

Expert Witness  
Post-Employment Restrictions

Charter Sections 2604(d)(2), (4) and (5)

Advisory Opinion No. 96-6

The Conflicts of Interest Board (the "Board") has received a request for an opinion from a former public servant as to whether, consistent with the conflicts of interest provisions of Chapter 68 of the City Charter, he may serve as a paid expert witness in cases brought against the City by individuals who have allegedly been injured while operating automotive vehicles used by the public servant's former agency (the "Agency"). The cases would be brought before courts or adjudicative bodies other than the Agency. The plaintiffs in such cases might include Agency employees.

It is the opinion of the Board, for the reasons stated below, that the former public servant may, within one year after his resignation from the Agency, serve as a paid expert witness in cases which involve the use and operation of Agency vehicles, but may not directly communicate with the Agency if such cases are

before the Agency or were pending in the Agency while the former public servant was employed there. Furthermore, the former public servant may never testify as a paid expert witness concerning any particular matter on which he worked personally and substantially during his tenure with the Agency. He may never reveal any confidential information concerning the City.

#### Background

From 1986 through September 1994, the former public servant was responsible for preparing specifications for specialty automotive vehicles used by the Agency. His work consisted of determining the particular parts and equipment that a vehicle would need and promulgating general guidelines used by Agency purchasing personnel who ordered vehicles for the Agency's fleet. In September 1994, the former public servant was transferred to another assignment within the Agency, and from that time until his retirement in December 1995, he had no responsibilities involving Agency vehicles.

The former public servant was approached by an

attorney representing an Agency employee who had been injured while operating one of the Agency's vehicles. The attorney asked the former public servant to serve as a paid expert witness in the case. He wanted the former public servant to testify that the vehicle used by the plaintiff failed to meet Agency specifications and failed to operate properly, which allegedly resulted in the plaintiff's injuries. The public servant stated that he refused the attorney's offer but that he would like to be able to serve as an expert witness in similar cases in the future. Specifically, he has asked whether the post-employment provisions of Chapter 68 would prohibit him from serving as an expert witness in cases similar to the one described above.

#### Discussion

##### **Charter Section 2604(d)(2)**

Charter Section 2604(d), which is contained in Chapter 68 of the City Charter, sets forth the restrictions on the activities of public servants who leave City employment. Charter Section 2604(d)(2) provides that no former public servant shall, within a

period of one year after the termination of the public servant's service with the City, appear before the agency served by the public servant, except concerning ministerial matters. However, a former public servant is not prohibited from communicating with his or her former agency when such communications "are incidental to an otherwise permitted appearance in an adjudicative proceeding before another agency or body, or a court, unless the proceeding was pending in the agency served during the period of the public servant's service with that agency."<sup>1</sup> See Charter Section 2604(d)(2).

Under Charter Section 2604(d)(2), it is therefore impermissible for a former public servant to choose to appear before or directly communicate with his or her former City agency in connection with an adjudicative proceeding in the following situations: (1) when the matter with respect to which the former public servant

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<sup>1</sup> "Appear" means to make any communication, including personal appearances, telephone calls and letters, 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 of the City, which is carried out in a prescribed manner and does not involve substantial personal discretion. See Charter Section 2601(15).

seeks to communicate with his or her former agency is before that agency (such appearances are permitted when made incidental to an otherwise permitted appearance in an adjudicative proceeding pending before another agency, body or court); or (2) when the matter was pending in the agency during the period of the former public servant's City service.

If the former public servant were to serve as an expert witness in cases involving the Agency, he has stated that it is likely that either he would be required to communicate with the Agency in preparing or delivering his testimony or his name might appear on documents relating to his testimony which would be read by Agency staff in connection with the litigation, or both. The former public servant's sending such documents would be a "prohibited appearance" if the case in connection with which he was sending the documents was either pending before the Agency or had been pending there at the time he left City service. The mere fact that the Agency obtained documents relating to the public servant's expert testimony would not constitute an appearance under Charter Section 2604(d)(2), regardless of the circumstances of the

particular case.

While direct communications with the Agency would ordinarily constitute an appearance before the Agency, the former public servant, as noted above, is permitted to communicate with the Agency if such communications relate to an adjudicative proceeding which is before another agency or a court unless the proceeding was pending in the Agency while the former public servant was still working for the Agency. Accordingly, the former public servant may, within one year after leaving City service, serve as a paid expert witness in a case in which the Agency was involved, and, in providing such a service, he may communicate directly with the Agency in preparing or delivering his expert testimony, provided that the particular case in which he seeks to serve is not before the Agency and was not pending in the Agency during the period of his City employment.

**Charter Section 2604(d)(4)**

In order to serve as a paid expert witness in any adjudicative proceeding, the former public servant must also comply with Charter Section 2604(d)(4), which

provides that no former public servant "shall appear, whether paid or unpaid, before the city, or receive compensation for any services rendered, in relation to any particular matter involving the same party or parties with respect to which particular matter such person had participated personally and substantially as a public servant through decision, approval, recommendation, investigation or other similar activities." Charter Section 2601(17) defines particular matter as "any case, proceeding, application, request for a ruling or benefit, determination, contract limited to the duration of the contract as specified therein, investigation, charge, accusation, arrest, or other similar action which involves a specific party or parties, including actions leading up to the particular matter...." Because of the permanent nature of the prohibition against working on a particular matter with respect to which a former public servant was involved personally and substantially as a public servant, the Charter Revision Commission urged that "particular matter" be narrowly interpreted. See Report of the Charter Revision Commission, Vol. II (December 1986 - November 1988) at

182-183.

The specifications which the former public servant drafted for the Agency were used as general guidelines by the Agency in purchasing vehicles for its fleet. Furthermore, the guidelines were not drafted in connection with any "specific party or parties." The former public servant would thus not be prohibited from serving as a paid expert witness in cases in which he will be asked to testify concerning the specifications, inasmuch as these Agency guidelines generally would not be considered a particular matter on which the former public servant worked, for the purposes of Charter Section 2604(d)(4). If, however, the former public servant had had some direct involvement with specific parties in such cases, when he was still a public servant, he would have been prohibited from serving as a paid expert witness in those cases.

**Charter Section 2604(d)(5)**

Finally, although the public servant may serve as an expert witness in cases involving the Agency subject to the conditions described above, he must not disclose any confidential information obtained through his City

employment which is not otherwise available to the public, except for any information concerning waste, inefficiency, corruption, criminal activity or conflict of interest. See Charter Section 2604(d)(5).

#### Conclusion

For the reasons discussed above, it is the opinion of the Board that the former public servant may, within one year after his resignation from the Agency, serve as an expert witness in cases which involve the use and operation of Agency vehicles, provided that the public servant does not directly communicate with the Agency if such matters are before the Agency or were pending in the Agency while the former public servant was employed by the Agency. Furthermore, at no time may the former public servant testify for compensation concerning any particular matter and any specific party or parties with respect to which or whom he had worked personally and substantially during his tenure with the Agency. Nor may he reveal any confidential information concerning the City.

As indicated above, the determination as to whether former public servants may directly communicate

with their former agencies or work on particular matters in the course of offering their services as paid expert witnesses depends on the factual circumstances of each case in which they seek to become involved. Former public servants who have any questions concerning the rules discussed in this opinion should contact the Board prior to becoming involved in such activities.

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Dated: July 15, 1996