

Advisory Opinion No. 91-7

Several public servants who are attorneys have separately asked the Conflicts of Interest Board whether it would be a violation of the conflict of interest provisions of Chapter 68 of the City Charter for them to engage in the private practice of law.

The primary employment of these public servants, who serve in both attorney and non-attorney titles, is with the City. Their private practices would involve such matters as real estate closings, general legal counseling, uncontested divorces, trusts and estates and name changes. They represent that their private practices would be conducted outside of their regular hours of City employment and would not involve the use of City facilities. It is our opinion, as explained below, that such practice may be allowed if conducted in compliance with the provisions of Chapter 68 and with agency approval.

In its Opinion No. 578 (1980), the Board of Ethics, this Board's predecessor, advised an attorney who worked for the City in a non-attorney title that he could maintain such a practice subject to the

prohibitions of former Chapter 68, then in effect, which did not expressly prohibit a City employee's private law practice.

The Board of Ethics cautioned this City employee, however, that:

"[we] are mindful of the difficulties that confront an attorney who is restrained from practicing his profession during normal business hours. Indeed, we take note of the observations of Judge Gibson in Goldstein v. Bartlett, 92 Misc. 2d 262, 267 (Sup. Ct., Albany Co., 1978), aff'd on the opinion below, 64 A.D.2d 956 (1978), a proceeding brought by law secretaries to the Justices of the Supreme Court challenging restrictions imposed upon their right to engage in the private practice of law:

'Inevitably, the exigencies of the private practice and the convenience of private clients required communication and sometime actual representation, with concomitant distraction, during the regular hours (including the normal hours of court sessions) required to be devoted to the employment; and occasionally the incidental use of official library, telephone and other facilities to accommodate the temporal and other necessities of the private practice. Many of the permitted activities (e.g. title closings; uncontested judicial accountings) would normally have to be conducted during customary day time business hours. In short, the conflict was inevitable and, indeed, inherent.'

Other New York courts have subsequently affirmed the validity and rationale of agency regulations which prohibit private practice by attorneys employed in city or state agencies. In Civil Service Bar v. Schwartz, 114 Misc. 2d (Sup. Ct., N.Y. County 1982), aff'd, 97

A.D.2d 715 (1982), the court upheld a regulation which prohibited attorneys employed in the Office of the Corporation Counsel from engaging in the private practice of law, except in unusual circumstances and then only with agency permission. The court noted that this regulation was issued to achieve the highest level of professionalism, to eliminate any possible appearance of impropriety and to insure that by eliminating "the inevitable infringement" on their official responsibilities caused by private practice, the attorneys in the office would devote their full time to their City jobs.

In Matter of Lazarus v. Steingut, 129 Misc. 982 (Sup. Ct., N.Y. County 1985), the court upheld a regulation of the Workmen's Compensation Board (WCB) which prohibited its attorneys from engaging in the private practice of law, concluding "[t]hat the continued practice of law by Board attorneys poses a potential conflict between private interest and public service."

Chapter 68 of the Charter was revised as of January 1, 1990. Like former Chapter 68, it does not expressly prohibit a public servant who is an attorney from engaging in the private practice of law.

We therefore hold in this opinion, which

supersedes Board of Ethics Opinion No. 578, that public servants who are attorneys may engage in the private practice of law during their off-duty hours, provided that they do not use City office space or equipment and that their practices are conducted in compliance with Chapter 68.

This means that a public servant who is an attorney may not do private legal work for a person or firm which has business dealings with the City, nor may such public servant use or attempt to use his or her official position to obtain any advantage for a private client. See Charter Sections 2604(a)(1)(b) and 2604(b)(3).

Such public servant may not represent private clients before any City agency or appear directly or indirectly on their behalf in matters involving the City.¹ See Charter Section 2604(b)(6).

Such public servant may not appear as counsel against the interests of the City in any litigation in which the City, or any public servant of the City acting in the course of official duties, is a complainant. See Charter Section 2604(b)(7).² He or

¹ For a public servant whose primary employment is not with the City, this prohibition is limited to the public servant's agency.

² See note 1.

she may not give opinion evidence as a paid expert against the interests of the City in any civil litigation brought by or against the City.³ See Charter Section 2604(b)(8). Finally, a public servant who is an attorney may not have a private law practice which conflicts with the proper discharge of his or her official duties. See Charter Section 2604(b)(2).

Like the Board of Ethics, we are concerned that a City attorney's private practice of law, even outside of normal business hours and not on City premises, may come in conflict with the proper discharge of his or her official duties. It is therefore our opinion that Chapter 68 requires that a public servant who is an attorney must obtain written agency approval to engage in the private practice of law. Such practice must, of course, be conducted in compliance with the foregoing provisions of Chapter 68.

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Chair

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Dated: August 12, 1991

³ See note 1.