personal conflict of interest, Code Section 20-607(a) provides in relevant part:

Unless there is public disclosure and disqualification as provided for in Section 20-608 hereof, no member of Council, or other City officer or employee shall be financially interested in any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity

We advised the requestor that if in his City position he were to make referrals to the attorney who has represented him in private litigation because the attorney has given or promised the requestor a greater portion of settlement proceeds in exchange for the referrals, the requestor would have a conflict of interest because he would be financially interested in making such referrals. Because referrals to lawyers are part of the requestor's duties in his City position, the making of these referrals constitute a decision or judgment made by him in his official capacity. Moreover, even if the requestor was not to make such referrals in the capacity of his City position, but merely to draw from lists of people he met as a result of his City job or names acquired from doing his City job, or in any other way using City information, resources, or equipment, that would still constitute being interested in a decision or judgment made by him in his official capacity.

The Code's conflict of interest provision noted above prohibits the requestor from having a financial interest in actions, such as referrals, that he takes in his capacity as a City employee. Under the facts the requestor provided, disclosure of the conflict and disqualification of himself is not an option to avoid the conflict because that process requires a City employee with a conflict to disqualify himself or herself from any official action related to the matter at issue. *See* Code § 20-608(1). The requestor would not be able to remove himself from the official action at issue, namely the making of the referrals, because under the proposed arrangement he would have to make the referrals. Accordingly, we advised that the proposed arrangement would pose an unavoidable conflict of interest for the requestor and would violate City Code Section 20-607(a).

In addition, if making referrals to the attorney would involve the requestor giving names to the attorney that are confidential information to which he has access through his City position, this could violate Code Section 20-609 on Confidential Information, which states:

No member of the Council or other elected official or City officer or employee, paid or unpaid, full-time or part-time, shall directly or indirectly disclose or make available confidential information concerning the property, government or affairs of the City without proper legal authorization, for the purpose of advancing the financial interest of himself or others.

Code § 20-609.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, likely applies to the requestor.¹ The Act's conflict of interest provision provides:

No public official or public employee shall engage in conduct that constitutes a conflict of interest.

65 Pa.C.S. § 1103(a). Reference to the definitions section of the Act is necessary to identify what constitutes a "conflict of interest" under the State Act:

The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

...

"Authority of office or employment." The actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular public office or position of public employment.

...

¹ The State Ethics Act applies to a "public employee," which is defined in the Act to include: "Any individual employed by the Commonwealth or a political subdivision who is responsible for taking or recommending official action of a non-ministerial nature with respect to (1) contracting or procurement; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interests of any person." 65 Pa.C.S. §1102. It is likely that the requestor's job duties cause him to qualify as a "public employee."

“Conflict” or “conflict of interest.” Use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or a member of his immediate family is associated. “Conflict” or “conflict of interest” does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his immediate family or a business with which he or a member of his immediate family is associated.

65 Pa.C.S. §1102.

For the requestor to take official action that has an economic impact on himself personally would be a conflict under the State Act in the same way it would be under the City Code. In such a case, Section 1103(a) would restrict his activities as a public employee relative to the use of authority of his office to obtain a private pecuniary benefit for himself. The proposed arrangement of increased settlement proceeds from the attorney in exchange for some client referrals to the attorney through the requestor’s City position or drawing from lists of people he met as a result of his City job or names acquired from doing his City job, or in any other way using City information, resources, or equipment, would constitute a use of the authority of his public position for his private pecuniary benefit. The State Ethics Commission has ruled many times that “the use of government staff, time, equipment, facilities, or property for non-governmental purposes—including business, personal, or political purposes—is generally prohibited and may form the basis for a violation of Section 1103(a) of the Ethics Act.” *See, e.g.*, State Ethics Commission Advice of Counsel No. 08-603 (Schorpp, December 29, 2008). Therefore, we advised that the proposed arrangement would also cause the requestor to have a prohibited conflict of interest under the State Act to the extent that Act applies to the requestor.

We note, however, that the State Ethics Commission is the definitive authority on the State Ethics Act. Our advice on the Act is guidance only and does not provide protection from possible enforcement action by the State Ethics Commission. To

those who rely in good faith on advice from the Commission itself, the State Act provides a complete defense in any enforcement action by the Commission and evidence of good faith conduct in other criminal or civil proceedings. 65 Pa.C.S. § 1107(10), (11). Upon request, advice from the State Ethics Commission can be redacted to protect the identities of those involved. The State Act also provides certain protection from penalties for those who rely on a non-confidential Solicitor's opinion. The Act provides that: "A public official of a political subdivision who acts in good faith reliance on a written, nonconfidential opinion of the solicitor of the political subdivision . . . shall not be subject to the penalties provided for in [certain provisions of the Act]." 65 Pa.C.S. §1109(g). Since the Board of Ethics is not "the solicitor" of the City, requestors have the option to obtain an opinion from the Law Department as to the application of the State Ethics Act, including whether the requestor is a "public employee" subject to the Act. See Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). Any such request, to receive the protection, could not be confidential, and will only protect the subject from the criminal penalties in subsections 1109(a) and (b) and from treble damages under subsection 1109(c) of the Act. (A violation of the Ethics Act can still be found, and restitution can still be ordered.)

For these reasons, the requestor may choose to seek advice about the State Ethics Act directly from the State Ethics Commission or from the Law Department.

Conclusion

We advised that the ethics laws do not allow the requestor to accept a greater percentage of settlement proceeds than he had otherwise agreed upon from an attorney representing him in a personal lawsuit in exchange for referring that attorney some clients where he would make such referrals as part of his City position or drawing from lists of people he met as a result of his City job or names acquired from doing his City job, or in any other way using City information, resources, or equipment. Such a situation poses a prohibited conflict of interest that cannot be avoided through disclosure and disqualification. We also noted the City Code's prohibition on the disclosure of confidential information obtained in a City job for the purpose of advancing one's financial interest.

We advised the requestor that if he has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. Since the requestor asked for nonpublic advice from the Board of Ethics, we will not make the

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original letter public, but we are making public this revised version, edited to conceal the requestor's identity, as required by Code Section 20-606(1)(d)(iii).

Evan Meyer
General Counsel

cc: Richard Glazer, Esq., Chair
J. Shane Creamer, Jr., Esq., Executive Director