CITY OF PHILADELPHIA

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Philadelphia Board of Ethics
Nonpublic Formal Opinion No. 2009-003

September 16, 2009

Re: Potential Conflict / Board or Commission / Relative-in-law / Lawyer

A City employee ("the employee" or "the requestor") asked to be advised on procedures that he/she must take to ensure compliance with the ethics laws, because the employee serves as another official's alternate on a City board or commission ("board"), and the requestor's board from time to time is presented with matters in which the applicant is represented by the law firm of which a relative-in-law of the requestor is a partner, although the relative is not involved in the representation. The requestor's board is not merely advisory, but has a statutory mandate to make determinations that directly affect the financial interest of applicants before it. On June 11, 2009, our General Counsel issued Nonpublic Advice of Counsel No. GC-2009-506 concerning that matter, but the Advice of Counsel noted that the question turned on whether the law firm's representation of its client constitutes a financial interest in the matter. That is, the question is whether the financial interest then resides in all partners of the firm, such that it would create a conflict for a City officer/employee with discretion in the matter and who is a relative of a partner.

The Advice concluded that interpretation of the reach of the term "financial interest" is a question of first impression, such that it would be more appropriate for a Formal Opinion of the Board of Ethics, rather than an Advice of Counsel. The Advice concluded: "The requestor was advised that, if this situation is likely to recur, he/she may wish to seek a Formal Opinion from the Board of Ethics, in advance of future board matters." The requestor has now requested such a Formal Opinion. It is apparent that the requestor is seeking not merely a review of the specific matter that was the subject of Nonpublic Advice of Counsel No. GC-2009-506, but also advice on

other, future matters in which a member of the relative-in-law's law firm may be representing a client before the board on which the requestor serves.

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, the requestor was encouraged to contact the Board of Ethics 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 a designee to a City board or commission, the requestor is not only a City employee, but also a City officer in his/her capacity as a member of the board. Code Section 20-607(a) applies to any personal interest that the requestor might have as an officer or employee. That provision is not relevant here, as we were not advised that the requestor had a personal financial interest in either the party before the requestor's board or in the law firm representing that party.

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.

Since the phrase "like relative-in-law" clearly includes the relation at issue, and since the requestor's relative-in-law is a partner of the law firm, the requestor was advised that he/she may not take official action in a matter affecting the law firm in which the relative-in-law has a direct financial interest. It cannot be necessarily assumed that every matter that affects the finances of a law firm's client also affects the financial interests of any particular partner of that law firm. Accordingly, Code subsection 20-607(b) would require the requestor's disclosure and disqualification from any City decision that would have a financial impact on the law firm only where the financial impact specifically extends to the requestor's relative-in-law. The question is whether the law firm's representation of its client constitutes a financial interest in the matter affecting that client, to the degree that the financial interest then resides in all partners of the firm, and creates a conflict for a City officer/employee with discretion in the matter who is a relative of a partner.

The Code does not define "financial interest." Nor are we aware of any controlling or persuasive authority (such as a prior Opinion by the Board of Ethics or an Opinion of the Law Department) that construes the term "financial interest" in the context of Code Section 20-607.[1] In the context of the annual financial disclosure

[1] Note that a discussion of financial interest—in the very different context of a City employee's pursuit of future employment opportunities—may be found in Confidential Opinion No. 2007-001 (November 5, 2007), which is available on the website of the Board. See pages 5-9 and 14-16 of Confidential Opinion No. 2007-001. The State Ethics Act does define "financial interest" but does not use that term in its definition of "conflict of interest," which instead is based on a "private pecuniary benefit" to the official/employee or his/her relatives or business. *See* 65 Pa.C.S.A. §1102.

form, "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. However, filing of this form is required by Code Section 20-610, a separate provision.

Since the requestor asked the Board of Ethics for advice concerning any of possibly several unspecified matters that may come before the requestor's board, it is necessary to identify the assumed facts upon which we are basing our opinion.

Clearly, if the relative's law firm itself were to be an applicant before the requestor's board, that matter would create a financial interest in the partners and present a conflict of interest for the requestor.

Also, if the law firm were to represent a client on a fee basis (such as a contingent fee) under which the fee to be paid to the law firm would be significantly different depending on the result from the board matter, that matter would create a financial interest in the partners and present a conflict of interest for the requestor.

However, the more likely scenario would be that, in a case before the requestor's board, the law firm would be receiving an hourly fee that will not be affected by the result of the board's decision. As pointed out in Advice of Counsel GC-2009-506, one could argue that success in such a matter could 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. The Board of Ethics concludes that a reasonable expectation of future business is a financial interest.

As noted above, the Code does not define the term "financial interest." Nor has the reach of what it means to "be financially interested in any . . . decision, decree or judgment" been the subject of extensive analysis. However, some interests clearly are too remote to require the disclosure and disqualification of Code §20-607. The Code does not have an explicit exception for action that "affects to the same degree a class or subclass of the general public" as does the State Ethics Act. However, the Law Department has previously advised members of City Council that where a personal financial interest in a Council bill is not "direct, immediate, and particular, as distinct from the interests that might be shared by a larger group," disqualification under Code Section 20-607 is not required. Opinion Nos. 88-12 and 89-5, *1988-1989 City Solicitor's Opinions*, at 43 and 85 (Councilmembers who held liquor licenses were not

prohibited from voting on a proposed liquor tax ordinance.) Accordingly, 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. In a case decided on June 8, 2009, the United States Supreme Court, in discussing financial interests that require recusal of judges, noted:

> This concern with conflicts resulting from financial incentives was elaborated in *Ward* v. *Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972), which invalidated a conviction in another mayor's court. In *Monroeville*, unlike in *Tumey*, the mayor received no money; instead, the fines the mayor assessed went to the town's general fisc. The Court held that "[t]he fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle." 409 U.S., at 60, 93 S. Ct. 80, 34 L. Ed. 2d 267. The principle, instead, turned on the "'possible temptation'" the mayor might face; the mayor's "executive responsibilities for village finances may make him partisan to maintain the high level of contribution [to those finances] from the mayor's court." *Ibid.* As the Court reiterated in another case that Term, "the [judge's] financial stake need not be as direct or positive as it appeared to be in *Tumey*." *Gibson* v. *Berryhill*, 411 U.S. 564, 579, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973) (an administrative board composed of optometrists had a pecuniary interest of "sufficient substance" so that it could not preside over a hearing against competing optometrists).

Caperton v. A. T. Massey Coal Co., 2009 U.S. LEXIS 4157, pages 18-19. Thus, as in the *Ward* and *Gibson* cases, "possible temptation" may come from financial stakes that are less than "direct or positive."

There is little case law in Pennsylvania construing the phrase "financial interest." However, there are a number of court decisions that interpret the similar phrase "pecuniary interest."[2] These decisions illustrate, as does the *Caperton* quote above, that a pecuniary interest need not require a direct cause-and-effect impact on the subject's personal finances.

In 2008, the federal district court for the Western District of Pennsylvania, referring initially to a prior stage of the same litigation, opined as follows:

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[2] The term "private pecuniary benefit" is not defined in the State Ethics Act. *See* note 1.

> The existence of a pecuniary interest arose in the context of the negligent misrepresentation claims. In denying Defendant's motion for summary judgment on the basis that he lacked a sufficient pecuniary interest, the Court stated: "The substantial legal bill outstanding to Hergert's law firm constituted a sufficient, if not significant, 'pecuniary interest.'" Memorandum Opinion at 12. Defendant now seeks to argue that there was no substantial legal bill outstanding to his law firm "for legal work performed with regard to these Notes" and that the fee was due to the firm, rather than to Hergert personally. The Court rejects these arguments of Defendant. It does not matter what specific work led to the legal bill owed to Eckert Seamans because the summary judgment record established that at the time of the closing on the August 16 Note, over $138,000 in unpaid legal fees had been billed to the Main Medical Companies. Plaintiffs' Statement of Undisputed Facts p. 22 and Defendant's Response thereto. Similarly, it is immaterial that the bill was owed to the firm and not Hergert individually. Hergert certainly had a personal pecuniary interest in maintaining his employment at Eckert Seamans and in maximizing his compensation. At least potentially, Hergert's status might have been affected by the write-off of such a significant bill, such that he had an incentive to obtain an infusion of cash from Plaintiffs. The Court has determined that Hergert had a sufficient "pecuniary interest" to establish a negligent misrepresentation claim and Defendant will not be permitted to reopen that issue.

Gilliland v. Hergert, 2008 U.S. Dist. LEXIS 51421 at *12-*13 (W.D. Pa. 2008) (emphasis added).

In a 2004 decision by the Philadelphia Court of Common Pleas, the court found:

> The fourth category of misleading communications fails to inform the class members that they were drafted by lawyers with pecuniary interests in maximizing the number of opt-outs from the Class Action Settlement. If the class members in this Litigation decided to remain in the Settlement Class, they would, effectively, release their claims in the Zakheim and Malloy actions. See New Jersey Objectors' Memorandum of Law In Opposition to Motion to Invalidate Opt-outs, Ex. 6. 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.

Gregg v. Independence Blue Cross, 2004 Phila. Ct. Com. Pl. LEXIS 3 at *183.

This Board concludes that in a case before the requestor's board, where the law firm would be representing a party (but with no involvement by the requestor's relative) and receiving an hourly fee that will not be affected by the result of the board's decision, the question of whether it would be a conflict of interest for the requestor to participate in that matter as a designee member of the board depends on the particular facts.

Two examples will not exhaust the field, but may give an idea of the range of possibilities. The Board of Ethics in the nonpublic Opinion included two specific examples, which are here edited to be more generic:

a. A major party in an action before a City board/commission, the result of which will have significant financial effect on the party, with the possibility of an appeal or additional legal work, is represented by the law firm. It is clear that success in the matter means that the party will hire the law firm for future work.

b. An interested, but minor, party in an action before a City board/commission the result of which will have small financial effect on that party has hired an associate in the law firm to represent them for the associate's hourly fee. The party is not financially well off, nor an entity that requires frequent legal work.

The above examples possibly illustrate the approximate extremes of the spectrum of factual scenarios where a board/commission member has a relative who works for a law firm.[3]

The Board of Ethics concluded that scenario (a) above would represent a conflict of interest for the requestor as a designee on his/her board, and that Code Section 20-607(b) would require the requestor to publicly disclose the financial

[3] Scenario (a) would present an even greater financial interest where the professional firm involved would have a major role in the project after the project receives approval from the City board/commission. Scenario (b), on the other hand, would present an even lesser financial interest where the lawyer who is a relative of the board member is a salaried employee of the law firm, rather than an equity partner.

interest of his/her relative in such a matter and announce self-disqualification from participating in official action[4] in the matter, pursuant to Section 20-608 (see "Disclosure & Disqualification" below). As an aside, and although the Board of Ethics does not generally advise on past conduct, it is noted that the matter that was the subject of Advice of Counsel No. GC-2009-506 involved a significant and complex matter for the applicant. Representing the applicant in such a matter clearly results in a financial interest for the law firm and its partners.

On the other hand, the Board of Ethics concluded and advised the requestor that—absent some unusual circumstance—scenario (b) above would not represent a conflict of interest for the requestor as a designee on the board, and that Code Section 20-607(b) would not require the requestor to publicly disclose the financial interest of his/her relative in such a matter, and the requestor could permissibly vote and otherwise participate in the consideration of such a matter as a designee member of the board.[5]

Even if the question is limited to an applicant before the requestor's board who is represented by a partner or associate of the law firm (other than the requestor's relative), it is not possible for this Board of Ethics to provide a single definition of "financial interest" that can be clearly applied to any of the numerous factual situations that could arise out of the potential variety of applications that might be presented to the subject board, the variety of billing arrangements that might exist for the law firm, and the potential for future work or enhanced reputation for the firm that might accrue to such representation.

Accordingly, the Board of Ethics advised that in any matter in which an applicant before the board is to be represented by the law firm, the requestor must at a

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[4] "Official action" is not limited to final votes. Section 20-602 refers to a "transaction involving the City," which is defined in Section 20-601(4) to include any "determination, contract, lease, claim, case, award, decision, decree, judgment or legislation." Similarly, Section 20-607 refers in several places to the same list of actions. Clearly, at least "decisions" and "judgments" can include recommendations, discussions, and other actions preliminary to a final vote. The State Ethics Commission has said many times that the "use of authority of office" that constitutes a conflict of interest "includes more than mere voting; for example, it includes discussing, conferring with others, and lobbying for a particular result." *See, e.g.*, Confidential Opinion No. 07-018, at page 6.

[5] Whether there could remain an issue of an appearance of impropriety would depend on the particular facts. The Board notes that Advice of Counsel No 2009-506 addressed an appearance issue because there was no prior authority from the Board on the precise question presented by the requestor's factual situation.

minimum request the advice of this Board[6] as to whether there is a conflict that requires disclosure and disqualification under Code Sections 20-607 and 20-608. Of course, the requestor was advised that a board member always has the option of filing such a disclosure letter and disqualifying oneself without an opinion, since that would be the maximum remedy, prior to board action.

The Knowledge Requirement

The Board of Ethics notes that there may be a variety of scenarios that might arise, and also that it may be difficult for a City board member to learn much in advance of any meeting of the board that the agenda includes a matter in which a party is represented by the relative's law firm. It is important to note that Section 20-607 requires disclosure and disqualification only where a financial interest in official action of a City officer is held by a defined relative of that officer "and where said . . . City officer or employee has knowledge of the existence of such financial interest." Of course, one may not avoid application of Section 20-607(b) by consciously avoiding such knowledge; the requestor would be expected to make a good-faith effort to learn when the law firm is poised to represent a client before the requestor's board. This includes making best efforts to learn the agenda of board meetings in advance, if possible. In this regard, the Board adopts the reasoning and conclusions of Advice of Counsel GC-2008-524 regarding late notice of conflicts. In that Advice, board and commission members were advised as follows:

> (1) to take whatever steps they can to ensure they are informed of who will be appearing before them in good time so the occurrence of such last-minute situations is minimized; and (2) if such a situation occurs, to request their body postpone official action until they can comply with the Code's disclosure requirements; or (3) if postponement is not practicable, to announce their nonparticipation publicly at the meeting, leave the room during consideration of the matter, and bring themselves into compliance with the Code's requirements as soon as possible. This includes writing and filing a letter that is in full compliance with the requirements of Code Section 20-608(1)(c) no later than 5 calendar days after the Board action.

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[6] In most cases, an Advice of Counsel may be provided, now that our General Counsel has this Opinion for guidance on "financial interest."

It is important to note that the deadline of "no later than 5 calendar days after the Board action" is applicable only when it is not feasible to file the disclosure letter prior to Board action, as is required by the language of Code Section 20-608.

Disclosure and Disqualification

In the case of a financial interest in City action, the Code requires public disclosure of the interest and disqualification from taking official action. Section 20-608(1)(c) of the Philadelphia Code spells out the precise procedure for the disclosure required: The requestor should write a letter, which should contain the following elements:

1. That the purpose of the letter is to publicly disclose a potential conflict of interest;
2. The requestor's public position (member of the relevant board) and description of duties relevant to the conflict, if not obvious;
3. The requestor's private position or financial interest (representation of a party by the law firm, of which a relative is a partner) that presents the conflict;
4. A statement of how the requestor's public duties may intersect with his/her private interest (the board is considering a matter in which a party is represented by the law firm and the requestor would normally participate as a board member); and
5. The requestor's intention to disqualify himself or herself from any official action in matters affecting the private interest (should indicate, if possible, that such disqualification precedes any official action being taken in any such matter).

The letter should be sent by certified mail to the following: (1) the Chair, Executive Director, or Secretary of the board in which the requestor would be acting; (2) the Ethics Board, c/o Evan Meyer, General Counsel, Packard Building, 1441 Sansom Street, 2nd Floor, Philadelphia, PA 19102; and (3) the Department of Records, Room 156, City Hall, Philadelphia, PA 19107. The letter should indicate on its face that copies are being sent to all three of the above addressees.

Representation

Code Section 20-602 prohibits certain involvement in transactions involving the City, wherein a City official represents a person in the matter, or—in some

circumstances—is a member of the firm that is representing a person in the matter. However, since the requestor is not a member of the law firm and has not asked about personally representing persons before the board, we did not address this provision.

State Ethics Act

The State Ethics Act, 65 Pa.C.S. §1101 *et seq.*, likely applies to the requestor, assuming that as a City member the requestor qualifies as a "public official" under the Act. However, unlike the City Code, the Act's conflict of interest provision does not reach a "like relative-in-law." The Act's definition of "conflict of interest" reaches official action that benefits the public official himself, "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 (definition of "conflict of interest"). The term "immediate family" is defined as: "A parent, spouse, child, brother or sister." 65 Pa.C.S. §1102 (definition of "immediate family"). In-laws are not included. Thus, the requestor was advised that financial interests held by the requestor's in-law would not implicate the State Ethics Act conflict of interest provision.

Nevertheless, it is instructive to note that if the law firm lawyer was a close relative covered by the State Act's definition of "immediate family," there might be a State Act conflict issue under almost any scenario, because of an interpretation[7] that the Act's definition of "conflict of interest" includes an official taking action that affects individuals that are current on-going clients of the official's private business, even if those individuals are not involved in the particular matter. *See* State Ethics Commission Opinion No. 92-010 (Kannebecker, December 10, 1992). In that Opinion, the Commission ruled that a township supervisor who was also a private attorney had a conflict as to clients of his who have matters pending before the township, even if he represents those clients only in an unrelated matter, not the matter before the township. Opinion 92-010 was reaffirmed by more recent Opinions of the Commission (Opinion Nos. 08-007 and 07-009) and has been followed by the Counsel of the Commission who has, over the years, issued multiple Advices of Counsel citing it. Thus, if the Act applied and the Commission applied this interpretation, such an official would be required to publicly disclose the potential conflict and arrange to be disqualified from taking any official City action with respect to any client of a parent, child, spouse or sibling through that relative's firm, applying the same principles as for the City Code above.

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[7] See the following paragraph for a caution referring the requestor to the State Ethics Commission for a definitive ruling. This caution is particularly appropriate in the case of any application of the interpretation referred to here.

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the Act. Please note that 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. 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

The requestor was advised that, since his/her in-law is a partner in a law firm that occasionally represents clients before the requestor's board, and based on this Board's interpretation of the term "financial interest," the requestor would have a conflict of interest under Code Section 20-607 in certain board matters where a party is represented by the law firm and the scope of the employment and the type of matter is such that any partner would have a financial interest, of a more than insignificant value, in the successful representation of the client. The requestor was advised that in such a case he/she is required to file a public disclosure under Code Section 20-608 and disqualify himself or herself from participating in the matter as a designee member of the requestor's board.

Additionally, the requestor was advised that, unless he/she wishes to voluntarily disclose and disqualify in any matter involving the law firm representation, the requestor is strongly encouraged to determine, as far in advance as possible, when such matters are approaching and seek the advice of this Board as to whether disclosure and disqualification is required. Alternately, the named member may wish to consult the Law Department on the possibility of providing a substitute designee or possibly participating personally on certain matters.

The requestor was advised that if he/she has any additional facts to provide, the

Board will be happy to consider if they change any of the conclusions in this Opinion. Since the requestor requested nonpublic advice from the Board of Ethics, we are not making the original Formal Opinion 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).

By the Board:

Richard Glazer, Esq., Chair
Richard Negrin, Esq., Vice-Chair
Kenya S. Mann, Esq., Member
Rev. Damone B. Jones, Sr., Member

[There was one vacancy on the board, due to the resignation, prior to the September 16 Board meeting, of Phoebe A. Haddon, Esq.]