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Use of Position

Charter Sections: 2601(5), 2604(b)(3), 2604(b)(4), 2604(b)(6),
2604(e)

Opinions Cited: 94-24, 2002-1, 2008-2, 2008-5, 2009-2

Advisory Opinion No. 2011-1

The Conflicts of Interest Board (the "Board") has recently received requests for advice from two public servants regarding their affiliations with law firms whose clients had a matter pending before the public servant's City agency. In both cases the public servants sought the Board's advice as to whether, under Chapter 68 of the City Charter, the City's Conflicts of Interest Law, they could participate in their agency's consideration of the matter involving the client.

Because the Board has not previously published an Opinion addressing this question, but anticipates similar questions in the future, the Board publishes this Opinion setting forth the advice given to these public servants. As noted below, some of the conflicts of interest questions presented in this area may turn on the specific facts of individual cases, so that public servants in similar circumstances should

seek the Board's advice prior to participating in a matter if they are in doubt.

Before turning to the specifics of these two requests, we first set forth the relevant City Charter provisions.

I. Relevant Charter Provisions

Charter Section 2604(b)(3) prohibits a public servant from using or attempting 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.*" (Emphasis added.)

Charter Section 2601(5) defines those "associated" with a public servant to be "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." (Emphasis added.)

Charter Section 2604(b)(6) provides that public servants, such as "Public Servant No. 1" described below, who are not regular full-time employees of the City may not, for compensation, represent private interests before the City agency he or she serves, or appear directly or indirectly on behalf of private interests in matters involving their City agency.

II. The Instant Requests for Advice

A. Public Servant No. 1.

1. Facts

Public Servant No. 1 is a part-time public servant who serves on the governing board of a City agency (the "Agency"). The public servant is also a partner at a large law firm (the "Firm"). The Firm represents a client (the "Client"), a publicly traded

corporation, primarily in some out-of-state litigation matters. The Firm's annual revenue derived from its representation of the Client has constituted less than 2% of the Firm's total annual revenue. The public servant has never been involved in any of the Firm's matters with the Client, and has no intention or expectation of ever being so involved.

The Agency's board has authority to approve certain City-related transactions and was preparing to vote on a proposed transaction involving the Client. It was anticipated that, if approved by the Agency, the proposed transaction would have yielded revenue for the Client, albeit an extremely small percentage of its total revenue. The Firm had no involvement in this transaction.

The public servant sought the Board's advice as to whether Chapter 68 would permit him to vote on the subject transaction.

2. Discussion

The Board was called on to determine whether Public Servant No. 1, or any person or firm "associated" with him within the meaning of Charter Section 2601(5), would benefit from the Agency's approval of the transaction. If so, consistent with the Board's long-standing jurisprudence, his recusal from the matter would have been required, so that he would not have been permitted to vote on, or even discuss, the proposed transaction. Such actions would have violated the prohibition in Charter Section 2604(b)(3) against the public servant's use of his City position for his own advantage or for the advantage of those with whom he is associated. If, however, neither the public servant nor anyone associated with him could be advantaged, then he could participate in the Agency's discussion of and vote on the proposed transaction.

In order to determine whether *any* party associated with the public servant stood to benefit from the matter before the Agency, the Board first noted that, while the public servant is clearly associated with the Firm of which he is a partner, there was no suggestion that the Firm would benefit from the Agency's approval of the transaction. The Firm did not represent the Client in this matter, nor was the transaction before the Agency of such significance to the Client that all of its employees and major providers of goods and services, even those not involved in the transaction (*e.g.*, the Firm), might materially benefit from its approval, for example, by facilitating their future or continued employment by the Client. Thus, on the facts presented, it was clear that the Firm would not receive a "private advantage" from approval of the transaction within the meaning of Charter Section 2604(b)(3).

The more difficult question was whether the public servant was "associated" with the Client within the meaning of Charter Section 2601(5) given that, unlike the Firm, the Client would plainly benefit from the Agency's approval of this transaction. To answer that question, the Board first observed that the Model Rules of Professional Conduct, which govern the legal profession, impose duties of loyalty and confidentiality upon *all* attorneys at a law firm with respect to *all* of the law firm's clients. Accordingly, all attorneys at a firm are deemed to be in an attorney-client relationship with all of the firm's clients. *See* New York Rules of Professional Conduct, Rule 1.10 (Imputation of Conflicts of Interest).¹ Thus, among other things, no attorney at a law firm may represent

¹ *See, e.g.*, Rule 1.10(a): "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein."

a party in a matter adverse to any client of the firm, however unrelated the matter is to the firm's work for the client, without specified waivers. *See* Rule 1.7, Rule 1.8.

Although the Board has often found the Rules of Professional Conduct to be a useful guide as to other Chapter 68 questions involving public servants who are lawyers,² we concluded that the doctrine that every client of a law firm is effectively a client of every attorney at the firm regardless of whether the lawyer is a partner, associate, or counsel, regardless of the particular lawyer's relationship to a particular client, and regardless of the significance of the client to the firm's business is not the appropriate standard for determining whether a lawyer is "associated" with a client of the firm within the definition of that term in Charter Section 2601(5). The Board's precedents support the conclusion that whether a public servant is "associated" with a particular entity turns on the depth and significance of the relationship between the entity and the public servant, rather than the titles and labels that characterize their connection. For example, in Advisory Opinion No. 2008-2, the Board ruled that community board members who were executives of not-for-profit organizations would not be deemed to be "associated" with funders of their not-for-profits unless the funder provided a substantial portion of the organization's funding. In that Opinion, the Board contrasted its previous decision in *COIB v. Bergman*, COIB Case No. 2003-152a (2007), where it held that the executive director of a non-profit was "associated" with an entity that provided 25% of the organization's funding (and thus of the executive director's salary), with a case in which

² For example, in Advisory Opinion No. 2008-5, the Board looked to Disciplinary Rule 2-107 of the former New York Code of Professional Responsibility, the predecessor to the Rules of Professional Conduct, to determine that a lawyer who is a regular City employee may not accept fees for referring a criminal case pending before courts within the City.

the funder provided less than 5% of the organization's budget, in which case the Board determined that the executive director was *not* "associated" with the funder.

Along similar lines, in Advisory Opinion No. 2002-1, the Board concluded that Mayor Bloomberg was not required to recuse himself from matters involving customers of his firm, Bloomberg L.P., since the Mayor had disclosed Bloomberg L.P.'s one hundred largest customers, none of which accounted for more than 4% of the firm's total revenues. However, the Board directed the Mayor to seek further guidance from the Board if any customer began to generate 10% or more of Bloomberg L.P.'s total revenues, in which case the Board might conclude that such a customer *was* "associated" with the Mayor.

As these prior Opinions have suggested, whether a particular entity has a sufficient "business or other financial relationship" with a public servant to be considered "associated" with that public servant within the meaning of Charter Section 2601(5) will depend heavily upon the nature and magnitude of that relationship. Following that principle here, the Board determined that not every client of a law firm is "associated" with each of the firm's lawyers. If the lawyer/public servant has not personally represented the client in question, and the client does not account for a substantial portion of the firm's billings, the Board will ordinarily determine that no "association" exists. In such a case, absent any other disqualifying interest, such as the law firm's involvement in the matter before the public servant's agency,³ Chapter 68 will not require the partner's

³ Charter Section 2604(b)(6) prohibits public servants who are not regular City employees from, for compensation, representing or appearing directly or indirectly on behalf of private interests before their City agencies. Advisory Opinion No. 94-24 held that a law firm's appearance before a City board or commission on which one of its partners sits would violate this provision as an indirect appearance by the board member. Thus, even with the recusal of the partner/board member required by Charter Section

recusal from agency matters involving a client of his law firm. The Board accordingly advised Public Servant No. 1 that it would not violate Chapter 68 for him to consider and vote on the transaction before the Agency involving the Client.

Going beyond the case of Public Servant No. 1 and adopting a criterion that will apply to other public servants similarly situated, the Board has determined that a law firm partner will not be considered “associated” within the meaning of Charter Section 2601(5) with a client of the firm on whose matters the partner never works *unless* the client accounts for 5% or more of the firm’s billings *or* is one of the firm’s ten largest clients. Concomitantly, where the law firm partner represents or has represented the client on any matter, or has an expectation of doing so in the future, or where the client accounts for 5% or more of the firm’s billings or is one of the firm’s ten largest clients in revenues, then the partner will be deemed to be associated with the client.⁴

B. Public Servant No. 2

1. Facts

Public Servant No. 2, who is a full-time City employee, occupies a managerial position at her City agency (the “Department”) in which her duties would normally include having a major role in the possible award and oversight of a contract (the “Contract”) to a not-for-profit organization (the “Organization”). The multi-year Contract would provide an overwhelming majority of the Organization’s total revenues.

2604(b)(3), there will remain, absent a waiver from the Board pursuant to Charter Section 2604(e), a violation of Charter Section 2604(b)(6) when the member’s firm appears before his or her City agency.

⁴ The Board has not had occasion to determine whether the same criterion would apply to an *associate* or *counsel* at the firm who does not personally represent a particular client. When, if ever, such an associate or counsel would be considered “associated” with a major firm client is a question the Board leaves for another day.

The public servant's father, a lawyer, had represented, and continued to represent, the Organization on a litigation matter involving a private party and unrelated to the Organization's application for the Contract. His firm's billings for the work on the Organization's matter had been less than one-half of 1% of the firm's total annual billings, and were not expected to exceed that level.

Public Servant No. 2 sought the Board's advice as to whether her father's representation of the Organization barred her from participating in the Department's possible award of the Contract to the Organization.

2. Discussion

As with the request from Public Servant No. 1, the question presented to the Board was whether Public Servant No. 2 or any person or firm associated with her within the meaning of Charter Section 2601(5) could have been advantaged by the matter before her Department, that is, by the possible award of the Contract. As in the case of Public Servant No. 1, there was clearly one party, the Organization (the law firm's client), who stood to benefit from the matter before the City agency. Unlike the case of Public Servant No. 1, however, there was no suggestion that Public Servant No. 2 had a "business or financial relationship" with the Organization within the meaning of Charter Section 2601(5), so that she herself was plainly not "associated" with the Organization. Thus, the fact that the Organization would benefit from the award of the Contract did not, *standing alone*, disqualify Public Servant No. 2 from involvement in the award and administration of the Contract.

Still, there remained the question of whether someone with whom the public servant plainly *was* associated, her father, would benefit from the award of the Contract

to the Organization. If the father were himself a public servant, then, as set forth above, he would be deemed “associated” with the Organization, since it was a client he personally represented. Thus, the Board had to consider whether the benefit to the Organization from award of the Contract could be said also to benefit a party with whom the Organization was associated -- its lawyer -- who was in turn associated with the public servant. In answering that question, the Board again looked to its precedents.

In Advisory Opinion No. 2009-2, the Board considered whether Chapter 68 permits a City Council Member to sponsor funding of an entity in which a person “associated” with the Council Member is a paid officer or employee. The Board had previously considered a similar fact pattern in Advisory Opinion No. 2008-2, which discussed voting by community board members on matters involving organizations employing persons associated with the community board member. The relevant question in both Opinions was whether a public servant’s action, such as the sponsorship of funding or the act of voting, would benefit the associated party as well as that party’s employer. The Board’s determination in both Opinions rested on “whether or not the associated person appears reasonably likely to benefit materially” from the public servant’s action. In making that determination, the Board considered such factors as “the [associated] person’s position at the organization (the higher-ranking the person, the more likely that he or she will benefit), the size of the organization (the smaller the organization, the more likely that any given employee will benefit), and the nexus between the matter before the [City agency] and the person’s work at the organization.” Advisory Opinion No. 2009-2 at 14 (*quoting* COIB Advisory Opinion No. 2008-2 at 8).

In applying those precedents to the case of Public Servant No. 2, the Board noted, as it had in those Opinions, that it must take a hard look to determine whether, under the totality of the circumstances, the proposed action of the public servant appeared reasonably likely to confer a material benefit on the person associated with that public servant. In the instant case, payments to the father's firm for its legal representation of the Organization represented less than one-half of one percent of the firm's total annual revenues. Thus, although the Contract represented a major portion of the Organization's revenues, it did not appear reasonably likely that the award of the Contract to the firm's client would materially benefit the public servant's father or his law firm. Therefore, the Board advised Public Servant No. 2 that it would not violate Chapter 68 for her to be involved at the Department in the possible award of the Contract to the Organization or subsequent oversight of the Contract if awarded to the Organization.⁵ Nevertheless, the Board reminded Public Servant No. 2 of the prohibition of Charter Section 2604(b)(4) against using for private advantage or disclosing any confidential City information, which in her case required that she be careful not to reveal any such information to her father or to his firm.

III. Conclusion

Where a matter before a public servant's City agency involves a client of a law firm with which a public servant has some affiliation, the public servant may not participate in the consideration of the matter if it appears reasonably likely that the public

⁵ The opposite conclusion would have been suggested if the Organization accounted for a material portion of the law firm's billings. In that case, the Department's failure to award the Contract might well have adversely affected the payment of fees material to the law firm and its partners, requiring the public servant's recusal. The public servant's recusal would of course also have been required if her father had been representing the Organization before the Department.

servant or a person or firm with whom or which the public servant is “associated” within the meaning of Charter Section 2601(5) could materially benefit from the agency’s action. But a part-time public servant who is also a partner in a private law firm will not be deemed “associated” with a client of the firm where (1) the public servant’s law firm is not involved in the matter being considered by the public servant’s City agency; (2) the public servant has not participated and does not participate in the law firm’s representation of the client on any matter and has no expectation of doing so in the future; and (3) the client accounts for less than 5% of the firm’s total annual billings and is not among the firm’s top ten clients in revenues.

Also, a public servant who is “associated” with a lawyer (for example, a parent or sibling) who represents a client on a matter separate from the matter that the client has before the public servant’s City agency may participate in the agency’s consideration of that matter unless it appears reasonably likely that the matter will benefit not only the client, but the associated party as well. For example, even if the matter before the City agency is a substantial one for the client, where the revenues that the client provides to the associated party’s law firm make up an insubstantial portion of its total annual billings, any benefit to the associated party from the matter before the City agency is unlikely to be viewed as material, so that the public servant’s participation in the matter would be permissible. Of course, the public servant must recuse himself/herself if the associated person is representing the client in the matter before the public servant’s agency.

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Although the Board believes that the rulings summarized above will provide substantial guidance to public servants who are lawyers, or associated with lawyers (and other professionals), it recognizes that many of the conflicts of interest questions in this area are fact-dependent. Accordingly, any public servant who is in doubt about participating in a matter involving a client of a firm with which the public servant, or an associate of the public servant, has some affiliation should consult with the Board before participating in such matter.



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