

FILE 2691 – April 3, 2017

CONFLICT OF INTEREST

JACKSONVILLE ETHICS COMMISSION MEMBER PARTNER IN LAW FIRM REPRESENTING CLIENTS IN LITIGATION INVOLVING CITY AND INDEPENDENT AGENCIES OF THE CITY

To: *Carla Miller, Director, Office of Ethics, Jacksonville*

SUMMARY:

No prohibited conflict of interest would be created under Section 112.313(7)(a), Florida Statutes, were a member of the Jacksonville Ethics Commission also to be a partner in a law firm that represents clients in litigation adverse to the City or its independent agencies, other than the Jacksonville Ethics Commission. Although the member would have a contractual relationship with each client of her firm, the clients are not regulated by or doing business with her agency—the Jacksonville Ethics Commission—and such contractual relationships would not create a continuing or frequently recurring conflict with, or impede, her public duties as a member. However, the firm must not represent any clients before the Commission or in any appeal of a decision rendered by the Commission. CEO 03-7, CEO 99-14, CEO 96-1, CEO 95-30, CEO 94-5, CEO 92-16, CEO 88-8, and CEO 77-14 are referenced.¹

QUESTION:

Would a prohibited conflict of interest be created were a member of the Jacksonville

¹ Prior opinions of the Commission on Ethics can be viewed at www.ethics.state.fl.us.

Ethics Commission also to be a partner in a law firm that represents clients in litigation adverse to the City or its independent agencies?

Your question is answered in the negative, under the circumstances presented.

In your letter of inquiry and in conversations with our staff, you state that you are requesting this opinion on behalf of a nominee for appointment to the Jacksonville Ethics Commission. You relate that pursuant to Section 1.202 of the Charter of the City of Jacksonville, the Jacksonville Ethics Commission is an independent board with jurisdictional authority to interpret and enforce the Ethics Code for the City contained in Chapter 602, Jacksonville Ordinance Code. The Commission has the authority to issue advisory opinions, adjudicate ethics offenses involving City officers and employees, and issue fines.² Determinations of the Commission are appealable to the Circuit Court. The Commission is comprised of six members. Each of the six members is nominated for appointment by one of the following—the Mayor, the President of the Council, the Sheriff, the Chief Judge of the Fourth Judicial Circuit, the State Attorney of the Fourth Judicial Circuit, and the Public Defender of the Fourth Judicial Circuit. You relate that the nominee, on whose behalf you are inquiring, has been nominated by the Public Defender. You further state that occasionally the personal injury law firm in which the nominee is a partner has been involved in tort litigation against the City and/or its independent agencies.³ Communications with the nominee

² Section 1.202, Jacksonville Ordinance Code, provides that the Jacksonville Ethics Code is applicable to all officers and employees of the consolidated government of the City of Jacksonville, its constitutional officers, and all employees of its independent agencies.

³ The Charter of the City of Jacksonville sets forth the creation and operation of certain independent city agencies including but not limited to the Jacksonville Aviation Authority, Jacksonville Port Authority, Jacksonville Housing Authority, Jacksonville Housing Finance Authority, Jacksonville Transportation Authority, and the Jacksonville Health Facilities

indicate that she and her firm are currently involved in litigation against the Jacksonville Transportation Authority (JTA). The JTA is an independent agency serving Duval County through the design and construction of bridges and highways and the provision of varied mass transit services. The nominee further clarified that pending the resolution of this advisory opinion request she has removed herself from the personal representation of her client in the litigation against JTA. The nominee has further specified that, if necessary, she will not personally engage in any litigation against the City or any of its independent agencies while serving on the Commission. You also relate that neither the nominee nor any member of her firm has ever appeared before the Commission on behalf of any client nor have they ever been involved in an appeal of any decision of the Jacksonville Ethics Commission.

In this context, you inquire, first, whether the nominee's service on the Jacksonville Ethics Commission while her firm is involved in litigation against the City or its independent agencies gives rise to a prohibited conflict of interest for her—and second, whether the nominee herself is prohibited by the State Code of Ethics for Public Officers and Employees from personally representing a client in ongoing litigation against the City or its independent agencies.

Pertinent to your inquiry is Section 112.313(7)(a), Florida Statutes, which provides:

CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.--No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . .; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or

her public duties, or that would impede the full and faithful discharge of his or her public duties.

The first part of Section 112.313(7)(a) would prohibit the nominee, should she become a member, from having a contractual relationship with any business entity or agency which is regulated by or doing business with her agency, the Jacksonville Ethics Commission. As an attorney and partner in her law firm, the nominee has a contractual relationship with her clients and all other clients of her firm. See, among others, CEO 03-7, CEO 96-1 (Question 2), and CEO 94-5. However, a lawsuit between a business entity and an agency does not constitute "doing business" for purposes of this statute (CEO 77-14) and there are no other facts present which suggest that the nominee's firm, or any client of her firm, is doing business with, or is regulated by, the Jacksonville Ethics Commission. Therefore, the first part of Section 112.313(7)(a) would not apply to prohibit the nominee's service on the Jacksonville Ethics Commission in the event that she, or a member of her firm, engages in the representation of a client in a matter adverse to the City or its independent agencies, including the JTA.

The second part of Section 112.313(7)(a) prohibits a public officer from having an employment or contractual relationship which creates a continuing or frequently recurring conflict between her private interests and the performance of her public duties, or which impedes the full and faithful discharge of her public duties. Under this part, we must examine the nature of an Ethics Commission member's public duties, along with the obligations of the nominee's private relationship as an attorney with her clients and the clients of her firm, to determine if the two are compatible. See Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982).

While we have found that the second part of Section 112.313(7)(a) is implicated when a public officer, or any member of his or her firm, represents clients in litigation adverse to the official's own agency, such is not the case here. Rather, the nominee and her firm will represent clients against agencies *other than* her own. In such circumstances, we have determined that no conflict of interest would be created under the second part of Section 112.313(7)(a) because there would be scant potential for overlap between the attorney's obligations to their clients engaged in litigation and the officer's public duties while serving in their official capacity. See CEO 99-14, CEO 95-30, and CEO 92-16.

The Jacksonville Ethics Commission is an independent collegial body tasked with interpreting and enforcing the Jacksonville Ethics Code as it applies to officers and employees of the City of Jacksonville and others subject to its jurisdiction. It is not an "advisory body" to the City Council for purposes of the City's Code of Ethics nor does it confer with or review the determinations of the City Council or its independent agencies with respect to the adjudication or resolution of any litigation pending against the City or any independent City agency. Moreover, neither the nominee nor any other attorney within her firm have ever appeared before the Jacksonville Ethics Commission or represented a client in an Ethics Commission matter, nor do they intend to do so while the nominee is a Commission member. Therefore, in the scenario you present, a situation wherein the nominee or her firm represents clients in litigation against agencies other than the Jacksonville Ethics Commission and involving personal injury matters wholly unrelated to the Jacksonville Ethics Commission or the Jacksonville Code of Ethics, such representation should have no impact on the decisions which the nominee makes while serving as an Ethics Commissioner. Thus, the representation of such clients would not create a continuing or

frequently recurring conflict or an impediment to the nominee's full and faithful discharge of her public duties as an Ethics Commissioner under the second part of Section 112.313(7)(a), Florida Statutes.⁴

However, were either the nominee or any member of the nominee's law firm to represent a client in a matter before her agency—the Jacksonville Ethics Commission—or in any appeal of such a matter, we believe that such representation would constitute a conflict of interest prohibited by the second clause of Section 112.313(7)(a), Florida Statutes. See CEO 88-8 and the opinions cited therein.

Your question is answered accordingly.

MFC/cmK

cc: Carla Miller, Esquire

⁴ We can conceive of certain circumstances wherein a prohibited conflict could arise, such as where an officer or employee of the City or independent agency being sued is the subject of an ethics complaint or where a member of the public files a complaint against an officer or employee of the City that is acting as a witness in litigation adverse to the City or an independent agency. The nominee should remain watchful for such factual scenarios and seek additional guidance, as necessary.

Anderson, Chris

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From: Miller, Carla <CarlaM@coj.net>
Sent: Wednesday, February 22, 2017 2:13 PM
To: Anderson, Chris
Subject: Question from Jacksonville Ethics Commission

Dear Mr. Anderson,

I would like to request an informal opinion from your office.

One of our Ethics Commissions members is appointed by our local Public Defender. He has recently appointed an outstanding attorney to be on the Commission: Leslie Scott Jean-Bart.

Leslie is employed with the law firm of Terrell Hogan, a personal injury firm. Her law firm occasionally is involved in tort litigation against the City or its Independent Agencies. (Example; bus accident, person injured, Terrell Hogan sues the Jacksonville Transportation Agency.)

Leslie will not be personally involved in any such cases while she is on the Ethics Commission.

Question: Is she prohibited from serving on the Ethics Commission due to 112.313 (3) or (7) if other members of her firm have tort litigation against the City or its Independent Authorities?

Because the Ethics Commission has the authority to adjudicate ethics offenses and issue fines, it does not appear that the section (12) exemption applies in this case.

Thank you for your assistance.

Carla Miller
Ethics Director

112.313 Standards of conduct for public officers, employees of agencies, and local government attorneys.—

(1) DEFINITION.—As used in this section, unless the context otherwise requires, the term “public officer” includes any person elected or appointed to hold office in any agency, including any person serving on an advisory body.

(3) DOING BUSINESS WITH ONE’S AGENCY.—No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer or employee or the officer’s or employee’s spouse or child is an officer, partner, director, or proprietor or in which such officer or employee or the officer’s or employee’s spouse or child, or any combination of them, has a material interest. Nor shall a public officer or employee, acting in a private capacity, rent, lease, or sell any realty, goods, or services to the officer’s or employee’s own agency, if he or she is a state officer or employee, or to any political subdivision or any agency thereof, if he or she is serving as an officer or employee of that political subdivision. The foregoing shall not apply to district offices maintained by legislators when such offices are located in the legislator’s place of business or when such offices are on property wholly or partially owned by the legislator.

(7) CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.—

(a) No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual

relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties. (12) EXEMPTION.—The requirements of subsections (3) and (7) as they pertain to persons serving on advisory boards may be waived in a particular instance by the body which appointed the person to the advisory board, upon a full disclosure of the transaction or relationship to the appointing body prior to the waiver and an affirmative vote in favor of waiver by two-thirds vote of that body.

112.312 Definitions.—As used in this part and for purposes of the provisions of s. 8, Art. II of the State Constitution, unless the context otherwise requires:

(1) “Advisory body” means any board, commission, committee, council, or authority, however selected, whose total budget, appropriations, or authorized expenditures constitute less than 1 percent of the budget of each agency it serves or \$100,000, whichever is less, and whose **powers, jurisdiction, and authority are solely advisory and do not include the final determination or adjudication of any personal or property rights, duties, or obligations**, other than those relating to its internal operations.