



**COUNTY OF NASSAU  
BOARD OF ETHICS**  
One West Street  
Mineola, New York 11501-4820  
516-571-3056

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STEVEN G. LEVENTHAL  
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**ADVISORY OPINION 101-20**

A [REDACTED] requests an advisory opinion as to whether a prohibited conflict of interest would arise if she were to provide compensated business development, consulting and government relations services in Suffolk County, the City of New York, and towns and villages in Nassau County, as an independent contractor to a firm that represents municipalities among other clients,

**GOVERNING AUTHORITY**

Nassau County Charter section 2218 (the "Code of Ethics") provides at subdivision 2 (Conflicts of Interest Prohibited) that:

a. ... [N]o County officer or employee whether paid or unpaid shall...

(1) Have a financial interest ... in any business or professional dealings with the County or any agency thereof or a financial interest in any entity which has business or professional dealings with the County

(2) Participate as attorney, agent, broker, representative or employee in a business or professional transaction with, or lawsuit against, the county or any agency thereof for any person or entity directly or indirectly in any matter whatsoever or fail to ensure that adequate measures are taken to prevent his or her participating in any manner in any such transaction where a law firm or other entity in which such person is an owner, member or employee becomes involved as attorney, agent, broker or representative in such a transaction with, or lawsuit against, the County.

(3) Accept or retain other employment, engage in any business transactions, or make or retain any investments, have any financial interest, or engage in other activities that directly or indirectly create a conflict with his or her official duties....

- b. A County officer or employee shall not appear before any agency or officer of the County except on behalf of the County, provided, however, that for County officers or employees serving in an unpaid capacity, this prohibition shall apply only to appearances before the agency served by such officer or employee.
- c. No County officer or employee shall receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any municipal agency of which he is an officer, member or employee or of any municipal agency over which he has jurisdiction or to which he has the power to appoint any member, officer or employee.
- d. No legislator, during his or her term and for a period of two years from the expiration of the term to which he or she was elected, shall engage in any employment as a lobbyist on behalf of any person, firm, corporation or association doing business with the County.

The Nassau County Code of Ethics provides at subdivision 4 (Recusal and Disclosure of Interest), in pertinent part, that:

- a. A County officer or employee, whether paid or unpaid, shall promptly recuse himself or herself from acting on any matter before the County in which he or she has (i) any direct or indirect financial or (ii) any other private interest that a reasonable person would perceive to compromise his or her ability to make impartial judgment or take discretionary actions in the best interest of the County.
- b. Any County officer or employee who recuses himself or herself pursuant to paragraph (a) of this subdivision shall be required to disclose such recusal in writing to the Board [of Ethics] and the nature of his or her private interest.....

Nassau County Code of Ethics subdivision 5 (Disclosure of confidential information) provides that:

No officer or employee of the County, whether paid or unpaid 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 interest of himself or herself or others.

Nassau County Code of Ethics subdivision 6 (Misuse of County resources) provides that:

No officer or employee of the County shall use the resources of the County in furtherance of his or her business, professional or political interests or activities, or in furtherance of the interests or activities of any outside entity other than pursuant to a County contract with such entity, without the approval of the head of his or her agency and the approval of the Board of Ethics upon a finding by the Board that such activity

is in furtherance of the interests of the County.

### DISCUSSION

The [REDACTED] wishes to accept employment as an independent contractor to a business consulting and government relations firm that engages in lobbying activities among other services. The [REDACTED] anticipates that she will mostly provide business development and consulting services, but may also provide lobbying services.

The [REDACTED] will not be an equity partner nor have a share in the profits of the firm. She will not provide lobbying services on behalf of any person, firm, corporation or association doing business with the County. Adequate steps will be undertaken to effectively screen the [REDACTED] from participation in the firm's business or professional dealings with the County, if any, and from participation in lobbying activities provided by the firm to individuals or entities doing business with the County (whether those activities involve lobbying of the County or of another government entity). She will neither disclose nor make personal use of confidential County information; and she will not use compensated County time or other County resources in connection with her secondary employment activities.

The Board of Ethics employed a three step analysis to determine whether, under the circumstance presented, a prohibited conflict of interest would arise if the [REDACTED] were to provide compensated business development, consulting and government relations services in Suffolk County, the City of New York, and towns and villages in Nassau County, as an independent contractor to a firm that represents municipalities among other clients. The Board considered: (i) whether the secondary employment, under the circumstances presented, would violate Article 18 of the New York General Municipal Law (Conflicts of Interest of Municipal Officers and Employees), (ii) whether the secondary employment, under the circumstances presented, would violate the Nassau County Code of Ethics, and (iii) whether the secondary employment, under the circumstances presented, would create a prohibited appearance of impropriety under common law principles.

#### *I. 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.<sup>1</sup> All officers and employees must comply, whether paid or unpaid, including members of boards and commissions.<sup>2</sup>

Like the Nassau County Code of Ethics, GML Article 18 prohibits a municipal officer or employee from receiving, or agreeing to receive, compensation for services to be rendered in relation to any matter before any agency of which she is an officer, member or employee or over which she has jurisdiction or the power to appoint any member, officer or employee.

Here, the [REDACTED] will not participate in the business or professional dealings that the firm may engage in with the County, if any, and will not share in the profits that the firm may

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<sup>1</sup> N.Y. Gen. Mun. Law §800(4).

<sup>2</sup> 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).

derive from such activities. Accordingly, under the circumstances presented, the secondary employment contemplated here would not violate Article 18 of the New York General Municipal Law.

## 2. Nassau County Code of Ethics

The Nassau County Code of Ethics prohibits a county officer or employee from having a financial interest, or from participating as an employee or representative in a business or professional transaction with the County or any County agency for any person or entity.

Here, the [REDACTED] will not share in any profits that her employer may derive from its business or professional dealings with the County, if any, and she will not participate in any matter before the County, or that is likely to come before the County or any County department, board or agency. The [REDACTED] must recuse herself in any official matter involving business or professional dealings between the County and her secondary employer, including but not limited to any matter in which her secondary employer lobbies the County.<sup>3</sup>

The Nassau County Code of Ethics prohibits a [REDACTED] from engaging in employment as a lobbyist on behalf of any person, firm, corporation or association doing business with the County. Therefore, the [REDACTED] may not lobby any federal, state or local government entity on behalf of person or entity doing business with the County.

The Nassau County Code of Ethics also prohibits a County officer or employee from engaging in secondary employment activities that conflict with his or her official duties. Long established common law principles and opinions of the New York Comptroller and Attorney General offer useful guidance in determining whether a position of outside employment would create a conflict with the official duties of a municipal office or employee. In the absence of a specific constitutional or statutory prohibition, one person may simultaneously hold a public office and a position of outside employment unless they are incompatible.<sup>4</sup> The leading case on compatibility of offices is People ex rel. Ryan v. Green.<sup>5</sup> In that case, the Court of Appeals held that two offices are incompatible if one is subordinate to the other (i.e., you cannot be your own boss) or if there is an inherent inconsistency between the two offices. Although the Ryan case involved two public offices, the same principle applies to the compatibility of a public office and a position of employment. To determine whether two positions are inherently inconsistent, it is necessary to analyze their respective duties. An obvious example of two offices with inconsistent duties is those of auditor and director of finance. *Id.*

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<sup>3</sup>The Attorney General has opined that recused officials should absent themselves from the deliberative body during the proceedings. "We have stated that members with conflicts of interests must recuse themselves from participating in any deliberations or votes concerning the application creating the conflict. (Citation omitted). The board member's participation in deliberations has the potential to influence other board members who will exercise a vote with respect to the matter in question. Further, we believe that a board member with a conflict of interest should not sit with his or her fellow board members during the deliberations and action regarding the matter. The mere presence of the board member holds the potential of influencing fellow board members and additionally, having declared a conflict of interest, there would reasonably be an appearance of impropriety in the eyes of the public should the member sit on the board. 1995 Op. Atty. Gen. 2.

<sup>4</sup> 1982 N.Y. Op. Atty. Gen (Inf.) 148.

<sup>5</sup> 58 N.Y. 295 (1874).

Here, there is no inherent incompatibility between the duties of the [REDACTED] and those of an independent contractor providing business development, consulting and government relations services in Suffolk County, the City of New York, and towns and villages in Nassau County.

The [REDACTED] must refrain from disclosing or making unauthorized use of confidential County information, and from using compensated County time or other County resources in connection with her secondary employment.

Accordingly, based on the facts presented, and subject to the conditions set forth herein, the secondary contemplated here would not violate the Nassau County Code of Ethics.

### ***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.<sup>6</sup>

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 a 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.

Here, having concluded for the reasons set forth above that there is no inherent incompatibility between the duties of the [REDACTED] and those of an independent contractor providing business development, consulting and government relations services in Suffolk County, the City of New York, and towns and villages in Nassau County, there is no reasonable basis for concluding that the secondary employment, under the circumstances presented, would tend to undermine public confidence in County government or create a prohibited appearance of impropriety under common law principles.

The [REDACTED] may not provide lobbying services on behalf of any person, firm, corporation or association doing business with the County. She may not participate in any matter

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<sup>6</sup> 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).


before the County, or that is likely to come before the County or any County department, board or agency. The [REDACTED] must recuse herself in any official matter involving business or professional dealings between the County and her secondary employer, including but not limited to any matter in which her secondary employer lobbies the County. Adequate steps should be undertaken to effectively screen the [REDACTED] from participation in the firm's business or professional dealings with the County, if any, and from participation in lobbying activities provided by the firm to individuals or entities doing business with the County (whether those activities involve lobbying of the County or of another government entity). The [REDACTED] may neither disclose nor make personal use of confidential County information; and may not use compensated County time or other County resources in connection with her secondary employment activities.

**CONCLUSION**

Based on the facts presented and subject to the conditions set forth herein, a [REDACTED] may provide compensated business development, consulting and government relations services in Suffolk County, the City of New York, and towns and villages in Nassau County, as an independent contractor to a firm that represents municipalities among other clients.

The foregoing constitutes the opinion of the Board of Ethics.

Dated: Mineola, New York  
February 24, 2019



Kenneth L. Gartner, Chair

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NASSAU CO ATTORNEY