



CITY OF PHILADELPHIA

BOARD OF ETHICS  
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## **Philadelphia Board of Ethics Non-Public Board Opinion 2013-005**

March 20, 2013

### **Re: Providing Constituents Legal Representation and Referrals to Attorneys**

Dear City Council employee:

You have requested an opinion on whether a City Council employee who is an attorney may represent constituents in legal matters in which the City is an opposing party. The City Solicitor has advised that, regardless of whether the City is a party, Council employees are prohibited from providing legal representation to members of the public as a constituent service. It follows that Council employees who are attorneys are prohibited by the representation restriction of the City Ethics Code from undertaking legal representation of constituents in transactions involving the City. You have also asked whether a Council employee is permitted to refer constituents to attorneys for legal advice. Referring constituents to attorneys is permissible where, as you have said is the case, no referral fee will be given, and no financial interest in the referral is held by the Council employee or the Councilmember for whom he works or certain of their relatives or business colleagues.

### **I. Jurisdiction and Relevant Law**

The Board of Ethics has jurisdiction to administer and enforce all Philadelphia Home Rule Charter provisions and ordinances pertaining to ethical matters. Charter §4-1100. The Charter and the City Code authorize the Board to render advisory opinions. Charter §4-1100; Code §20-606(1)(d). Board of Ethics Regulation 4 describes the procedures for seeking an advisory opinion, including how to request reconsideration of an opinion issued by the Board. Board of Ethics Regulation 4, ¶4.26.

FOR PUBLIC RELEASE

The City Ethics Code applies to employees of City Council. *See* Code §20-601(2) (defining officer or employee). As discussed in greater detail below, the Code generally prohibits City employees from representing people as an agent or attorney in City transactions and from having conflicts of interest. Code §§20-602, 20-607.

## **II. Discussion**

The questions, facts, and examples that you provided are set forth below and are followed by the Board's responses to your questions.

### **A. Providing Constituents Legal Representation**

**Question:** May a Councilmember's staff employee who is an attorney represent constituents in legal matters where the opposing party is the City?

**Facts and Examples Provided:** The attorney on a Councilmember's staff would be representing the constituent at the Councilmember's request and for no additional compensation beyond his City salary.

**Example 1 (Sheriff's Sale):** A constituent needs legal representation for a hearing to oppose the sale of her home at Sheriff's Sale. The City is the plaintiff in an action to recover delinquent real estate taxes or is the party opposing an emergency stay in a mortgage foreclosure sale.

**Example 2 (Trash Court):** Representing a constituent in municipal court regarding a Code violation. On occasion a staff attorney will be asked to attend municipal court to represent a constituent in "Trash Court." Trash Court is where cases are heard for people who do not recycle or who have put their trash out too early. The City is the plaintiff, and the constituent is the defendant.

**Response:** No, a Councilmember's staff employee who is an attorney may not represent constituents in legal matters where the opposing party is the City.

A Council employee providing legal representation to constituents in opposition to the City raises an issue under the representation restriction of the City Code. The representation restriction provides, in relevant part, that City employees are prohibited from assisting another person by representing that person directly or indirectly as an agent or attorney in a transaction involving the City. Code §20-602(1)(a). Transactions involving the City include proceedings, decisions, and matters that may be subject to City action, involve the City as a party, or include a direct proprietary interest of the City. Code §20-601(4). The representation restriction, however, does not apply to assistance a City employee renders "in the course of or incident to his official duties." Code §20-602(1)(a).

The application of the official duty exception to your question requires a determination of whether it is within the scope of a Council staff member's permissible job duties to provide legal representation to a constituent. We recognized that it is outside the jurisdiction of the Board of Ethics to determine what activities are within the scope of a Council staff member's employment, so we sought the advice of the City Solicitor on that issue. The Solicitor responded by issuing an opinion on March 7, 2013 that concludes that "providing legal representation to members of the public, whether or not in a transaction involving the City, would fall outside the official duties of a council staff member." The Solicitor's Opinion has a detailed analysis and is attached for your reference.

As a result of the Solicitor's conclusion, the official duty exception to the representation restriction would not apply to legal representation a Council staff member provides to a constituent. The representation restriction of Code Section 20-602 therefore prohibits City Council employees who are attorneys from providing legal representation to constituents in transactions involving the City. Accordingly, the Sheriff's Sale and Trash Court examples you provided would be prohibited representations for a Council staff member who is an attorney.

### **B. Providing Constituents Referrals to Attorneys**

**Question:** May a staff employee of a Councilmember refer constituents to attorneys when an issue requires legal advice?

**Facts and Example Provided:** A referral fee or other remuneration would not be involved. The attorneys to whom constituents are referred would have no connection with the staff employee or the Councilmember for whom he works.

**Example 1 (Zoning Process):** A constituent has a zoning issue and is seeking a variance. While the constituent may be able to navigate the zoning process, it is encouraged that the constituent obtain an attorney. A Council employee would recommend an attorney.

**Response:** Yes, a staff employee of a Councilmember may refer constituents to attorneys if no financial interest in the referrals is held by him, the Councilmember for whom he works, or certain relatives or business colleagues that he and the Councilmember have.

Two City ethics restrictions are potentially applicable to Council employees providing constituents attorney referrals. First, the Code's representation restriction prohibits City employees from accepting a fee from anyone for referring a matter to another person when the employees would be barred from the representation themselves. Code §20-602(1)(b).

Second, the Code's conflict of interest restriction prohibits a City official or employee from taking official action if she or a family member has a financial interest in the action or if another member of a for-profit organization of which she is a member has a financial interest in the action. Code §§20-607(a), (b). A financial interest is an interest in which a potential monetary gain or loss is at stake, such as a potential impact on a person's income, compensation, value of assets, wealth, employment prospects, business prospects, or financial relationship with another person. Board Opinion 2012-006 at 4. As an example of a conflict of interest in the attorney referral context, the Board's General Counsel previously advised a City employee that he would have a conflict of interest if in his City position he were to make referrals to an attorney who had represented him in private litigation because the attorney has promised him a greater than previously agreed upon percentage of litigation settlement proceeds in exchange for the referrals. General Counsel Opinion 2009-507 at 3.

A conflict of interest would arise in the situation you have asked about if: (1) the Council employee has a financial interest in making the referral; (2) a parent, spouse, life partner, child, brother, sister, or like relative-in-law of the Council employee has a financial interest in the referral; or (3) a member of a business of which the Council employee is a member has a financial interest in the referral. *See* Code §20-607(a),(b). A conflict of interest would also exist if the Councilmember to whom the staff employee reports, the Councilmember's relative, or another member of a business of which the Councilmember is a member has a financial interest in referrals the Councilmember directs the staff employee to make. *See id.*

Under the facts you have provided, which would not involve a referral fee or a conflict of interest, the Zoning Process example of an attorney referral would not be prohibited.

### **III. Conclusion**

In this Opinion, the Board of Ethics has addressed whether the proposed future conduct, not any past behavior, is permissible only under the City laws over which the Board has jurisdiction. *See* Code § 20-606(d)(ii); Board of Ethics Reg. 4, ¶¶4.2, 4.3. The Board is not endorsing or commenting on the advisability of the permissible activities.

Ethics advisory opinions are highly fact-specific, and this Opinion is predicated on the facts you provided as stated here. City officials and employees who want to know whether conduct they are contemplating is permissible should seek and rely on an advisory opinion issued about their specific situations. If you have questions about particular situations that vary from the facts presented here or that are related to principles described only generally in this Opinion, you should ask for specific advice on the application of the ethics laws to those particular facts.

Thank you for being concerned about compliance with the City's ethics laws and for seeking advice. Since you requested a non-public opinion, the original Opinion will not be made public. As required by the City Code, this version of this Opinion that is redacted to conceal facts that are reasonably likely to identify the requestor is being published on the Board's website. Please let Board Staff know if you have any questions or concerns.

BY THE PHILADELPHIA BOARD OF ETHICS<sup>1</sup>

Michael H. Reed, Esq., Chair  
Judge Phyllis W. Beck, (Ret.), Vice-Chair  
Sanjuanita González, Esq., Member  
Brian J. McCormick, Jr., Esq., Member

Attachment: March 7, 2013 Solicitor's Opinion

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<sup>1</sup> The Board currently has one vacancy.



City of Philadelphia

LAW DEPARTMENT  
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Philadelphia, PA 19102

**MEMORANDUM**

*Privileged and Confidential Advice of Counsel*

*Privilege Waived 4/16/13*  
*[Signature]*

**TO:** J. Shane Creamer, Jr., Esq., Executive Director, Board of Ethics  
**FROM:** Shelley R. Smith, City Solicitor *SR*  
**DATE:** March 7, 2013  
**SUBJECT:** **Whether provision of private legal representation comes within the scope of official duties of City Council Staff**

You have requested my opinion regarding what activities are properly encompassed by the “constituent services” offered by councilmembers to the public, and, more particularly, you have inquired whether these services properly include provision of legal representation by Council staff members, who happen to be attorneys, to the public. You have sought this advice in connection with a request to the Board of Ethics for its opinion regarding the prohibition of Code § 20-602(1)(a), which generally prohibits representation by City officers, employees, and councilmembers of anyone in transactions involving the City, *except* when rendered “in the course of or incident to his official duties.” Thus, if legal representation of members of the public in transactions involving the City is a legitimate constituent service, then such practice, if engaged in pursuant to direction from a Councilmember, would be exempt from the prohibition of Code § 20-602(1)(a). Conversely, if not a legitimate constituent service, such representation would violate the plain language of that provision.

For the reasons set forth below, it is my opinion that providing legal representation to members of the public, whether or not in a transaction involving the City, would fall outside the official duties of a council staff member. Therefore, such legal representation in a transaction involving the City would be barred by § 20-602(1)(a), and cannot be properly offered as a constituent service.

**What are Constituent Services?**

Though it escapes exact definition, some set of activities, known as “constituent services,” performed by legislators and their staffs on behalf of members of the public, has come to be customary and accepted. At base, one of the most common and accepted forms of constituent service is an ombudsman function, advocating with executive branch agencies for members of the public on matters such as tax, public benefits, and other matters involving

interactions with the government. *See, e.g.*, Ronald M. Levin, *Congressional Ethics & Constituent Advocacy in an Age of Mistrust*, 95 Mich. L. Rev. 1, 16-17 (1996).

City Council's practice of providing constituent services is well-established. In a local case concerning a member of City Council, the Court of Common Pleas wrote that "[g]overnment officials are frequently called upon to be ombudsmen for their constituents. In this capacity, they intercede, lobby, and generate publicity to advance their constituents' goals, both expressed and perceived." *DeSimone, Inc. v. Phila. Authority for Industrial Devel.*, No. 00207, Nov. Term 2001, 2003 WL 21390632, at \*6 (Phila. Ct. Com. Pleas June 10, 2003). The Law Department has also acknowledged the practice. *See Op. No. 94-18, 1994-1996 City Solicitor's Opinions* 51 (Aug. 12, 1994) (observing that "providing constituent services is clearly part of a Councilmember's official duties, and therefore establishing a 'District Office' to provide constituent services is an appropriate use of City space and City funds").

In determining the scope of activities encompassed by constituent services, it is helpful to look to other legislative bodies that provide them. At the federal level, the United States Supreme Court has acknowledged the practice by members of Congress:

It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities. . . . These include a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases.

*United States v. Brewster*, 408 U.S. 501, 512 (1972).

Whatever their scope, constituent services, as an activity of elected public officials, must naturally keep the general public interest as their highest aim. Constituent services cannot properly encompass the advancement of *purely* private interests, without regard for the public good. To hold otherwise would violate a self-evident principle of democratic governance. United States House of Representatives ethical guidelines on constituent services give particular emphasis to this point: "[t]he overall public interest, naturally, is primary to any individual matter and should be so considered." *Precedents of the United States House of Reps.*, Ch. 12, § 10, pp. 1717-18 (Lewis Deschler compiler, 1994). Of course, determining what is in the public interest is a matter that is necessarily subject to exceptionally wide discretion on the part of elected officials. Nevertheless, maintaining the primacy of the public interest necessarily places some limit on the proper scope of constituent services. *See Levin, Congressional Ethics, supra*, at 52-53 ("Legislators are not solely advocates, however. They are also responsible for

promoting the public interest . . . . That the obligation to consider an issue from multiple vantage points probably cannot be enforced does not mean that it should be ignored as an ethical ideal.”).

Finally, it is important to note that constituent services at least arguably complement the basic functions of Council—namely, legislating (*i.e.*, policy-making), and oversight. Constituent service requests are likely to raise issues that implicate questions of public policy, the functioning of City agencies, the administration of City services, and the like. In this regard, constituent services may be said to fall within the legislative and oversight functions of Council. *See* John R. Johannes, *To Serve the People: Congress and Constituency Service* 161-66 (1984) (noting possible value of constituent services to legislative and oversight functions of Congress).

From the foregoing, it is safe to conclude that the activities encompassed by constituent services generally include intercession with government agencies for particular individuals or constituencies, as well as communicating with the public in various ways. Plainly, the practice of providing constituent services is well-accepted, and at this point in history, it would be futile to suggest that the provision of constituent services, as generally understood, falls outside the acceptable role of Council members and staff.

While the foregoing does not give precise definition to the proper boundaries of constituent services, it is nevertheless sufficient for purposes of analyzing the question of whether Council staff who are attorneys may properly provide legal representation to members of the public. As will be seen in the next section, constituent services necessarily cannot accommodate the direct provision of legal representation.

### **Provision of Legal Representation**

Because a lawyer is ethically obliged to place the client’s interests above all others, I do not believe that the provision of legal representation to individual members of the public falls within the proper scope of constituent services, or, therefore, of the permissible duties of Council members and employees. Accordingly, a Council staff member who is an attorney would not be acting within “the course of or incident to” his or her official duties under Code § 20-602(1)(a) by providing legal representation as a “constituent service” in any meeting, hearing, or adjudication by or before a City department, board, or commission. This is the case whether or not the City itself is a party, and whether or not the person represented by the Council staff member is adverse to the City in the proceeding.

### **Nature of the Attorney-Client Relationship**

This is perhaps most clearly demonstrated by the particular nature of legal representation, and the professional commitment it entails on the part of the attorney, who is also a City employee. Undertaking an attorney-client relationship is categorically different from the usual scope of constituent services in which a legislator or the legislator’s staff provides information or serves as an ombudsman on behalf of members of the public. Constituent service involves advocacy and troubleshooting within the government. Legal representation involves a distinct function that goes well beyond pressing agencies to attend to particular cases, or improve their operation. Rather, legal representation constitutes a specialized professional service subject to an



array of ethical obligations that are fundamentally incongruent with the constituent service function. In particular, the public interest must be subordinate to the client's interest. A lawyer's professional efforts must be devoted to the client's private interests, and must be subject to the client's ultimate direction.

The difference in kind between constituent service and legal representation is illustrated by an attorney's obligations under the Pennsylvania Rules of Professional Conduct. Under those rules, an attorney must remain unwaveringly loyal to her client, guard the client's interests zealously, and exercise independent judgment on the client's behalf. *See, e.g.*, Pa. R.P.C. 1.7, cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests.");<sup>1</sup> Pa. R.P.C. 1.3, cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

These professional obligations, which would attach when a lawyer-staff member undertakes the representation of a member of the public as a client, mean that the client's *private* interests must displace the *public* interest for purposes of the representation. However, an activity in which a lawyer-staff member must place her client's private interests before the public interest cannot properly be encompassed within the scope of constituent services, where the public interest must control.<sup>2</sup>

Because the two sets of activities serve entirely different ends, constituent services and providing legal representation to private parties necessarily do not overlap. On the one hand, constituent services must keep the overall public good as its primary goal. On the other, an attorney, in providing legal representation, must always place the client's interests above all

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<sup>1</sup> While a client may be entitled, and even inclined, to waive any conflict of interest raised by the attorney's employment as a member of Council staff, I am aware of no principle that would enable the subordination of the public interest to the client's interest. As discussed below, it is highly doubtful that the City could even permit such subordination of the public interest to the private interests.

<sup>2</sup> In all cases, the representation, at a minimum, would require that the would-be client consent to the potential conflicts of interest that may arise when a lawyer-staff member represents the client, while remaining faithful to the overall public good. This could put the client, the lawyer-staff member, or both in an untenable position when, for instance, the client's interests conflict with the policy views of the councilmember for whom the lawyer-staff member works (and indeed, attorney-client privilege issues would make it problematic for the lawyer-staff member to even report client issues to the councilmember). At a minimum, this conflict would jeopardize the lawyer-staff member's professional independence as an attorney, as well as her freedom to provide diligent and competent representation to her client. Alternatively, it would require her to jettison the public interest in making decisions on behalf of her client, an untenable position for a public servant.

others. That the client's interests, and the public good (no matter how broadly construed), may arguably overlap in some cases does not change the analysis.<sup>3</sup>

### **Use of Public Resources for Private Purpose**

Because provision of legal representation necessarily invokes the lawyer-staff member's professional obligation to place her client's interests above the public interest, such representation would violate the principle of law that forbids the commitment of public resources to concerns that are predominantly private. *See Price v. Phila. Parking Authority*, 221 A.2d 138, 147 (Pa. 1966) ("Empowered to act only for the public benefit, the Authority may not employ its resources for the primary and paramount benefit of a private endeavor."); *see also Kulp v. Philadelphia*, 140 A. 129 (Pa. 1928) (under 1919 Charter, appropriation to opera company not authorized where it "was not made to sustain a municipal purpose"). Even if the provision of legal representation to private individuals arguably serves the public interest by, for example, providing some insight into how existing laws affect constituents, this does not alter the basic character of the lawyer's work on behalf of her client, which must remain tightly focused on the client's private interest. "An engagement essentially private in nature may not be justified on the theory that the public will be incidentally benefited." *Price*, 221 A.2d at 147.

As discussed above, the client has a right to expect, and the lawyer has an obligation to maintain, undivided loyalty with respect to the client's personal interests. There is no manner in which the public interest can properly be said to be paramount in taking on the representation. The lawyer could well breach her professional duty by placing broader concerns of sound policy or the public good ahead of the client's interests. To the extent the public interest can be recognized in the context of private representation at all, it must be subject to the *client's* determination of what is in the public interest, and the extent to which the public interest will be pursued in the course of the representation. Provision of legal representation in private matters as a constituent service is, by its nature, a private benefit.

As a practical matter, the provision of legal representation as a constituent service, particularly where the representation is in a case before a City agency, raises the possibility of City resources being used to represent one resident's private interests over another's. For instance, cases before the Zoning Board of Adjustment may well involve the competing *private* interests of various City residents. The impropriety of a lawyer-staff member affording representation to any private party in such a case is manifest. A private party's interests in a zoning hearing are overwhelmingly likely to be proprietary. Even if the councilmember feels that advancing the party's case will serve the greater good, doing so by directing a lawyer-staff member to provide legal representation to the private party necessarily serves the party's private

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<sup>3</sup> This discussion should not be taken to suggest that a lawyer-staff member may never provide legal representation *independent* of her employment by the City. Such representation would, of course, be subject to all applicable professional obligations and public employee ethics rules (including Code § 20-602(1)(a), which would prohibit providing such representation in cases involving the City). Rather, the point is that provision of legal representation as a constituent service is simply not within the scope of a Council staff member's duties.

ends first. As an attorney engaged to provide legal representation, the lawyer-staff member could not ethically do otherwise.

Similarly, if such representation were within the proper scope of a lawyer-staff member's duties, the City would become the staff member's de facto malpractice insurer through its indemnification of all City officers and employees for acts "performed within the scope of their employment." Phila. Code § 20-702. This means that the City would be providing financial protection to the lawyer-staff member for activities that must necessarily serve private, rather than public, interests. This would be profoundly at odds with the purpose of indemnification, which is to free public officers and employees to serve the public good by performing their *public* duties fully, without fear of personal liability.

Providing legal representation as a constituent service is necessarily beyond the proper scope of a lawyer-staff member's proper job duties because public resources cannot be devoted to what is inherently a private endeavor.

## **Conclusion**

Although constituent services are plainly within the scope of the duties of Council staff assigned to provide such services, the scope of such duties necessarily cannot include the provision of legal representation to members of the public. The professional obligations of attorneys require them to place the client's private interests above all others, while the paramount object of constituent services must always be the public good. This difference in primary objective means that legal representation cannot fall within the proper scope of constituent services. By the same token, the law prohibits the commitment of public resources to purely private ends—and again, the provision of legal representation necessarily serves the client's private purpose.

Accordingly, it is my opinion, and you are advised, that it is not a permissible function of constituent services, and it is not within the scope of employment of those Council employees who provide constituent services, to provide legal representation to members of the public as a constituent service.