

CITY OF NEW YORK
CONFLICTS OF INTEREST BOARD

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Outside Practice of Law

Charter Sections: 2601(4), (5), (12), (18), and (20); 2604(a)(1)(a) and (a)(1)(b);
2604 (b)(2), (3), (4), (6), (7), and (14); 2604(c)(6); 2604(e).

Opinions Cited: 91-7, 92-5, 92-28, 98-10

Advisory Opinion No. 2001-3

The Conflicts of Interest Board (the "Board") has received a request from a City agency (the "Agency") for an opinion as to whether, consistent with the conflicts of interest provisions of Chapter 68 of the City Charter, Agency attorneys may provide pro bono legal services. More broadly, this request raises issues regarding the provision of outside legal services by City attorneys.

Background

In its inquiry, the Agency makes reference to the Resolution of the Administrative Board of the Courts (the "Resolution"), adopted in May 1997, which exhorts all New York attorneys to provide annually at least 20 hours of pro bono legal services to benefit poor persons. The Resolution has been incorporated into the biennial attorney registration statement. Chief Judge

Judith S. Kaye, Chair of the Administrative Board of the Courts, has stated that the efforts of attorneys in New York providing pro bono legal services have “only begun to meet the need.” She further stated: “The continuous drain of available legal services for the poor in recent years is threatening to create an inequitable system of justice – made of those who can afford representation and those who must do without.” The Board notes that the Resolution is directed to every attorney practicing in New York State and, therefore, would apply to City attorneys.

The Board further notes that many government agencies have established policies to guide their employees who wish to engage in the pro bono practice of law. In 1996, President Clinton issued Executive Order 129888 which urged all federal agencies to develop programs facilitating pro bono legal service by government employees. Attorney General Janet Reno developed a pro bono policy for United States Department of Justice attorneys, which set a goal of 50 hours of pro bono service per year. Ms. Reno stated:

Government service by lawyers is certainly among the highest forms of public service....It is a public trust, and public as well as private attorneys have an obligation to give back to their communities. One of the most important ways they can do this is by working to increase the availability of legal assistance for all Americans.

Janet Reno, “Justice Department Embraces Pro Bono Program,” *THE PUBLIC LAWYER*, Winter 1997.

Commentators have noted both the merits of encouraging public sector attorneys to provide pro bono legal services and the potential conflicts which may arise. On the subject of pro bono service by government attorneys, Sara Osborne of the Government Law Center of Albany Law School wrote that “increased access to legal services is only one of several important factors which would be positively affected by pro bono opportunities in government law offices. Benefits might also include: skills training and professional development, public esteem for the legal profession, attorney job satisfaction and generally a more efficient use of

legal resources.” Sara Osborne, “Pro Bono Programs in State Government,” 1 NYSBA GOVERNMENT, LAW AND POLICY 1, 39 (Fall 1999). In her article on the subject, Kathleen Waits, associate professor of law at the University of Tulsa College of Law, stated: “The positive publicity generated by pro bono would tend to boost office morale.” Kathleen Waits, “Pro Bono and the Government Lawyer,” ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS, AND PUBLIC OFFICIALS 96 (Patricia Salkin ed., Section of State and Local Government Law, American Bar Association 1999). Ms. Waits also cautioned that attorneys must proceed carefully when performing pro bono legal work: “No one—not the pro bono client, not opposing counsel, not the court—should ever get the impression that the government is somehow representing this [pro bono] client.” *Id.* at 93.

Because the conflicts of interest issues that arise when City attorneys engage in pro bono legal services track those that arise whenever City attorneys engage in outside legal practice, the Board, in this opinion, will discuss both compensated and uncompensated legal practice.

The Board cautions that the restrictions imposed by Chapter 68 regarding the outside practice of law are not exclusive. Several City agencies have their own rules governing outside employment generally, and the outside practice of law in particular. The Board therefore advises City attorneys to conform their conduct not only to the requirements of Chapter 68, as set forth herein, but also to the rules of their City agency.

Relevant Law

City attorneys engaged in the outside practice of law, regardless of whether they receive compensation, must conform their practice to comply with the following provisions of Chapter

68 and the Rules of the Board, and with the Board's relevant advisory opinions.

Pursuant to Charter Section 2604(a)(1)(b), no regular City employee shall have an interest in a firm that the public servant knows is engaged in business dealings with the City.¹ In the case of part-time public servants, this prohibition applies only to firms that have business dealings with the agency served by the public servant. See Charter Section 2604(a)(1)(a). "Interest" means an ownership interest in a firm or a position with a firm. See Charter Section 2601(12). "Position" includes an attorney to the firm. See Charter Section 2601(18).

Charter Section 2604(b)(2) states: "No public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties."

Charter Section 2604(b)(2) and Rules of the Board Section 1-13(a) and (b) prohibit the use of City time, equipment, resources, letterhead, personnel, and supplies for any non-City purpose. Rules of the Board Section 1-13(c) provides an exception to those prohibitions (except the prohibition on use of City letterhead) where the Board determines, with prior agency head written approval, that such activities further the purposes and interests of the City.

Charter Section 2604(b)(3) states: "No public servant shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant." A person or firm "associated" with a public servant includes a spouse, domestic partner, child, parent, or sibling; a person with whom

¹ Charter Section 2604(a)(6) states: "For the purposes of subdivisions a and b of section twenty-six hundred six, a public servant shall be deemed to know of a business dealing with the city if such public servant should have known of such business dealing with the city." This "should have known" standard, *i.e.*, that public servants are deemed to know of business dealings where they should have known of such business dealings, imposes on public servants an affirmative obligation to inquire whether such business dealings exist. See Howard Safir Letter, dated August 16, 2000 (*Safir*, COIB Case No. 99-115).

the public servant has a business or other financial relationship; and each firm in which the public servant has a present or potential interest. See Charter Section 2601(5).

Charter Section 2604(b)(4) provides that public servants shall not use or disclose any confidential information concerning the property, affairs, or government of the City which is obtained as a result of the official duties of the public servant and which is not otherwise available to the public.

Charter Section 2604(b)(6) states: "No public servant shall, for compensation, represent private interests before any city agency or appear directly or indirectly on behalf of private interests in matters involving the city. For a public servant who is not a regular employee, this prohibition shall apply only to the agency served by the public servant."

Charter Section 2604(b)(7) states: "No public servant shall appear as attorney or counsel against the interests of the city in any litigation to which the city is a part, or in any action or proceeding in which the city, or any public servant of the city, acting in the course of official duties, is a complainant....For a public servant who is not a regular employee, this prohibition shall apply only to the agency served by the public servant."

Charter Section 2604(b)(14) states: "No public servant shall enter into any business or financial relationship with another public servant who is a superior or subordinate of such public servant."

Charter Section 2604(c)(6) states that a public servant shall not be prohibited from acting as an attorney for any not-for-profit corporation or association, or other such entity which operates on a not-for-profit basis, interested in business dealings with the City, provided that: (1) the public servant takes no direct or indirect part in such business dealings; (2) the not-for-profit entity has no direct or indirect interest in any business dealings with the City agency in which the

public servant is employed and is not subject to supervision, control, or regulation by that agency, except where it is determined by the head of that agency, or by the mayor where the public servant is an agency head, that the activity is in furtherance of the purposes and interests of the City; (3) all such activities by the public servant are performed at times during which he or she is not required to perform services for the City; and (4) the public servant receives no salary or other compensation in connection with such activities.

In Advisory Opinion No. 91-7, the Board stated that pursuant to Chapter 68 City attorneys may engage in the outside practice of law, provided that they: (1) do so on their own time, without the use of City resources; (2) do not handle City matters; and (3) obtain their agency's written approval.

In its Advisory Opinion No. 92-28, a candidate for a part-time appointment as a councilmanic aide, who had a longstanding personal and professional relationship with the Council Member, asked the Board whether he might continue to represent the Council Member in private matters without compensation. The Board determined that even such uncompensated representation would violate Charter Section 2604(b)(14), the prohibition on business or financial relationships between a superior and a subordinate. The aide also wished to continue to represent, for compensation, certain clients on matters before the Council and on matters before certain other City agencies. The Board determined that it would be a violation of Charter Section 2604(b)(6) for the aide to represent clients in matters before the Council, but that, because he was a part-time City employee, it would not violate Chapter 68 for him to represent clients in matters before City agencies other than the Council.

In Advisory Opinion No. 98-10, in which a City attorney was performing volunteer legal work for a community school board (the "CSB"), the Board suggested that the prohibitions of

Charter Sections 2604(b)(6) and (b)(7) would not apply in the case of a public servant who is providing uncompensated legal work for the CSB. The Board also stated that the public servant must comply with Charter Sections 2604(b)(2), (b)(3), and (b)(4), as well as disclose to her City agency her outside work for the CSB.

Discussion

1. Clients with City Business

Pursuant to Charter Section 2604(a), public servants are prohibited from having an interest in a firm which the public servant knows² is engaged in business dealings with the City, in the case of a regular employee,³ or with the public servant's agency, in the case of a part-time public servant. "Interest" means an ownership interest in a firm or a position with a firm. See Charter Section 2601(12). An attorney to a firm has a position with that firm. See Charter Section 2601(18). Thus, it would violate Charter Section 2604(a), absent a waiver pursuant to Charter Section 2604(e), for a City attorney, in his or her outside practice, to represent for compensation, on any matter, a client that has business dealings with the City, even where the matter does not involve the City.

In the case of uncompensated services, however, a City attorney may represent a not-for-profit that does business with the City if the attorney satisfies the four requirements of Charter

² As noted in footnote 1, City attorneys have an affirmative obligation to determine whether their clients have business dealings with the City. Therefore, before undertaking to represent any private client, the City attorney must inquire whether that client is engaged in business dealings with the City.

³ "Regular employee" means all elected officials and public servants whose primary employment, as defined by rule of the board, is with the city, but shall not include members of advisory committees or community boards." Charter Section 2601(20). Rules of the Board § 1-06(a) states: "For purposes of Charter §2601(20), 'primary employment with the City' means the employment of those public servants who receive compensation from the City and are employed on a full-time basis or the equivalent or who are regularly scheduled to work the equivalent of 20 or more hours per week."

Section 2604(c)(6), as cited above. Most importantly, the not-for-profit may not have business dealings with the public servant's own City agency, and the public servant must not work on the not-for-profit's City business. A City attorney could therefore, for example, draft the by-laws of a not-for-profit with City business (other than one with business with his or her own agency), but could not meet, on behalf of that not-for-profit, with staff from a City agency to discuss the not-for-profit's operations.

2. Use of City Time and Resources for Outside Practice

Under Charter Section 2604(b)(2) and Rules of the Board § 1-13(a) and (b), public servants may not engage in any private activity during times when they are required to perform services for the City and may not use City letterhead, personnel, equipment, resources, or supplies for any non-City purpose, including the private practice of law. With respect to compensated outside practice of law, the Board has indeed fined public servants for using City time and resources for their private practice. *See COIB v. Kerry J. Katsorhis, Case No. 94-351, appeal dismissed, No. M-1723/M-1904 (1st Dep't, April 13, 2000), appeal dismissed, 95 N.Y.2d 918, 719 N.Y.S.2d 645 (Nov. 21, 2000).*

The same prohibitions would apply when City attorneys provide outside uncompensated legal services. Such private activities, except as set forth below, must be conducted out of the City office, on one's own time, and without the use of City resources. Should, however, a City agency head wish to encourage and support the pro bono practice of law by his or her staff attorneys, or indeed to establish a formal pro bono program at his or her agency,⁴ the agency head may provide written approval to the Board and seek a determination from the Board,

⁴ For an example of such a program, see Daniel Collopy, "Setting Up and Running a Pro Bono Program in a Government Office: The NLRB's Experience," 7 THE PUBLIC LAWYER 2 (Summer 1999). The author describes the pro bono program established by the National Labor Relations Board and provides suggestions for the implementation of such a program in other government offices.

pursuant to Board Rules § 1-13(c), that such outside activities would further the purposes and interests of the City. With such a Board determination, City attorneys in that agency would be permitted to use modest amounts of City time and resources (*e.g.*, use of the office computer, and the fax and copy machines, but not City letterhead) for their pro bono work. An agency head may choose to condition such approval as he or she sees fit, and the Board, in its determination, may place additional restrictions on the City attorneys' pro bono practice.

3. Use of City Position in Support of Outside Legal Work

Under Charter Section 2604(b)(3), a public servant may not use or attempt to use, directly or indirectly, his or her position for private or personal advantage, for the public servant or any person or firm associated⁵ with the public servant. This provision applies whether or not the attorney is receiving compensation for his or her outside legal work. This provision means that City attorneys may not use the powers of office to obtain a benefit for themselves or their outside clients. For example, in their outside legal work, they may not identify themselves to an adversary or to a tribunal as a City attorney in an effort to gain an advantage for a client.

4. Use of Confidential Information

Charter Section 2604(b)(4) prohibits public servants from disclosing or using confidential City information for private advantage. This prohibition applies whether or not the City attorney is compensated for such outside legal work.

⁵ A person or firm "associated" with a public servant includes a spouse, domestic partner, child, parent or sibling; a person with whom the public servant has a business or other financial relationship; and each firm in which the public servant has a present or potential interest.

5. Working on City-Related Matters

As part of an outside compensated practice, attorneys working full time for the City may not, directly or indirectly, appear on behalf of private interests in matters involving the City or represent, for compensation, private interests that are before any City agency. See Charter Section 2604(b)(6). For public servants who are not regular employees, *i.e.*, those working less than 20 hours per week, the restriction applies only to matters that involve their City agency. The prohibition on public servants making direct appearances means that they may not write, call, e-mail, fax, or otherwise communicate directly with any agency of the City (or with their own agency, in the case of part-time employees), except on ministerial matters. The prohibitions on indirect appearances and on representation mean that public servants may not work on City-related matters even “behind the scenes.” Thus, for example, a City attorney with an outside real estate practice may not complete an application to the City in connection with a tax abatement or exemption program, even if an outside colleague of the attorney formally submitted the application.

Charter Section 2604(b)(6) does not apply, however, to outside uncompensated legal practice. See Volume II, Report of the New York City Charter Revision Commission, December 1986 – November 1988 (“Charter Revision Report”) (“The prohibitions are modified to prohibit only such representations as are made for compensation.”) at p. 177. See also, Advisory Opinion No. 98-10, pp. 5-6. Charter Section 2604(c)(6) states that it would not violate Chapter 68 for a public servant to act as an attorney for a not-for-profit entity engaged in business dealings with the City, provided that such public servant meets the four restrictions cited above, one of which is that the public servant not be involved, directly or indirectly, in the not-for-profit’s business dealings with the City. The Board has consistently interpreted this prohibition on participation in

City-related matters to require complete recusal from City business, *i.e.*, the public servant may not participate in discussions, attend meetings, or receive relevant documents which relate to the not-for-profit's business dealings with the City. See Advisory Opinion No. 92-5, p. 3. Likewise, as to all other clients, *e.g.*, not-for-profits that are not engaged in business dealings with the City, as well as individuals and for-profit entities, the Board now determines that any involvement by a public servant in City matters would be inconsistent with the discharge of his or her official duties and hence would violate Charter Section 2604(b)(2).

In sum, therefore, public servants, in their outside law practice, regardless of whether they receive compensation, may not have any involvement in their clients' City-related matters.

6. Litigating Against the City

Charter Section 2604(b)(7) prohibits a public servant from appearing as an attorney or counsel against the interests of the City in any litigation to which the City is a party, or in any action or proceeding in which the City, or any public servant of the City, acting in the course of his or her official duties, is a complainant. In the case of part-time employees, this prohibition applies only to the agency served by the public servant.

A City lawyer who represents a party, for compensation, in litigation against the City therefore would plainly violate Charter Section 2604(b)(7). As for uncompensated representation, while the provision uses the term "appear," which is defined by Charter Section 2601(4) to mean compensated communication, the Board determines that, for several reasons, the word "appear" as it is used in Charter Section 2604(b)(7) applies to uncompensated services as well. First, the history of Charter Section 2604(b)(6) specifically states that the provision does not include uncompensated appearances. See Charter Revision Report at p. 177. In contrast, the Charter Revision Report regarding Charter Section 2604(b)(7) is silent regarding uncompensated

appearances. Second, the Charter Revision Report states that Charter Section 2604(b)(7) should mean the same as the pre-existing Charter Section 2604(b)(5), which the current Charter Section 2604(b)(7) repeats virtually verbatim. While that provision also used the term "appear," appear was not defined in the prior Chapter 68, and seemingly was used there, as normally understood, to speak of any "appearance" by an attorney in litigation, regardless of whether such attorney received compensation for his or her work. In any event, City lawyers who handle litigation, even pro bono, against the City would be acting in conflict with the proper discharge of their official duties, and would therefore also violate Charter Section 2604(b)(2).

Thus, whether paid or not, public servants in their outside legal work may not litigate against the City.

7. Representing superiors or subordinates

Charter Section 2604(b)(14) prohibits a public servant from entering into any "business or financial relationship" with another public servant who is a superior or subordinate. Providing legal representation to a superior or subordinate for compensation plainly involves a business or financial relationship, and thus would violate Charter Section 2604(b)(14). Even where the representation is uncompensated, however, the Board has previously determined that representing a superior violates Charter Section 2604(b)(14). See Advisory Opinion No. 92-28, at p. 4. The Board now reaffirms the proposition that any representation of a superior or subordinate, regardless of whether the attorney is compensated, would violate Charter Section 2604(b)(14). Thus, for example, a City attorney, however well intentioned, may not do a property closing, or handle a landlord/tenant matter, for a superior or subordinate, whether compensated or not.

8. Agency Approval

Finally, because of the myriad issues raised when City lawyers perform outside legal work, it may be sound practice for City agencies to require their lawyers to obtain agency approval before doing so. Such permission is not required, however, by Chapter 68, except where the activity would otherwise violate Chapter 68 and where agency head approval is therefore a prerequisite to obtaining a Board waiver pursuant to Charter Section 2604(e). The Board therefore determines that it is not a violation of Chapter 68 for a public servant to engage in otherwise permitted outside legal work without written approval from or notice to his or her City agency. To the extent that Advisory Opinion No. 91-7 may be read to mandate such approval or notice, even where not required by Charter Section 2604(e), it is overruled.

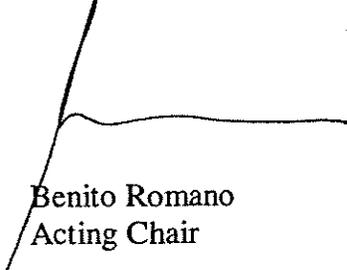
Conclusion

It will violate Chapter 68 for public servants engaged in the outside practice of law, regardless of whether they receive compensation, to: (1) use City time, resources, facilities, or letterhead in connection with this practice, except in the case of pro bono legal work which has been approved by the Board pursuant to Board Rules § 1-13(c), which approval would permit the limited use of City time, resources, and facilities but not letterhead; (2) use or attempt to use their City positions to obtain a benefit for themselves or their clients; (3) disclose or use confidential City information; (4) work on City-related matters on behalf of outside clients (or, for part-time public servants, work on agency-related matters); (5) represent private interests in litigation against the City (or, for part-time public servants, against their City agencies); and (6) provide legal services to a superior or subordinate.

In addition, for outside compensated practice, it will violate Chapter 68 for an attorney to

represent, on any matter, a client that has business dealings with the City (or, for part-time public servants, with their agencies), absent a Board waiver. In contrast, it will not violate Chapter 68 for public servants to provide outside uncompensated legal services to a client that has business dealings with the City, provided that: 1) the public servant is not involved in such City matters; 2) the client has no business dealings with the public servant's agency; and 3) all work is done without the use of City time or resources (again, except where there Board has approved pro bono work pursuant to Board Rules § 1-13(c)).

In addition to the requirements of Chapter 68, some City agencies have set stricter rules regarding the outside practice of law.



Benito Romano
Acting Chair

Jane Parver

Bruce A. Green

Dated: April 27, 2001

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