

Appearance Before City Agency

Charter Section 2604(b)(2)  
2604(b)(6)

Advisory Opinion No. 96-5

The Conflicts of Interest Board (the "Board") has received a request for an opinion from a public servant who is a part-time member of a City commission (the "Commission") as to whether, consistent with the conflicts of interest provisions of Chapter 68 of the City Charter, the law firm in which he is a partner (the "Firm"), may be retained by an industry group in connection with possible litigation concerning the adoption of new rules by the Commission and in which litigation the Commission would also be a party. It is the opinion of the Board, for the reasons discussed below, that it would create a conflict of interest for the public servant if the Firm were to be retained by the industry group for this case.

### Background

The prospective client is an industry group that wants to retain the Firm to support the Commission's recent actions. The client would either intervene as a party defendant in the prospective litigation, in which the Commission would also be a party, or file an amicus curiae brief. Thus, according to the public servant, the representation would not be adverse to the City; rather, it would be in support of the Commission's actions (and the public servant's actions, in that he voted in favor of the rules' adoption). The public servant has advised the Board that he would be willing to take steps to ensure that he personally would not benefit in any way from the compensation to be paid to the Firm in connection with the representation.

### Discussion

Chapter 68 prohibits public servants from having private interests that conflict with their official duties. If the Firm were to handle this case involving the Commission and its rules, such action could create an appearance of impropriety because of the public

servant's dual role as both a partner in the Firm, which would be representing business owners who are subject to the Commission's ongoing regulatory authority, and as a member of the Commission, which serves, among other things, as a regulatory and adjudicatory body which oversees a particular industry, and which therefore must maintain the highest standard of impartiality. See Charter Section 2604(b)(2), which provides that 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. Accordingly, this requested representation would violate Charter Section 2604(b)(2).

While the public servant has offered to recuse himself from this prospective litigation, both as a member of the Commission and as a member of the Firm, such recusal would not cure the perception of a conflict of interest, inasmuch as the public servant has already ruled, as a member of the Commission, on the subject matter of such litigation. The fact that the public servant is a partner in the Firm could give rise to a public perception that the client retained

this Firm only because of the public servant's membership on the Commission. See Charter Section 2604(b)(2).

The public perception of a conflict could be exacerbated by the particular circumstances of this case, i.e., the public servant personally participated, as a Commission member, in the adoption of the new rules. Under the circumstances, if the Firm were to represent the industry group, the public servant would, as a member of the Firm, then be in a position where he was indirectly appearing, within the meaning of Charter Section 2604(b)(6), in a matter in which his City agency was directly involved as a party and, further, in which he had personally participated at an earlier stage. These facts, and the overlapping interests of the Commission and the Firm in this case, could blur the clear distinction which should exist between a public servant's public duties and private interests.

Charter Section 2604(b)(6) prohibits public servants who are not regular employees of the City, including members of the Commission, from appearing, directly or indirectly, on behalf of private interests

in matters "involving" the public servants' agencies.<sup>1</sup>

The Firm's representation of the industry group in this case, where these clients would either intervene as a party defendant in the prospective litigation, in which the Commission would also be a party, or file an amicus curiae brief, would constitute an indirect appearance by the public servant because the public servant has an ownership interest in the Firm as one of its partners.

In a similar case, discussed in the Board's Advisory Opinion No. 94-24, the Board determined that a law firm in which a part-time City commissioner was a partner could not appear before the public servant's commission, with certain limited exceptions for cases

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<sup>1</sup> "Regular employee" means all elected officials and public servants whose primary employment, as defined by rule of the Board, is with the City. See Charter Section 2601(20). Since the public servant in this case works fewer than 20 hours per week for the Commission, he is not considered a regular employee, as that term is defined in Board Rule Section 1-06. Accordingly, he is prohibited by Charter Section 2604(b)(6) from representing private interests, and appearing on their behalf, in matters involving the agency.

which had been commenced before the public servant's

appointment.<sup>2</sup> While that case involved a public servant whose firm would have appeared before the public servant's own commission on various matters in which the commission per se had no direct interest, the Firm in the instant case seeks to appear in court on a matter in which the Commission will also be a party and, since the public servant voted on the matter, the matter directly involves the public servant as well.

Thus, if the Firm were to undertake the representation of this particular client in this case, such representation would result in the public servant making a prohibited indirect appearance under Charter Section 2604(b)(6) and, furthermore, could result in questions being raised as to whether the public servant was seeking to serve the public interests of the Commission or the private interests of the Firm and its

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<sup>2</sup> In that opinion, the public servant's private law firm was given limited permission to continue representing clients before the public servant's commission in matters there pending, because the public servant was newly appointed and immediate divestiture of matters commenced prior to the public servant's appointment could have created substantial hardships for those clients.

clients by voting in a particular way. See Charter Section 2604(b)(2).

Conclusion

For the reasons discussed above, it is the opinion of the Board that it would create a conflict of interest for the public servant if the Firm were to be retained by the industry group to represent it in the potential litigation relating to an official act of the Commission of which the public servant is a member. See Charter Sections 2604(b)(2) and (b)(6).

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Dated: July 15, 1996