



KENNETH L. GARTNER
CHAIR

JARED A. KASSCHAU
COUNTY ATTORNEY

MICHAEL PERNICK
MEMBER

STEVEN G. LEVENTHAL
COUNSEL

**COUNTY OF NASSAU
BOARD OF ETHICS**

One West Street
Mineola, New York 11501-4820
516-571-3056

ADVISORY OPINION 114-18

The County Attorney's Office requests a waiver pursuant to Nassau County Charter section 2218 (the "Code of Ethics"), subdivision 8 (Post-employment restrictions) so as to permit a recently retired Deputy County Attorney (the "DCA") to provide compensated legal services to the County through the law firm by which he is now employed.

GOVERNING AUTHORITY

Nassau County Charter section 2218 (the "Code of Ethics") subdivision 8 (Post-employment restrictions) provides, in pertinent part, that:

- a. No person who has served as a paid officer or employee of the County shall, within a period of two years after the termination of such service or employment, appear¹ before any Board, agency, officer or employee of the County, except on behalf of the State, or a political subdivision or instrumentality thereof, or in furtherance of the interests of the County with the approval of the Board upon application of a County agency....
- b. No person who has served as a paid or unpaid officer or employee of the County shall receive compensation or render any services in relation to any case, proceeding, application or particular matter which such person was directly concerned with, personally participated in, or actively considered during the period of his or her service or employment, except in furtherance of the interests of the County with the approval of the Board upon application of a County agency....
- c. No former paid or unpaid officer or employee of the County shall disclose confidential information concerning the property, government or affairs of the County or any other confidential information of an official character obtained as a result of County employment except when disclosure is required by law or when such information is otherwise available to the public, nor shall he or she use such information to advance the financial or other private interests of himself or herself or others.

¹"Appear" is broadly defined by Code of Ethics subdivision 1 to mean "to make a communication in any form, personally or through another person, including, but not limited to, by letter, telephone, by e-mail or by facsimile, on behalf of a person or entity from whom one receives income or compensation."

DISCUSSION

The DCA separated from County employment on October 23, 2017. In support of the request for a waiver, the Chief Deputy County Attorney informed the Board of Ethics that:

During his tenure at the County, [the] DCA... served in two County departments, [REDACTED] and [REDACTED]. In the County Attorney's Office [the] DCA... was assigned to [REDACTED] Bureau and [REDACTED] Division from 2014 to 2016. In 2016 he was assigned to act a counsel to the Department of [REDACTED].

[The] former DCA... provided day to day counsel to the Department of Assessment and specifically worked on the implementation and administration of the Department's requirement by [REDACTED] to file [REDACTED]. [The] DCA... assisted the Department of [REDACTED] with over 600 due process hearings for 2013 and 2014 [REDACTED] filers who requested such hearings. He provided legal counsel to the Department when the [REDACTED] law was passed in 2017 by the Nassau County Legislature.

[The] DCA... represented the County in the trial court portion [REDACTED] after the case was reassigned from outside counsel. [The] DCA's... effective representation while working for the County should be continued as it is important for the County's success in the [REDACTED] Litigation. [The] DCA... prepared all County witnesses that testified in the 2017 hearing and he is able to prepare Department of [REDACTED] witnesses again for court ordered discovery in the [REDACTED] litigations in 2018.

The County will be saving the expense of reassigning the matter to another attorney that would need to familiarize themselves with the case. The [REDACTED] litigation commenced in 2014 and it has continued to present. The County's ability to collect [REDACTED] data is essential to the Department of [REDACTED]'s effort to produce [REDACTED] in Nassau County. [The] former DCA's... extensive work to date has helped this process and it is the request of the County Attorney's office that DCA [REDACTED] continue with his efforts. To bring a new attorney/in-house counsel on board at this point will significantly decelerate the process at a critical point in the [REDACTED] litigation.

Because of [the] DCA's... express knowledge of the [REDACTED] requirements and his strong litigation skills, [the] former County Attorney... in consultation with the Nassau County Legislature, retained [the] former DCA's... firm to continue in representing the County in the [REDACTED] litigations. Due to the efforts of counsel, the [REDACTED] law has been upheld as constitutional; however, enforcement of penalties is still being contested in the courts and it is under appeal. [The] former DCA's... intimate understanding of the 2013 [REDACTED] law as well as knowledge of the Department of [REDACTED]'s operations, will enable the County to continue to effectively apply the local law.

In considering this inquiry, the Board of Ethics employed a three step analysis to determine whether to grant a waiver of the post-employment restrictions set forth in subdivision 8 of the Code of Ethics, so as to permit the recently retired DCA to provide compensated legal services to the County through the law firm by which he is now employed. The Board considered: (i) whether the proposed post-employment activities of the DCA would violate N.Y. Gen. Mun. Law Article 18 (Conflicts of Interest of Municipal Officers and Employees), (ii) whether the proposed post-employment activities of the DCA would further the interests of the County, and (iii) whether the proposed post-employment activities of the DCA would create a prohibited appearance of impropriety under common law principles.

1. N.Y. Gen. Mun. Law Article 18

Article 18 of the New York General Municipal Law establishes minimum standards of conduct for the officers and employees of all municipalities within the State of New York, other than New York City.² All officers and employees must comply, whether paid or unpaid, including members of boards and commissions.³ However, the statute does not regulate the post-employment activities. Accordingly, the proposed post-employment activities of the DCA would not violate N.Y. Gen. Mun. Law Article 18.

2. Nassau County Code of Ethics

The Nassau County Code of Ethics imposes three post-employment restrictions. First, it prohibits a County officer or employee from communicating with any Board, agency, officer or employee of the County, except on behalf of another government agency or instrumentality. The Board of Ethics is authorized to waive this post-employment restriction upon the request of a County agency, if a waiver would further the interests of the County. Secondly, the Code of Ethics prohibits former County officers and employees from performing compensated services in connection with any case, proceeding, application or particular matter with which the former officer or employee was materially involved while employed by the County. This second prohibition may also be waived by the Board of Ethics upon the request of a County agency, if a waiver would further the interests of the County. Finally, a former officer or employee may not disclose or make unauthorized use of confidential information of an official character obtained as a result of County employment. The Board of Ethics is not authorized to grant a waiver of this third prohibition.

In Advisory Opinion 119-10, the Board of Ethics granted a waiver of the post-employment restrictions set forth in subdivision 8 of the Code of Ethics, so as to permit former Deputy County Attorneys to appear in matters before the County within two years of the termination of their employment. The Board of Ethics further determined that a former Deputy County Attorney may not appear as counsel in a matter on behalf of a private sector client in which the attorney was directly concerned, personally participated in, or actively considered as a County employee; and a former Deputy County Attorney may not disclose nor make private use of confidential County information obtained by the former Deputy County Attorney as a result of his or her County employment.

² N.Y. Gen. Mun. Law §800(4).

³ Volunteer firefighters and civil defense volunteers, other than fire chiefs and assistant fire chiefs, are not “officers” or “employees” within the meaning of GML Article 18. N.Y. Gen. Mun. Law §800(5).

The Board of Ethics reasoned that:

...[A] waiver of the post-employment restrictions set forth in subdivision 8 of the Code of Ethics, so as to permit former Deputy County Attorneys appear as counsel in matters before the County within two years of the termination of their respective employments would further the interests of the County. Full time and part time attorneys employed by the Unified Court System are not prohibited from appearing in their respective courts upon separation from service. Assistant District Attorneys are not prohibited from appearing as defense counsel in matters adverse to the District Attorney's Office upon termination of their County employment; and attorneys employed by the Nassau County Traffic and Parking Violations Agency are not prohibited from appearing as defense counsel before that agency upon termination of their County employment. Viewed in this context, the imposition of a two year post-employment ban on appearances in matters before the County by former Deputy County Attorneys burdens those attorneys with an unfair economic disadvantage, and could chill the ability of the County Attorney's Office to hire and employ qualified attorneys to serve public.

The second post-employment restriction imposed by the Nassau County Code of Ethics is a permanent ban on the receipt of compensation or the rendering of services in connection with particular matters handled by a former county officer or employee during the period of his or her county service. Similarly, Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees) of the New York Rules of Professional Conduct prohibit an attorney who has formerly served as an employee of the government from representing a client in connection with a matter in which the attorney participated personally and substantially as a government employee without the informed written consent of the government employer. Thus, by virtue of Rule 1.11 of the New York Rules of Professional Conduct, and by virtue of Code of Ethics subdivision 8(b), a former Deputy County Attorney would be precluded from handling a matter on behalf of a private sector client in which the attorney was directly concerned, personally participated in, or actively considered as a County employee.

The third post-employment restriction imposed by the Nassau County Code of Ethics is a permanent ban on the disclosure or private use of confidential government information. Further, the confidentiality of government information disclosed to former Deputy County Attorneys is protected by New York Civil Practice Law and Rules section 4503, which codifies the attorney client privilege, prohibits an attorney from disclosing the confidential communications made between the attorney and his or her client, absent a waiver by the client and by Rule 1.6 (Confidentiality of Information) of the New York Rules of Professional Conduct which prohibits an attorney from revealing confidential information gained during or relating to the representation of a client, whatever its source, that is protected by the attorney-client privilege or that the client has requested be kept confidential. Also, Rule 1.11 prohibits a former government attorney from representing a client where confidential government information (as defined by Rule 1.11) acquired by the attorney while employed by the government could be used to the material disadvantage of an adverse party. Rule 1.12 provides that an attorney shall not accept private employment in a matter upon the merits of which the attorney acted in a judicial capacity.

The foregoing references to the New York Rules of Professional Conduct are made for informational purposes only. The Board expresses no opinion as to their interpretation or

application here, or in any particular case.

Ethics regulations generally are designed to promote high standards of official conduct and to foster public confidence in government. The post-employment restrictions imposed by the Nassau County Code of Ethics help foster public confidence in government by avoiding situations where it might appear that a former officer or employee may have improperly exchanged official favors to obtain post-employment employment; that the former officer or employee enjoys a special relationship with his or her former colleagues and thus has an unfair advantage over other persons seeking similar benefits; or that the former county officer or employee may be in a position to use confidential government information to the unfair advantage of a private sector employer or to the disadvantage of the County.

When considering an application for waiver of the post-employment restrictions, the Board should consider the value of the County interest that would be advanced, the availability of alternative sources of the proposed services, and the means by which any appearance of impropriety might be mitigated.

As previously stated, because attorneys employed by the Unified Court System are free to appear in the Courts of this State upon separation from government employment, former Assistant District Attorneys are free to appear as defense counsel in matters adverse to the District Attorney's Office upon termination of their County employment, and attorneys formerly employed by the Traffic and Parking Violations Agency are free to appear as defense counsel before that agency upon termination of their County employment, the imposition of a two year post-employment ban on appearances as counsel in matters before the County would burden those attorneys with an unfair economic disadvantage, and could chill the ability of the County Attorney's Office to hire and employ qualified attorneys to serve the public.

Thus, a waiver of the post-employment restrictions set forth in subdivision 8 of the Code of Ethics, so as to permit former County Attorneys to appear as counsel in matters before the County within two years of the termination of their County employment could not reasonably be viewed as having resulted from any official favor granted to the former Deputy County Attorney. Further, since the requested waiver would place former Deputy County Attorneys on the same footing as other government attorneys, it could not reasonably be concluded that any special relationship with their former colleagues resulted in a special advantage for them in the granting of this waiver.

The Board of Ethics adheres to the reasoning and conclusions that it reached in Advisory Opinion 119-10. Further, here, it is not proposed that the former DCA will represent private sector clients in matters adverse to the County. Rather, it is proposed that the former DCA continue his previous representation of the County in matter in which he has developed a unique expertise the use of which will further the interests of the County.

Accordingly, on the facts presented, the grant of a waiver pursuant to Nassau County Charter section 2218 (the "Code of Ethics"), subdivision 8 (Post-employment restrictions) so as to permit the DCA to provide compensated legal services to the County through the law firm by which he is now employed would further in the interests of the County.

3. *Common Law Principles*

Ethics regulations are not only designed to promote high standards of official conduct, they are also designed to foster public confidence in government. An appearance of impropriety undermines public confidence. Therefore, courts have found that government officials have an implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.⁴

Where a contemplated action by an official might create an appearance of impropriety, the official should refrain from acting. Officials should be vigilant in avoiding real and apparent conflicts of interest. They should consider not only whether they believe that they can fairly judge a particular application or official matter, but also whether it may appear that they did not do so. Even a good faith and public spirited action by a conflicted public official could tend to undermine public confidence in government by confirming to a skeptical public that government serves to advance the private interests of public officials rather than to advance the public interest.

In considering whether a prohibited appearance of impropriety has arisen, the question is whether an officer or employee has engaged in or influenced decisive official action despite having a disqualifying conflict of interest that is clear and obvious, such as where the action is contrary to public policy, or raises the specter of self-interest or partiality. A prohibited appearance of impropriety should not be found where a conflict is speculative or immaterial.

For the reasons set forth above and in Advisory Opinion 119-10, the proposed post-employment activities of the DCA would not be likely to undermine public confidence in County government nor give rise to a prohibited appearance of impropriety under common law principles.

CONCLUSION

Based on the facts presented, the Board of Ethics grants a waiver pursuant to Code of Ethics subdivision 8 (Post-employment restrictions) so as to permit the DCA to provide compensated legal services to the County through the law firm by which he is now employed.

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York
July 23, 2018



Kenneth L. Gartner, Chair

⁴ See, e.g., Matter of Zagoreos v. Conklin, 109 A.D.2d 281 (2d Dept. 1985); Matter of Tuxedo Conservation & Taxpayer Assn. v. Town. Board of Town of Tuxedo, 69 A.D.2d 320 (2d Dept. 1979).