



CITY OF NEW YORK  
CONFLICTS OF INTEREST BOARD

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**Outside Practice of Criminal Law**

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Charter Sections: 2601(2), 2601(4), 2601(15), 2601(20), 2604(b)(6), and 2604(b)(7)

Kevin B. Frawley  
*Board Member*

Opinions Cited: 93-23 and 2001-3

Angela Mariana Freyre  
*Board Member*

Andrew Irving  
*Board Member*

**Advisory Opinion No. 2008-5**

Mark Davies  
*Executive Director*

The Conflicts of Interest Board (the “Board”) has been asked whether, consistent with the conflicts of interest provisions of Chapter 68 of the City Charter, a City employee who is an attorney may accept referral fees from an attorney in private practice for referring criminal matters before New York State courts within the City.

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This question raises a broader issue, not previously considered by the Board, that must be answered first: may a City employee who is an attorney engage in criminal defense work in the City? This opinion will thus address both questions. For the reasons set forth below, the Board concludes that attorneys employed by the City *may not* represent criminal defendants in

courts within the City and also *may not* accept referral fees for referring such cases to lawyers in private practice.

### **Background**

A criminal matter involves an action or proceeding in which a person is charged with a crime or an offense, such as a violation, misdemeanor, or felony. In New York City, criminal matters are heard before one of two New York State courts, the New York City Criminal Court and the New York State Supreme Court. See N.Y. City Crim. Ct. Act § 31 and N.Y. Const. art. VI, § 7; see also N.Y. Crim. Proc. § 10.10 -10.30. A criminal action or proceeding before one of these State courts is prosecuted in the name of the People of the State of New York as plaintiff against the party charged with the crime or offense as defendant. See N.Y. Crim. Proc. § 1.20(1). The People of the State of New York are represented, in most cases, by the district attorney for the county in which the case is pending. New York City accordingly has five district attorneys (the “City DAs”), one for each of the five counties that comprise New York City. In addition, the witnesses for the prosecution in criminal cases often include members of the New York City Police Department (“NYPD”) or other City law enforcement agencies.

The City employee whose request for advice engendered this Advisory Opinion is not, in his City job, involved in criminal cases. However, in the course of his City work, he met, and became friendly with, an attorney in private practice who does handle criminal cases. The employee had referred a client to that attorney and asked whether he was permitted under Chapter 68 to accept a referral fee from the attorney of between \$750 and \$1500.

### **Relevant Law**

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.*” (Emphasis added.) For a public servant who is not a regular employee, this prohibition applies only to the agency served by the public servant. “Appear” means to make any communication, for compensation, other than those involving ministerial matters. See Charter Section 2601(4). A “ministerial matter” means an administrative act, including the issuance of a license, permit, or other permission by the City, that is carried out in a prescribed manner and does not involve substantial personal discretion. See Charter Section 2601(15).<sup>1</sup>

In Advisory Opinion No. 2001-3, in considering the restrictions imposed by Chapter 68 on City attorneys engaged in the outside practice of law, the Board determined that it would violate Charter Section 2604(b)(6) for a City employee in his or her outside law practice to be involved, on behalf of a client and for compensation, in any City-related matters. The Board advised that 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, except on ministerial matters, and that the prohibitions on indirect appearances and

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<sup>1</sup> Outside practice of criminal law in New York City by a City-employed lawyer – even without compensation – may also implicate Charter Section 2604(b)(7), at least in some kinds of criminal cases. See Advisory Opinion Nos. 93-23 and 2001-3. 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 party, 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....” However, for the reasons set forth hereinafter, the Board need not address Section 2604(b)(7) in order to answer the question presented here.

representation mean that public servants may not work on City-related matters even “behind the scenes.” See Advisory Opinion No. 2001-3 at 10.

Also relevant here is New York’s Code of Professional Responsibility. Disciplinary Rule 2-107 permits a lawyer to receive a share of the fee for referring a matter to another lawyer, provided that (1) the client consents after a full disclosure that a division of fees will be made, (2) the division is in proportion to the *services performed by each lawyer* or, by a writing given the client, *each lawyer assumes joint responsibility for the representation*, and (3) the total fee of the lawyers does not exceed reasonable compensation for all legal services they render the client. See DR 2-107 [22 NYCRR § 1200.12] Division of Fees Among Lawyers (emphasis added).

### **Discussion**

Because the Code of Professional Responsibility requires that an attorney who receives a share of the fee for referring a matter to another attorney either personally perform *some* legal work on the matter or assume joint responsibility for the representation, an attorney who is a City employee, by accepting a referral fee related to a criminal case within the City, would be required to perform, or to assume responsibility for performing, such criminal defense work. Accordingly, receipt of the referral fee would be permissible under Chapter 68 only if personally working on the criminal defense matter would itself be permissible.

The Board has previously determined that it would violate Chapter 68 for certain public servants, such as police officers, whose City duties require them to be involved in the criminal justice system or to regularly communicate with City agencies involved in criminal matters, to represent criminal defendants before a New York State court within the City. See Advisory Opinion No. 93-23. Of course, there are many City attorneys, such as the one in the instant case,

whose City duties do not require them to be involved in the criminal justice system nor to communicate with the City agencies involved in such matters. Any attorney engaged in criminal defense work in the City will, however, be required to communicate with City DAs, and possibly also the NYPD, both of which are City agencies for the purpose of Chapter 68.<sup>2</sup> Such communications could include, for example, plea negotiations, witness interviews, document reviews, motion practice, hearings, and trials – all of which are plainly not ministerial since they all involve the exercise of substantial personal discretion by City officials. See Charter Section 2601(15). For these reasons, it would violate Charter Section 2604(b)(6) for a regular City employee to engage in criminal defense work for compensation within the City.<sup>3</sup> Furthermore, even if a City attorney’s criminal defense responsibilities could be discharged without any direct communication with these agencies, such compensated work would still violate Charter Section 2604(b)(6) because the prohibition on indirect appearances and representation has been held to mean that a public servant may not work on City-related matters even “behind the scenes.” See Advisory Opinion No. 2001-3 at 10. Accordingly, the Board concludes that compensated

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<sup>2</sup> See Law Department Opinion No. 4-95, which concluded that the offices of the district attorneys within New York City, as well as their staff, fall within the definition of “agency” under Charter Section 2601(2) and are thus subject to Chapter 68.

<sup>3</sup> Regular City employees are all elected officials and all those public servants whose primary employment, as defined by Board rule, is with the City. See Charter Section 2601(20). Board Rules Section 1-06 defines primary employment with the City to mean 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. Thus, those public servants whose regular schedule is less than 20 hours per week will typically not be barred from the practice of criminal law, unless they are employed by a City agency with which they would need to communicate in the course of this outside practice. That said, because, as suggested by Advisory Opinion No. 93-23, it may conflict with the proper discharge of the official duties of even some part-time public servants to engage in private criminal defense work, part-time public servants are strongly encouraged to consult with the Board before engaging in any such work.

criminal defense work within the City by any lawyer who is a regular City employee cannot be reconciled with the requirements of Chapter 68.

Since compensated criminal defense work is thus prohibited, it follows that receiving a referral fee for referring a City criminal case is likewise prohibited, as any City attorney receiving such a fee is, under the Code of Professional Responsibility, mandated to perform some services on the referred matter or, at a minimum, to be responsible for the referred matter, each of which would likewise put the attorney in violation of Charter Section 2604(b)(6).<sup>4</sup>

### **Conclusion**

As set forth above, it will violate Chapter 68 for a lawyer who is a regular City employee to engage in compensated criminal defense work within the City. In addition, a lawyer who is a regular City employee may not accept fees for referring a criminal case within the City.



Steven B. Rosenfeld  
Chair

Monica Blum  
Kevin B. Frawley  
Angela Mariana Freyre  
Andrew Irving

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<sup>4</sup> As the foregoing analysis indicates, the prohibitions on criminal defense representations and receipt of referral fees apply only to criminal cases within the City of New York. Criminal defense work outside the City (and, by extension, referral fees for such cases) would not be barred by Chapter 68 – so long as these cases do not require communications with New York City DAs, NYPD employees, or other City officials.