

FILE 2678—May 13, 2016

CONFLICT OF INTEREST; MISUSE OF POSITION; VOTING CONFLICTS

**COUNTY HUMAN SERVICES ADVISORY BOARD MEMBER
REPRESENTING A CLIENT IN LITIGATION AGAINST
ENTITIES FUNDED BY THE COUNTY**

To: *Robert B. Shillinger, Monroe County Attorney (Key West)*

SUMMARY:

A prohibited conflict of interest would be created under Section 112.313(7), Florida Statutes, were a member of a County Human Services Advisory Board to represent a plaintiff in a lawsuit against two nonprofit entities whose funding request must come before the Board. This conflict of interest could be negated by a waiver under Section 112.313(12), Florida Statutes. The member is advised to keep separate his private interests from his public responsibilities, thereby avoiding allegations of misuse of position or disclosure or use of certain information. Further, the member must abstain from voting and comply with the other requirements of Sections 112.3143(3) and 112.3143(4), Florida Statutes, regarding Board measures that will affect the two nonprofit organizations that are defendants to the lawsuit in which the member is serving as counsel.

Referenced are CEOs 16-02, 14-03, 12-01, 09-8, 06-24, 05-10, 03-7, 99-2, 98-11, 96-1, 94-5, 92-11, 90-10, 88-8, 86-37, 81-66.¹

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

QUESTION 1:

Would a prohibited conflict of interest be created were a member of a County Human Services Advisory Board to represent a client in litigation against two nonprofit organizations funded by the County pursuant to recommendations made by the Board?

This question is answered in the affirmative.

In your letter of inquiry and subsequent conversations with our staff you advise that you are requesting an opinion on behalf of a member of the County's Human Services Advisory Board (HSAB). You state that the HSAB was created by the Board of County Commissioners (BOCC) in 1991 to make funding recommendations for community-based nonprofit entities which provide health and social services for the citizens of the County. The HSAB is an advisory board consisting of five members, with each County Commissioner designating one HSAB member. Each year the BOCC sets the total amount that it will fund for the upcoming fiscal year for all entities that have filed applications for funding. The HSAB reviews funding requests for the qualifying nonprofit entities, and recommends specific funding allocations for each entity it deems worthy of funding. The BOCC makes the final decision for funding for each entity.

You further state that a current member of the HSAB is an attorney in private practice representing the plaintiff in a pending lawsuit filed against multiple defendants, including two nonprofit entities. You state that in prior years both of these entities were funded by the County through the HSAB process and both have submitted applications to the HSAB for funding in the upcoming fiscal year. You further relate that while HSAB funding must be used to fund

substantive programs of the respective nonprofit entity, the appropriation or non-appropriation of HSAB funding could affect the organization's overall budget, and thereby impact the entity's ability to devote resources to defense costs or satisfy any adverse judgments. Finally, you state that, because he serves on the HSAB, the member will be in a position to question representatives of the defendant nonprofit entities on matters that could benefit his private client's case and thus indirectly benefit him.

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 this statute prohibits a public officer from being employed by or having a contractual relationship with a business entity which is subject to the regulation of his agency or is doing business with his agency. We have long held that the "agency" of a member of an advisory board includes both the board as well as the governing body. See CEO 16-02, CEO 06-24, and CEO 05-10. As the HSAB advises the BOCC, the "agency" of HSAB board members includes the BOCC.

As an attorney and senior partner of his firm, the HSAB member has a contractual relationship with his client and every other client of his firm. See, among others, CEO 03-7, CEO 96-1 (Question 2), CEO 94-5, CEO 92-11, CEO 86-37, and CEO 81-66. However, nothing

in your materials suggests that the member's client is doing business with, or regulated by, the County. Therefore, this part of the statute does not apply.

The second part of the statute concerns whether the member's contractual relationship with his client—given the pending lawsuit against two entities seeking funding via the HSAB process—would create a continuing or frequently recurring conflict between his private interests and the performance of his duties as an HSAB member or would impede the full and faithful discharge of these duties. The District Court of Appeal in Zerweck v. State Commission on Ethics, 409 So. 2d 57, 61 (Fla. 4th DCA 1982) stated that this prohibition:

establishes an objective standard which requires an examination of the nature and extent of the public officer's duties together with a review of his private employment to determine whether the two are compatible, separate, and distinct or whether they coincide to create a situation which 'tempts dishonor.'

Section 112.312(8), Florida Statutes, defines "conflict" or "conflict of interest" as "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest." Applying Zerweck, in conjunction with the definition of "conflict" cited above, we must examine the nature of the HSAB member's public duties along with the obligations of his private relationship as an attorney with his client, to determine if the two are compatible.

The HSAB was created with the express purpose of analyzing, deliberating, and making recommendations to the BOCC regarding the funding applications of nonprofit entities which provide health and social services to citizens in the County. The two defendant nonprofit entities receive their funding based upon the recommendations of the HSAB, and currently have funding applications pending for consideration by the HSAB. Thus, in this matter the member's HSAB duties would involve determining whether the defendant nonprofit entities deserve funding—and if so, in what amount—in a fair and impartial manner.

As an attorney, the member has both an interest in a successful outcome to the litigation for his client and an obligation to act in his client's best interests. His client is suing two of the entities seeking funding through his board and his board's decisions with respect to the appropriation or non-appropriation of funding ultimately will affect the defendant nonprofit entities' overall budget; potentially impacting their ability to devote resources to litigation defense costs or satisfy an adverse judgment. The member will also have an opportunity to question the defendant entities' representatives—and the answers to those questions may be useful to his private client in the litigation.

These circumstances create an impermissible conflict of interest under the second part of Section 112.313(7)(a), Florida Statutes. The representation of a plaintiff in litigation against the respective nonprofit entities would impede the HSAB member's duty to impartially evaluate the funding applications of the defendant entities and to make objective determinations regarding whether funding the respective nonprofit entity is in the best interests of the County.² This conflict of interest would not be ameliorated were another attorney in the member's firm to take over representation of the plaintiff in the litigation, as an attorney has a contractual relationship with every partner and each client of his or her law firm, and because the firm, with which the

² In making our finding of a prohibited conflict, we do not impugn the character or personal integrity of the member. As the Zerweck court noted, the statute is purely preventative in nature, and requires no intentional or wrongful transgression on the part of the member such as would be required for a corrupt use of position under Section 112.313(6), Florida Statutes. We find no such transgression here; our opinion addresses only the incompatibility of serving on a board affecting the two entities' funding and simultaneously representing clients in a lawsuit against the entities.

member is inextricably intertwined, would remain on the case.³ See, for example, CEO 03-7 and CEO 88-8.

Section 112.313(12), Florida Statutes, provides for a waiver of conflicts of interest under Section 112.313(7)(a), Florida Statutes. Section 112.313(12), Florida Statutes, provides in pertinent part:

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 of that body. In instances in which appointment to the advisory board is made by an individual, waiver may be effected, after public hearing, by a determination by the appointing person and full disclosure of the transaction or relationship by the appointee to the appointing person.

The conflict of interest involved herein may be ameliorated were the BOCC to vote to waive the particular conflict of interest upon full disclosure by the HSAB member of the conflicting relationship on CE Form 4A prior to the waiver and an affirmative two-thirds vote of the BOCC, as the appointing body, waiving the conflict. See CEO 99-2. Absent such a waiver, a prohibited conflict would exist under the second part of Section 112.313(7)(a), under the circumstances you present.

QUESTION 2:

Would Section 112.313(6), Florida Statutes, be violated were the member to engage in the several actions discussed below?

Your question is answered as set forth below.

³ Similarly, we find that the referral of the case to another firm, with the member or his firm retaining a fee-sharing stake in the outcome, would not cure the conflict.

Assuming that the HSAB member were to successfully obtain a waiver of the above-referenced conflict of interest pursuant to Section 112.313(12), the member may continue to serve on the HSAB and participate in the deliberations regarding the funding applications of the applicant nonprofit organizations. However, such a scenario raises additional issues—which you raise in your inquiry—concerning the extent to which the member may ask questions of the defendant entities' representatives during the HSAB's deliberations and discussions of the entities' funding applications, the answer to which may glean information which could benefit his private client.

As a caveat, we direct your attention to the following provisions of the Code of Ethics:

MISUSE OF PUBLIC POSITION.—No public officer, employee of an agency, or local government attorney shall corruptly use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. [Section 112.313(6), Florida Statutes.]

DISCLOSURE OR USE OF CERTAIN INFORMATION.—No public officer or employee of an agency shall disclose or use information not available to members of the general public and gained by reason of his official position for his personal gain or benefit or for the personal gain or benefit of any other person or business entity. [Section 112.313(8), Florida Statutes.]

These provisions prohibit the member from using his official position to gain access to information which would not be available to the general public, and from otherwise using his official position in a manner inconsistent with the proper performance of his public duties for the benefit of any of his private clients. We do not know in advance what specific actions the member might take, and cannot prospectively rule on whether they may violate these provisions, particularly since Section 112.313(6) has a corrupt intent element and is not susceptible to analysis in the context of an advisory opinion. However, as we did in CEO 09-8 and CEO 90-10,

we advise that in order to avoid even the appearance of impropriety, the member should scrupulously separate his public role from his private pursuits in his interactions with entities that are subject to the determinations or input of the HSAB.

QUESTION 3:

Would the member be presented with a voting conflict under Sections 112.3143(3)(a) and 112.3143(4), Florida Statutes, concerning measures regarding the funding applications of nonprofit entities in the County?

Guidance is provided below.

Sections 112.3143(3)(a) and 112.3143(4), Florida Statutes, provide:

No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes. [Section 112.3143(3)(a), Florida Statutes]

No appointed public officer shall participate in any matter which would inure to the officer's special private gain or loss; which the officer knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained; or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer, without first disclosing the nature of his or her interest in the matter. [Section 112.3143(4), Florida Statutes]

In addition, Section 112.3143(4)(c), Florida Statutes, defines the term "participate" to mean "any

attempt to influence the decision by oral or written communication, whether made by the officer or at the officer's direction."

The voting conflicts statutes require that if a measure before a member's board would inure to his special private gain or loss, to that of his firm, or to that of a principal by whom he is retained, the officer would be required to comply with Sections 112.3143(3)(a) and 112.3143(4), Florida Statutes, by abstaining from voting and following the instructions for appointed officers on CE Form 8B. See e.g., CEO 03-7, CEO 94-5, and CEO 98-11.

Each year the BOCC sets the total amount of funding for the upcoming fiscal year for all of the entities applying for assistance. The HSAB then meets to review the funding requests from the qualifying nonprofit entities and ask questions of the applicant representatives regarding the particularities of their respective funding request. Pursuant to these deliberations specific funding levels are ascribed to each entity which affect the availability of funding for the remaining applicants. Once a funding consensus regarding the applicant funding levels of each entity has been determined by the board, it votes to approve the recommended funding levels via a single vote.

Initially, we recognize that the HSAB's appropriation or non-appropriation of funding to the two defendant entities will affect their overall budget and may impact their ability to devote resources to their defense costs or to satisfy a judgment—to the advantage or disadvantage of the member's client. Therefore, measures before the HSAB concerning the funding applications of the two nonprofit entities that are defendants in the pending litigation will present a voting/participation conflict. In addition, however, our analysis of the HSAB's deliberative process used to derive the ultimate funding levels for each applicant indicates that its determination with respect to the level of funding for one applicant affects the availability of funding for all remaining applicants, including

the two defendant entities. Due to the interrelatedness and interconnected nature of the allocation of a limited fund amongst many applicants, we cannot say that the two defendant applicants are only affected by the deliberation and determination on their specific applications. For this reason, we find that so long as the member maintains a contractual relationship with his client, the plaintiff to pending litigation against two of the nonprofit entity applicants, or he or his firm has a fee interest in the outcome of the case, he should abstain from voting on all measures involving the funding applications of the nonprofit entities, including those of the two defendant entities, and comply with the additional requirements of Section 112.3143(3)(a) (i.e., declare the conflict and timely file a CE Form 8B memorandum of voting conflict).⁴

With respect to the member's ability to participate in the discussion of such measures, Section 112.3143(4), Florida Statutes, prohibits such participation, unless the member first complies with the disclosures and actions required therein (see the instructions on Form 8B for appointed officers).

Your questions are answered accordingly.

cc: Mr. Robert B. Shillinger

SMW/cmk

⁴ Compliance with the voting conflicts laws (Sections 112.3143(3)(a) and 112.3143(4), Florida Statutes) does not negate a prohibited conflict of interest under Section 112.313(7)(a), Florida Statutes. See CEO 03-7 and CEO 94-5.

County of Monroe
The Florida Keys



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April 26, 2016

Virlindia Doss, Executive Director
The Florida Commission on Ethics
P.O. Drawer 15709
Tallahassee, FL 32317-5709

Submitted via email to doss.virlindia@leg.state.fl.us

Re: Advisory Opinion for David Paul Horan, member of Monroe County's Human Services Advisory Board.

Dear Ms. Doss:

On behalf of Mr. David Paul Horan, a member of the Monroe County Human Services Advisory Board (HSAB)¹, we seek an advisory opinion from the Florida Commission on Ethics and, if possible, an informal written opinion from staff. The HSAB is scheduled to meet on June 1, 2016 to consider making recommendations to the BOCC on funding allocations for the upcoming fiscal year. After speaking with Ethics Commission General Counsel Chris Anderson, it is our understanding that the Commission on Ethics will not meet until June 3, 2016 so an informal staff opinion is preferable if one can be rendered. Both Mr. Horan and the Board of County Commissioners (BOCC) of Monroe County authorized this office to seek this opinion.

The BOCC created the HSAB in 1991 to make funding recommendations for community-based non-profit agencies which provide needed health and social services for the citizens of Monroe County. The HSAB advisory board consists of five (5) members, each of whom is appointed by a County Commissioner.

Each year, the BOCC sets the total amount that it will fund for the upcoming fiscal year for all of the entities applying for assistance. The HSAB reviews funding requests from the qualifying non-profit entities and recommends to the BOCC specific funding allocations for each entity the HSAB deems worthy of funding. The BOCC makes the final decision on funding for each entity.

Mr. Horan, an attorneyⁱⁱ in private practice, is currently representing the Plaintiff in an action for damages which he filed in the U.S. District Court for the Southern District of Florida against multiple Defendants, including two not-for-profit organizations. Both organizations were funded by the County through the HSAB process in prior years and both have submitted timely applications to the HSAB for funding in the upcoming fiscal year. While HSAB funding must be used to fund the substantive programs of an entity, the appropriation or non-appropriation of HSAB funding could affect the organization's overall budget thus indirectly affecting that entity's ability to devote resources to defense costs or satisfy any judgments.

Given Mr. Horan's representation of a Plaintiff in litigation against organizations which routinely appear before the HSAB, we are seeking guidance as to whether he has any type of prohibited conflict under F.S. 112.313(6) or (7), F.S. 112.3143, or any other applicable provision of chapter 112. As a member of the HSAB, Mr. Horan will be in a position to question representatives of these organizations on matters that may potentially benefit his private client's case and thus him indirectly. Absent a recusal, he will vote on funding recommendations for both organizations.

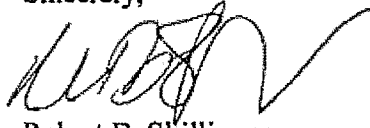
Our questions can be stated as follows:

1. Could a vote by Mr. Horan on funding or participation in the funding process of a defendant organization be viewed as a misuse of his public position in violation of F.S. 112.313(6)?
 - a. Could a vote by Mr. Horan in favor of funding for a defendant entity be viewed as a misuse of his public position by means of providing that entity with program funds so it would have the ability to divert other funds in its coffers to provide the relief Mr. Horan seeks for his client through the litigation?
 - b. Conversely, could a vote by Mr. Horan against funding for a defendant entity be viewed as a misuse of his public position so as to deprive that organization of program funding which could cause that entity to divert other funds that it would otherwise have spent towards the defense of litigation to cover underfunded program costs?
 - c. Even if Mr. Horan recused himself from voting on the funding levels from both organizations which he has sued, would his vote regarding the level of funding for the remaining HSAB applicants, which would indirectly affect the available funding for the two organizations he sued, be a misuse of his position?
2. Would any violation exist if Mr. Horan were to use his position on the HSAB as an opportunity to ask questions of a defendant organization's representative the answer to which would benefit his private client in the litigation? Would the analysis be different if the answer to the question posed served a dual purpose, i.e., helpful to the litigation and also relevant to the funding decision before the HSAB?
3. Does this situation amount to "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" in violation of F.S. 112.313(7)(a)?

4. Does this situation amount to a voting conflict under F.S. 112.3143(3)?
5. Assuming there is a voting conflict, would his participation in the discussion over the matter be prohibited by F.S. 112.3143(4)?
6. Are any of these conflicts waivable? If so, what steps must be taken to effectuate such a waiver. Who would need to take those steps?

We thank you for your expedited consideration of this request. Please contact Assistant County Attorney Christine Limbert-Barrows or me at 305-292-3470 should you have any questions.

Sincerely,



Robert B. Shillinger
Monroe County Attorney

Cc: David Paul Horan, Esq.
Monroe County BOCC
Monroe County Human Services Advisory Board members

ⁱ Additional information on the Human Services Advisory Board of Monroe County can be found at: <http://www.monroecounty-fl.gov/index.aspx?nid=318>.

ⁱⁱ Any issue involving Rule 4-4.2 of the Florida Bar's Rules of Professional Conduct is beyond the scope of this inquiry. We take no position on that issue, which we view as a matter between the Florida Bar and Mr. Horan.

Anderson, Chris

From: Shillinger-Bob <Shillinger-Bob@MonroeCounty-FL.Gov>
Sent: Wednesday, April 27, 2016 9:53 AM
To: Anderson, Chris
Cc: Limbert-Christine; 'David P. Horan'; Doss, Virindia; DeloachHartle-Laura
Subject: RE: Request for Ethics Commission Opinion

Chris:

To follow up on our phone call from yesterday about this matter, I am advised by County staff that we can postpone the HSAB meeting currently scheduled for June 1st to a date towards the end of June. This would allow for the Ethics Commission to consider this matter at its June 3rd meeting. It is my understanding that if the Ethics Commission reaches a decision on Friday June 3rd, the opinion won't be released until five working days following the meeting so by June 10th. Please confirm my understanding.

Thank you for your assistance with this matter.



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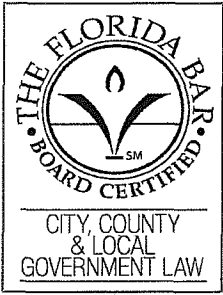
From: Shillinger-Bob
Sent: Tuesday, April 26, 2016 9:14 AM
To: 'doss.virlindia@leg.state.fl.us'
Cc: anderson.chris@leg.state.fl.us; Limbert-Christine; David P. Horan
Subject: Request for Ethics Commission Opinion

Dear Ms. Doss:

Attached please find a letter requesting an advisory opinion regarding whether David Paul Horan, Esq., a member of Monroe County's Human Services Advisory Board (HSAB), has a conflict of interest because he has filed suit in his private capacity on behalf a client against entities seeking funding from the HSAB. We spoke with Chris Anderson last week and he suggested, in light of some time constraints, that we seek an informal staff opinion if that is possible.

Please do not hesitate to contact Assistant county Attorney Christine Limbert-Barrows or me at 305-292-3470 or via email if you have any questions.

Respectfully,



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