GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

Office of Government Ethics

April 19, 2013

VIA EMAIL TO:

[name redacted]
Commissioner, ANC

Dear Commissioner:

This responds to your January 29, 2013, email in which you seek guidance concerning your dual positions as an Advisory Neighborhood Commission ("ANC") Commissioner and an associate at [a law firm]. In addition to the information you provided in your January 2013, email, you provided information to a member of my staff in a telephone conversation and in a subsequent email.

You state that as an associate at [a law firm], you are a salaried employee and mostly work on [redacted] regulatory and litigation matters, generally on behalf of state government agencies. You also state that [the law firm] represents large corporations all over the world on a variety of matters, but does not have any practices that focus on the type of matters that most commonly come before ANCs, such as historic review, planning and zoning, and alcohol licensing issues. You state that if [the law firm] represents a person or entity in a matter that comes before [your] ANC, you likely would be aware of it in advance and would recuse yourself from all voting, discussion, and any other involvement. You also state that if you ever are in a recusal situation, you plan to contact this Office to ensure that you do everything appropriately.

As an ANC Commissioner, your conduct is guided by the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012, D.C. Law 19-124, D.C. Official Code § 1-1161.01 *et seq.* Section 223(a) of the Ethics Act (D.C. Official Code § 1-1162.23(a)) provides:

> No employee shall use his or her official position or title, or personally and substantially participate, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter, or attempt to influence the outcome of a particular matter, in an manner that the employee knows is likely to have a ***direct and predictable effect*** on the employee's financial interests or the financial interests of a person closely affiliated with the employee.

The Ethics Act definition of "person closely affiliated" (D.C. Official Code § 1-1161.01(43)) includes "affiliated organization," which is defined as one in which a person serves as an "officer, director, trustee, general partner, or ***employee.***" D.C. Official Code § 1-1161.01(3)(A)(i). The question then is whether, as an employee of [the law firm], your ANC duties could have a "direct and predictable effect" on the financial interests of [the law firm] or its clients. It is certainly possible that this would be the case if [the law firm] appears before the ANC on behalf of one of its clients. Though ANCs are limited in their statutory powers, their recommendations are given great weight by the District government. For instance, a [law firm] client who wishes to obtain an ANC's support with regard to an application for a liquor license could benefit from a positive recommendation by the ANC to the District agency responsible for issuing the license. In such a case, having one of [the law firm's] employees as a voting member of the ANC could have a direct and predictable effect on the client's financial interests, and, therefore, the firm's finances.

Recusal

Although nearly everyone who works for the District (whether for pay or without) falls within the conflict of interest provision set out above, there are differences in the way a regular employee is treated compared with an employee who is also considered an elected official. For instance, though recusal is the proper method to deal with a conflict, an employee other than an elected official may be eligible for a waiver from the Ethics Board in certain circumstances. (Ethics Act § 223(b); D.C. Official Code § 1-1162.23(b)). No such waiver is available to an elected official.

The procedures and reporting obligations associated with recusal are somewhat different as well depending on classification. For instance, in the case of an elected official, the Act states:

> Any elected official who, in the discharge of the elected official's official duties, would be required to act in any matter prohibited under subsection (a) of this section shall make full disclosure of the financial interest, prepare a written statement describing the matter and the nature of the potential conflict of interest, and deliver that statement to . . . . the Ethics Board." (Ethics Act § 223 (c)(1); D.C. Official Code § 1-1162.23 (c)(1)).

Moreover, D.C. Official Code § 1-1162.23(c)(3) states:

> During a proceeding in which an elected official would be required to take action in any matter that is prohibited under subsection (a) of this section, the Chairman shall: (A) Read the statement provided in paragraph (1) of this subsection into the record of proceedings; and (B) Excuse the elected official from votes, deliberations, and other actions on the matter.

The question is whether ANC Commissioners are considered "elected officials." The term "elected official" is not specifically defined in the Ethics Act. The term "Election" is defined as "a primary, general, or special election held in the District of Columbia for the purpose of nominating an individual to be a candidate for election to office, or for the purpose of electing a candidate to office, or for the purpose of deciding an initiative, referendum, or recall measure, and includes a convention or caucus of a political party held

for the purpose of nominating such a candidate." D.C. Official Code § 1-1161.01(15). To the extent that ANC Commissioners are selected through this process, they are, in my view, clearly elected officials and should follow the recusal procedures set out above.

Therefore, if you ever learn that [the law firm] represents a person or entity in a matter that will come or has come before [your] ANC, you will be required to provide a written statement that details your financial interest, describes the matter, and describes the nature of the potential conflict of interest. You also will be required to provide that written statement to the Ethics Board and to have it read into the record at the next ANC meeting. Finally, you must fully excuse yourself from all votes, deliberations, and other actions on that matter.

This is the clear remedy in those cases in which [law firm] attorneys seek to appear before your ANC. However, you raise several other scenarios that also might occur, and which require more careful analysis. You explain that a [law firm] client may have an issue before [your] ANC, in which [the law firm] has no involvement whatsoever. You point out that the person or entity could be represented by other lawyers or not represented at all. You also point out that if [the law firm] represents the person or entity on an entirely unrelated matter and does not represent the person or entity before [your] ANC, you may or may not know that the person or entity is a [law firm] client. The concern is that, as an associate, you may not have ready access to the firm's client rolls necessary to do conflicts checks each time a party appears before your ANC, and the firm may find it unduly costly and burdensome to itself provide a conflicts check to you on an ongoing, indefinite basis. You, therefore, request guidance as to what actions you should take to ensure that you act in compliance with the highest ethical standards.

Although the Ethics Act imposes restrictions on what you may do in your private capacity, including representation of clients, it is not intended to be so restrictive as to deprive the District of well-meaning citizens who choose to serve without pay on Boards and Commissions, or as ANC Commissioners, by unduly interfering with an individual's regular employment. This is especially true for private attorneys who engage in representation including, perhaps, of clients with matters involving the District government. Generally speaking, those in government may not represent private individuals against the government. But, both the District's Code of Conduct and federal law, recognize an exception for part-time government workers, also known as "special government employees," who may or may not be compensated for their government service.[1] This exception and its underlying prohibition balance the importance of employee loyalty with the benefit of utilizing highly qualified part-time workers who likely have separate careers outside of the government.

I note that in a previous Advisory Opinion, dated June 11, 2012, from the Office of the Attorney General for the District of Columbia ("OAG") to BEGA Chairman Robert Spagnoletti, the Attorney General dealt with this issue in somewhat similar fashion. (OAG Letter Op., June 11, 2012, attached hereto). The issue arose because Mr. Spagnoletti, as a Special Government Employee, is also a partner in a small law firm in the District that sometimes represents clients before the District government. Mr. Spagnoletti wished to

[1] A "special government employee" is an officer or employee of the government who serves, with or without pay, for no more than one hundred and thirty days during any period of three hundred and sixty-five consecutive days. I note, however, that even these individuals would be prohibited from representation in a private matter in which they personally and substantially participated while working for the government. DPM § 1814.1. *See also* 18 U.S.C. §§ 202(a) and 205.

know the parameters of permissible conduct as a practicing lawyer and a BEGA Board member. The Attorney General wrote:

> Under governing conflict of interest rules and canons of judicial ethics, an Ethics Board Member would generally be required to recuse himself or herself in every instance in which a firm client has a matter before the Ethics Board. Under the conflict of interest provisions of the Ethics Act, as well as under previously long-standing conflicts of interest principles, an employee of the District is not permitted to hold an interest in a business that is related directly to the employee's official duties or would be related to matters over which the employee could wield any influence. . . . a Board Member would not be permitted to take any official action that would involve either a family member or any entity by which the Member is employed or in which he or she otherwise has a financial interest. That would certainly include taking action in a matter in which a Board Member's law firm appears on behalf of a litigant.

That Advisory Opinion, however, does not directly address the situation you have described. There is no mention that Mr. Spagnoletti as a partner, unlike you as an associate, may be unaware that a party that comes before him at the Ethics Board may be a client of his firm or that he would not have ready access to the firm's client rolls necessary to do conflicts checks each time a party appears before him. Moreover, the Opinion assumes that it is his firm that would represent the client before the Ethics Board, rather than a different firm. It also does not address a client that appears without representation. As stated above, where firm representation occurs you, like Mr. Spagnoletti, would recuse from participation. However, for the reasons that follow, I distinguish your situation from the one described in the OAG Advisory Opinion and limit those requirements to situations in which you learn that [the law firm] represents a person or entity in a matter that comes before [your] ANC.

As a starting point, I recognize the real-world practicalities of law firm practice, managing clients and the potential conflicts that frequently arise, especially in large multi-jurisdiction firms. I am also not insensitive to the role of an associate in a firm, as opposed to that of a partner. I believe the Ethics Act should be applied with all of this in mind. As described above, section § 223 (D.C. Official Code § 1-1162.23) of the Ethics Act prohibits you from using your official title or position, or personally and substantially participating, in a particular matter that you ***know*** is likely to have a direct and predictable effect on your financial interests or on the financial interests of a person closely affiliated with you. The key issue is whether you have the requisite knowledge when a matter comes before you as an ANC commissioner. Certainly, in the case of a [law firm] client who is represented before your ANC by [law firm] attorneys, or where one of your [law firm] clients appears before the ANC with or without [law firm] representation, the knowledge requirement would be subjectively met and you would have to recuse yourself and follow the above procedures. What is less clear is what should occur when a [law firm] client comes before your ANC and you are unaware of the connection to the firm. To be sure, knowledge of a firm's clients may be imputed for purposes of the legal ethics rules that bind attorneys, and this may be true as well for our government ethics rules. But it would be unreasonable to expect you or any large-firm associate to have access to a running resume of every firm client at any given moment. Fortunately, I do not need definitively to decide the imputed knowledge issue today in order to provide you with the guidance you request.

As previously stated, you and [the law firm] are prohibited from financially benefiting from your service as an ANC Commissioner. In the case of a [law firm] client that appears before the ANC in a matter without [the law firm] as counsel, neither [the law firm], through client fees, nor you, as a salaried employee of [the law firm], may be said to have benefitted financially from any action [your] ANC may take. It is this lack of a financial benefit that is important because financial gain through your government position is what the statute was designed to prevent. Without that potential for gain, the statute is not triggered.

Therefore, if a [law firm] client comes before [your] ANC, represented by lawyers other than [the law firm] or without legal representation, unless you have worked on, are working on, or expect to work on that client's matter, you do not need to recuse yourself from the matter as an ANC Commissioner and you do not have to affirmatively determine whether the client is, in fact, a [law firm] client. Certainly, there could be exceptions to this approach. If, for instance, you are aware that a matter before the ANC involves an otherwise unrepresented [law firm] client, that the client knows you to be a [law firm] attorney and you are aware that the client is of great financial significance to the firm, the question of financial gain becomes more difficult. In such situations, even if you believe that neither you nor the firm will derive a direct financial benefit, you should recuse yourself as a matter of good practice and to avoid the appearance of impropriety. You may also contact this Office for further guidance should those or similar circumstances arise.

Please be advised that this advice is provided to you pursuant to section 219 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012, D.C. Law 19-124, D.C. Official Code § 1-1161.01 *et seq.*, which empowers me to provide such guidance. As a result, no enforcement action for violation of the District's Code of Conduct may be taken against you in this context, provided that you have made full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion.

Finally, you are advised that the Ethics Act requires this opinion to be published in the District of Columbia Register within 30 days of its issuance, but that identifying information will not be disclosed unless and until you consent to such disclosure in writing, should you wish to do so.

Please let me know if you have any questions or wish to discuss this matter further. I may be reached at 202-481-3411, or by email at darrin.sobin@dc.gov.

Sincerely,

/s/
DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability

Attachment: OAG Letter Op., June 11, 2012

AA-009-13

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

June 11, 2012

Robert J. Spagnoletti, Esq.
Schertler & Onorato, LLP
575 7th Street, NW, Suite 300 South
Washington, D.C. 20004

Re: *Service on the Board of Ethics and Government Accountability by Practicing Attorneys*

Dear Mr. Spagnoletti:

Congratulations on your nomination as Chair of the Board of Ethics and Government Accountability ("Board" or "Ethics Board"). The District will be fortunate to have your service again, and to have the service of your fellow nominated Board Members. As you know, the Board is by law comprised of three members who will serve in what is expected to be a less than full-time capacity. As a result, it is anticipated that Board Members will have outside employment. For example, you are a partner in a law firm that sometimes has matters that are adverse to the District and that may also engage in lobbying efforts of District officials on behalf of firm clients. As discussed, we have been asked to opine on issues that may arise when Board Members engage in the practice of law at private firms.

Below, I address three such issues. First, I conclude that Board Members who are also attorneys should *not* be regarded as being engaged in the practice of law while fulfilling their Board duties, and that, therefore, the conflicts of interest rules of the D.C. Rules of Professional Conduct will not require waivers from the District when Board Members or members of their respective firms are representing interests adverse to the District. Second, I conclude that, while no lobbyists may serve on the Board, this obligation is not imputed to law firm colleagues of the Members of the Board. Finally, I conclude that under the governing conflict of interest laws and rules, an Ethics Board Member would generally be required to recuse himself or herself from any matter in which a firm client has a matter before the Board.

In addition, though not required, for the sake of appearances, prudence suggests that you and the other Members of the Ethics Board should consider adopting rules that would place restrictions on what a Board Member or his or her firm will be permitted to do when the Member or his or her firm is representing a client in a matter before a District agency when an agency official is before the Board. There is a reasonable concern of an appearance of conflict of interest where a Member is serving on the Board, considering a matter involving a top official of a District

agency and the Member or his firm is simultaneously engaged in the representation of a private client before that District agency. There could be a concern that the Board Member might afford lenient treatment to the agency official in the hope that the agency will reciprocate by providing the requested relief to the firm client. Thus, for example, the Ethics Board should consider adopting a rule that would require recusal of a Board Member in such a circumstance. Likewise, for appearance-related reasons, I also suggest the Board Members consider as a matter of discretion foregoing any direct compensation from the firm that is derived from lobbying the District to the extent that such funds are segregable. These steps should help minimize any reasonable perceptions of an appearance of conflict of interest when a Board Member is a practicing attorney.

These conclusions and suggestions are discussed in further detail below. Please let me know if you or the prospective Ethics Board Members have questions. I look forward to the Board's beginning its important work and reiterate our commitment to provide assistance to get the Board up and running.

1) **Is Service as a Board Member the Practice of Law in the District of Columbia?**

For attorneys who serve as Ethics Board Members, there will likely be instances in which a Member's outside law practice (or that of the Member's firm) could find itself adverse to the District through a client representation. There are numerous functions of the District Government, and there is no shortage of individuals who hire attorneys to represent their claims against the District. A potential conflict arises if the lawyer proposing to represent the client or his firm is already representing the District. In those circumstances, a conflict develops under Rule 1.7(a) or (b) of the Rules of Professional Conduct and the District, as a client, would have to decide whether to waive the conflict. The key question, therefore, is whether the lawyer's service on the Board constitutes the practice of law for purposes of the conflict of interest provisions of the Rules of Professional Conduct. As discussed below, I conclude that it does not.

The Ethics Act sets forth both the qualifications for service on the Board as well as the Board's duties. *See* Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-0124, 59 DCR 1862) ("Ethics Act"), sec. 202. There is no requirement in the Ethics Act that a Board Member must be an attorney. In addition to its adjudicatory functions, the Board will render advice and issue advisory opinions when requested to do so by a government employee or official and publish those opinions in the D.C. Register (sec. 219). Among its duties, the Board is also expected to "administer and enforce the Code of Conduct" (sec. 202(a)(1)), establish a telephone hotline for the purpose of receiving information related to violations of the Code of Conduct (sec. 202(a)(9)), and conduct training and develop training materials (202(a)(5)).

Rule 49 of the Rules of the D.C. Court of Appeals defines the practice of law in the District. It includes the following presumptions that one is practicing law when: (1) preparing any legal document; (2) preparing or expressing legal opinions; (3) preparing any written document containing legal argument or interpretation of law for filing in any court, administrative agency

or other tribunal; and (4) providing advice or counsel as to how any of these activities might be done, or whether they were done in accordance with applicable law. *See* Rule 49(b)(2)(A-F).

Notwithstanding the presumptions, the key question under Rule 49 is whether the legal advice or service is provided in a lawyer-client relationship.[1] The commentary to the Rule states: "[T]he Rule *is not* intended to cover conduct which lacks the essential features of an attorney-client relationship." *See* Comments to Rule 49. The commentary goes on to state that: "This intent is expressed in the first sentence of the definition of the "practice of law" [in Rule 49] which requires the presence of two essential factors: The provision of legal advice or services and a client relationship of trust or reliance." *Id.* (Emphasis added.) Examples of those who are not considered to be engaged in the practice of law include judges, mediators, and law professors. These types of lawyers are not understood by members of the public to be providing their services in a relationship of trust, confidentiality or agency with any particular person or entity. The same is true for legislators who are also practicing attorneys. In Legal Ethics Opinion 231, the D.C. Bar Legal Ethics Committee concluded that members of the Council of the District of Columbia do not represent clients when they carry out their legislative functions, and that the conflicts restrictions of RPC 1.7 therefore would not apply in such scenarios.

The Ethics Board Members share these characteristics insofar as their activities will also lack the traditional attorney/client structure. For example, as noted previously, one of the functions of the Ethics Board is to administer and enforce the Code of Conduct, which will include conducting investigations of allegations of misconduct. Much like an adjudicatory body or tribunal that hears disputes, there will be no attorney/client relationship with anyone, and especially not with the individual who has come under ethics scrutiny.

Likewise, the training functions of the Ethics Board may be said to be akin to those of a law professor conducting a law school class, which the commentary expressly recognizes as being outside the reach of Rule 49. This would apply equally to the initial and then yearly analysis the Board is to undertake to recommend revisions to the Code of Conduct based upon national best practices. Sec. 202(a)(b)((1-8).

The advice-giving function presents a closer question. Such advice conceivably would be sought by an individual government employee or official. However, insofar as this advice would be in the form of a written Board opinion, published in the *D.C. Register*, this again would be similar to the type of legal guidance provided by courts or agencies when opinions are issued interpreting law or applying law to facts. In such instances, it is not said that judges have created a relationship of trust or agency with the requester. The advice is not given in an attorney-client

[1] The commentary to Rule 49 states in part: "The definition set forth in section (b)(2) is designed to focus first on the two essential elements of the practice of law: The provision of legal advice or services, and a client relationship of trust or reliance. Where one provides such advice or services within such a relationship, there is an implicit representation that the provider is authorized or competent to provide them; just as one who provides any services requiring special skill gives an implied warranty that they are provided in a good and workmanlike manner. *See, e.g., Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192, 1200 (D.C.1984); *Carey v. Crane Service Co., Inc.*, 457 A.2d 1102, 1107 (D.C.1983)."

relationship and no employee would be justified in believing that the Board is giving advice as his or her lawyer. Moreover, like judges, Board Members are likely to be removed from the actual practice of direct advice-giving. Under the Ethics Act, either the Board *or* the Director of Government Ethics may provide ethics advice (sec. 219), and, given the practicalities of the workplace and the part-time status of the Board, it is likely that it will be the Director who will provide such advice in the first instance to requesting individuals. Indeed, sec. 219(c) contemplates this by permitting an appeal to the Board for advice provided by the Director. As a result, given the minimal potential that a Board Member would ever be in a position of directly counseling a government employee, the advice-giving function of the Board would not constitute the practice of law under Rule 49.[2]

Since service on the Board is not the practice of law and since the Members are not acting for a client, there is no need for a Member or his or her firm to seek a waiver of conflict of interests if the Member or his or her firm represents a client adverse to the District.

2) **Is the prohibition that a lobbyist may not serve on the Ethics Board imputed to other members of the firm?**

Section 203(i)(4) of the Ethics Act prohibits the appointment of a "lobbyist" (among other prohibitions and qualifications) to the Ethics Board. The term "lobbying" is defined in the Ethics Act at section 101(32) as "communicating directly with any official in the legislative or executive branch of the District government with the purpose of influencing any legislative action or an administrative decision." Title II, Subtitle E of the Ethics Act, requires that lobbyists register as such. There is no further explanation of the term, nor any indicia that the prohibition is meant to extend to others with whom the Board Member might be professionally associated, such as a law partner. Even in those instances in which the entity itself may be registered as a lobbying entity, the actual employee lobbyists still must be registered if they intend to lobby. In other words, a member of a lobbying firm would not be permitted, solely by virtue of his or her status as an employee of the firm, to automatically be permitted to engage in lobbying the District without separately fulfilling the registration requirements. Conversely, unregistered non-lobbyist employees should not be considered to be lobbyists merely because of employment in a firm that engages in lobbying activities. This is consistent with the general practice in firms in the District that engage in both lobbying and non-lobbying activities.

[2] It is theoretically possible that a future attorney regulatory body in the District with applicable jurisdiction (Bar Counsel, the D.C. Bar Legal Ethics Committee, the Committee on Unauthorized Practice of Law, or the D.C. Court of Appeals) could arrive at a conclusion contrary to the one laid out here, and determine that the Ethics Board Members *are* indeed engaged in the practice of law by virtue of their service to the District. In the unlikely event that were to occur, I recommend that these individuals be treated in a manner similar to those private attorneys who are sometimes retained by the District to provide representation. In other words, conflicts of interest between the District and other clients of the Board Member should be considered and dealt with under the Rules of Professional Conduct, which allow for conflict waivers on a case-by-case basis. But this is an unlikely scenario, and need not be addressed until and unless such a finding is made by one of these regulatory bodies.

Nor do the Legal Ethics rules of the D.C. Rules of Professional Conduct prevent the appointment. Under Rule 1.10, known as the "imputation rule," no lawyer in a firm may participate in a matter if any other lawyer would be prohibited from doing so because of a conflict of interest (with certain exceptions). But the prohibition of a lobbyist serving on the Board is not based on a conflict of interest; it is simply a qualifying measure established by the Council that the Board Member not be a lobbyist. As a result, I find no basis to conclude that status alone as a lobbyist by one member of a firm is sufficient to disqualify all non-lobbyist lawyers of a firm from appointment to the Ethics Board.

The actual lobbying activities of the firm members may or may not present conflicts of interest for the appointed Board Member. The D.C. Bar Legal Ethics Committee has determined that lobbying itself is not considered to be the practice of law. *See* Legal Ethics Opinion 344. This is consistent with a separate opinion issued by the Committee on the Unauthorized Practice of Law of the District of Columbia Court of Appeals, which Opinion 344 cites, concluding that "U.S. legislative lobbying does not constitute the practice of law under Rule 49, and Rule 49 does not require individuals engaged in such lobbying to be members of the D.C. Bar." *See* Unauthorized Practice of Law Opinion 19-07, *Applicability of Rule 49 to U.S. Legislative Lobbying* (Dec. 17, 2007).

To be sure, there are certain safeguards that are required of attorneys who are both lawyers and lobbyists. When firms engage in both activities, the Legal Ethics Committee has cautioned that lawyer/lobbyists must make very clear to their clients when they will be engaged in the practice of law and when they will be engaged merely in non-law related lobbying efforts. And, lawyer/lobbyists may not lobby on separate sides of the same issue (Rule 1.7(a)), nor may they act if their professional judgment will be compromised and representation of another client is likely to be affected (Rule 1.7(b)(2-4)). As long as the lobbying activities of a Board Member's associates adhere to these standards, and do not otherwise involve the Ethics Board, there is no basis either to exclude the attorney from consideration as a Board Member or to believe that the activities of his or her associates would affect the Board Member's duties. However, you may wish to consider, for purposes of public confidence, whether to refrain from participating in any income from the firm's lobbying activities, if this is feasible. To do so would certainly adhere not only to the letter of the law but also to its spirit in not benefitting from any lobbying of the District.

3. **Whether a Board Member must recuse from a matter which the Board Member's law firm is representing a client?**

Under governing conflict of interest rules and canons of judicial ethics, an Ethics Board Member would generally be required to recuse himself or herself in every instance in which a firm client has a matter before the Ethics Board. Under the conflict of interest provisions of the Ethics Act, as well as under previously long-standing conflicts of interest principles, an employee of the District is not permitted to hold an interest in a business that is related directly to the employee's official duties or would be related to matters over which the employee could wield any

influence.[3] Ethics Act, sec. 223(d)(2)(B). This is consistent with federal criminal prohibitions concerning official acts affecting a personal financial interest. *See* 18 U.S.C. § 208. Similarly, 28 U.S.C.§ 455 provides that a federal judge or magistrate shall disqualify himself where his impartiality might reasonably be questioned and particularly where he has a financial interest in the matter or any other interest that could be substantially affected by the outcome of the proceeding. Much of what a Board Member is required to do is in the nature of judging whether an employee has violated the code of conduct or the statutes or regulations of the District, and thus the ethical rules that apply to judges seem an appropriate analogy. Under any of these standards, a Board Member would not be permitted to take any official action that would involve either a family member or any entity by which the Member is employed or in which he or she otherwise has a financial interest. That would certainly include taking action in a matter in which a Board Member's law firm appears on behalf of a litigant.[4]

In addition, though not required, for the sake of appearances and caution, I also encourage you and the other Members of the Ethics Board to consider adopting rules that would place restrictions on a Board Member when the Member or his/her firm is representing a client before a District agency whose officials are subject to Board scrutiny. There is a reasonable concern of appearance of conflict of interest where a Member is serving on the Board and the Board Member or the firm is simultaneously representing a client in a matter before a District agency that has a senior official with a matter before the Ethics Board. A reasonable observer in such a situation could question whether the Board Member's judgment in the matter might be affected -- and in particular if the Ethics Board found in favor of the agency official or imposed a minor sanction -- and there may be a perception that the decision was made in order to curry favor with the agency before which the Board Member's firm has a pending matter. Thus, for example, the Ethics Board should consider adopting a rule that would bar a Board Member from sitting on a matter when the Member or his/her firm has any business pending before an agency whose official is subject to the proceeding. Conversely, of course, the firm could withdraw from such a matter, thereby allowing the Board Member to continue to sit on the matter involving the agency official.

[3] Under section 301 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. law 2-139; D.C. Official Code § 1-603.01), the term "employee" means "an individual who performs a function of the District government and who receives compensation for the performance of such services. To the extent that Board Members will be compensated, each would be considered as an employee of the District for these purposes.

[4] That said, the *financial* interest analysis is a separate issue from lawyer related conflict of interest standards as set forth in the District of Columbia Rules of Professional Conduct – the ethics rules that specifically govern a lawyer's ethical conduct. Those conflicts are primarily concerned with the disclosure of otherwise confidential information of one client that might assist a separate firm client. Under these legal ethics rules, such conflicts, in certain instances, may be waived with the informed consent of the client. Moreover, a screen is also sometimes available as a remedy to certain types of law related conflicts. It is important to remember, however, that those remedies are not available for the statutorily enforced financial conflicts of interest discussed above, which carry criminal penalties. The financial conflict of interest statutes carry their own waiver provisions, but these are very narrow and of limited applicability.

Conclusion

Please do not hesitate to contact me should you or your fellow nominees wish to discuss any of these issues. Again, congratulations on your nomination.

Sincerely,

Irvin B. Nathan
Attorney General
for the District of Columbia