



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2009-512

November 13, 2009

Re: Potential Conflict / City Attorney / Attorney Referral Fee

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 she¹ may be faced with taking official action reviewing responses to a City RFP for outside counsel, to which her former law firm may respond.

We were advised that prior to accepting her position with the City, the requestor was a partner in a small local law firm. The City was one of the firm's clients. We were advised that prior to being hired by the City, the requestor sold all of her shares in the business to the successor law firm. We were advised that the requestor currently has no financial interest in the ongoing operations of the successor law firm. However, we were advised that there were several client matters that were pending at the time of the requestor's departure. The requestor advised that "This was addressed in a schedule of cases which was attached to our paperwork as exhibits." It is presumed that this refers to paperwork concerning the dissolution of the firm and the agreements between the former

¹ As a policy matter, and in an effort to be gender nonspecific and further conceal the identity of requestors, Nonpublic Advices of Counsel will occasionally use the feminine pronoun throughout or the masculine pronoun throughout, but will not necessarily use the pronoun appropriate to the actual requestor.

partners. The requestor advised that: "This schedule determined what percentage I would receive as a referral fee [if] and when the case was resolved. At this point, there appears to be only one matter remaining that is on appeal to the Commonwealth Court."

The requestor further advised that, as part of her duties for the City, she drafted an RFP for outside counsel, upon which the successor law firm will be bidding. We were advised: "These are 0 dollar value contracts, however the successful applicants will receive hourly compensation for legal work."

The requestor asked whether, under the ethics laws, she may participate in the selection process of outside counsel under the RFP, considering that she has a referral fee arrangement with a likely bidder.

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, the requestor was advised that to the extent that this opinion states general principles, and there are particular fact situations that he may be concerned about, she was encouraged to contact the Board for specific advice on the application of the ethics laws to those particular facts.

The issue is whether the requestor must take any actions to avoid a conflict of interest. The City Ethics Code and the State Ethics Act both contain provisions that address conflicts of interest.

Philadelphia Code

The Philadelphia Ethics Code prohibits City officers and employees from having conflicts of interest that arise from taking official action that affects either a personal financial interest or an interest held by their business or by certain relatives.

As to the interest through another person or entity, Code Section 20-607(b) provides:

(b) In the event that a financial interest in any legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment, resides in a parent, spouse, child, brother, sister, or like relative-in-law of the member of City Council, other City officer or employee; or in a member of a partnership, firm, corporation or other business organization or professional association organized for profit of which said member of City Council, City officer or employee is a member and where said member of City Council, City officer or employee has knowledge of the existence of such financial interest he or she shall comply with the provisions of Section 20-608(a) (b) (c) of this ordinance and shall thereafter disqualify himself or herself from any further official action regarding such legislation (including ordinances and resolutions) award, contract, lease, case, claim, decision, decree or judgment.

The only issue with respect to this subsection is whether the requestor is “a member” of a firm of which another member has a financial interest in the selection process for outside counsel. The employee was advised that having a contractual arrangement for a referral fee with a firm of which she was formerly a partner does not make her a member of that firm for this purpose.² Thus subsection 20-607(b) does not apply.

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

Clearly, for the requestor to participate officially in her City position in any way in the selection process under an RFP would involve a “decision” or “judgment” made by her in her official capacity.³ The question then remains whether she would have a “financial interest” in such an official action.

² See Opinion No. 95-17, *1994-1996 City Solicitor's Opinions* at 135 (“member” includes employee but not “of counsel” to firm, which is an independent contractor).

³ As would drafting the RFP. However, as noted above, we do not address past conduct in an advisory opinion. In any case, in light of the conclusion below that there is no “financial interest,” there would be no issue of a conflict of interest. It should be emphasized, however, that it is prudent to ask the Board of Ethics for advice

The Code does not define “financial interest.” Nevertheless, the Board addressed the interpretation of the term, “financial interest” in detail in Nonpublic Formal Opinion No. 2009-003.⁴ The term “financial interest” was also addressed in Nonpublic Advice of Counsel No. GC-2009-507. However, this request is different from the referral fee question in Nonpublic Advice of Counsel No. GC-2009-507. In that case, the question was whether a City employee could make referrals to City clients and thus receive referral fees for those referrals. The employee would clearly have a financial interest in using his City office to obtain clients to refer and as a result receive a referral fee. In Formal Opinion No. 2009-003 the Board opined that “in some cases, a financial interest may be too remote to create a conflict. . . . On the other hand, a financial interest may be less than direct and still cause concerns.” (p. 5) In support, the Board made a number of points that relate to this question:

The Board of Ethics concludes that a reasonable expectation of future business is a financial interest. (p.4) . . .

The Formal Opinion quoted a court opinion relating to a bill owed to a law firm (Eckert Seamans) that employed the attorney at issue (Hergert):

Hergert certainly had a personal pecuniary interest in maintaining his employment at Eckert Seamans and in maximizing his compensation. (p.6) (*quoting Gilliland v. Hergert*, 2008 U.S. Dist. LEXIS 51421 at *12-*13 (W.D. Pa. 2008).

And in another quote, the Opinion stated:

In that instance, the lawyers who represent the plaintiff classes in Zakheim and Malloy would lose members of those classes, and their contingency fees would be jeopardized. Thus, when the New Jersey Counsel failed to state in the July 11th letter or in the website posted July 16, 2003 that they had a pecuniary interest in urging opt-outs, they misled class members. (pp. 6-7) (*quoting Gregg v. Independence Blue Cross*, 2004 Phila. Ct. Com. Pl. LEXIS 3 at *183).

prior to taking any official action that might affect an outside financial interest or otherwise present an ethics issue.

⁴ The public version of Nonpublic Formal Opinion No. 2009-003 may be accessed on the Board’s website at www.phila.gov/ethicsboard.

In general, “financial interest” has been used to describe either an on-going and present financial relation, such as an employer-employee relationship, a compensated directorship, or an investment (such as equity ownership) in the subject entity. In Nonpublic Advice of Counsel No. 2009-506, we said:

In this case, it might well be the case that the law firm is receiving an hourly fee that will not be affected by the result of the City’s decision. One could argue, however, that success in the matter will likely mean that the law firm will receive more billings in matters related to executing and carrying out the project, if not future work for that client (or other clients) as a result of the client being pleased with the law firm’s representation. (p. 3)

Thus, even if there were no direct financial interest to a City lawyer in an official City action that affected a firm to which the City lawyer was connected, it could be argued that a benefit to the firm could benefit the lawyer in future fees or continued employment.

In the instant matter, however, based on the facts that were provided to us, the requestor was advised that there is no “financial interest” that she would have in any official action that she might take that would affect the possibility that the successor law firm might obtain a City legal services contract. The requestor advised that her only financial connection to the law firm is her contractual right to receive referral fees as a result of the resolution of any of several specific cases that were pending at the time that she left the firm, of which she advised that only one remains open, on appeal. The slight possibility that the additional revenue generated by having a City legal services contract might somehow enhance the firm’s ability to settle or prevail in that one case, and thus marginally increase her remaining contracted referral fees, is too remote to be considered a “financial interest” to the requestor in any decision affecting the award of that legal services contract.

Accordingly, the requestor is advised that the facts provided do not describe a matter where the requestor would have a financial interest in any legislation, award, contract, lease, case, claim, decision, decree or judgment made by her in her official capacity relative to the RFP for outside counsel. Therefore, there is no conflict of interest under Section 20-607 of The Philadelphia Code, and no requirement that the requestor disclose a financial interest and disqualify herself from the matter under Code Section 20-608.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, likely applies to the requestor.⁵ 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.

...

"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

⁵ 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 clear from various rulings of the State Ethics Commission that a staff attorney would qualify as a "public employee." *See* State Ethics Commission Regulations at 51 Pa. Code Section 11.1 "Public employe" (iv)(C)(staff attorneys).

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 herself 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 her activities as a public employee relative to the use of authority of her office to obtain a private pecuniary benefit for herself or for a business with which she is associated. As with the discussion above of the “conflict of interest” provision of the City Code, there would only be the remotest connection between any official action of hers as to the RFP and a private pecuniary benefit to her. Thus, it would appear that any such action would not constitute a use of the authority of her public position for her private pecuniary benefit. Nor do we believe that, under the facts presented to us, the requestor’s former law firm or its successor would be a “business with which [she is] associated.”

Nevertheless, the requestor was advised 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). *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). 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. 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 was advised that she may choose to seek advice about the State Ethics Act directly from the State Ethics Commission or from the Law Department.

Appearance of Impropriety

In a recent opinion, the Board of Ethics explained appearances of impropriety as follows:

Situations in which there is no conflict of interest or prohibited gift under the letter of the law can nevertheless create appearances of impropriety. Although the ethics laws do not prohibit appearances of impropriety, and an enforcement action could not be brought based on an appearance of impropriety, such appearances can be damaging to public confidence in government. There is no formal definition of “appearance of impropriety” in the laws under which this Board has jurisdiction, but generally there is an appearance issue any time there is a possible public perception that improper influence was being exerted upon or by a public official or that a public official’s personal interest in a matter is so substantial that it would be difficult to resist the temptation to act in favor of that interest.

Formal Opinion 2009-001 at 4. The facts presented are somewhat susceptible to an appearance of impropriety because the requestor was recently a partner in the firm that may bid on the proposed contract. A possible public perception might be that she could be biased in favor of her former firm. To avoid an appearance of impropriety with regard to the selection process, the requestor was advised that she might consider removing herself from any official actions that might affect the outcome of the contract award. For example, she could notify her department head to assign others to review proposals and make recommendations regarding selection of a contractor. *See also* Nonpublic Advice of Counsel No. 2009-509 at 6-7.

Other Authorities

This Advice of Counsel addresses only the Public Integrity Laws. Specifically not addressed is the Rules of Professional Conduct.

Conclusion

The requestor was advised that, applying the City Ethics Code to the facts that were presented, the requestor would not have a conflict of interest to disclose, and is not

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required by law to disqualify herself from any City action regarding the RFP for outside counsel. However, in light of the fact that we were advised that a possible bidder is the firm of which the requestor was recently a partner, she was advised that she may wish to follow the suggestions stated in this Advice on how to minimize an appearance of impropriety.

The requestor was advised that if she has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this Advice. Since the requestor had requested nonpublic advice from the Board of Ethics, we will not make the 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