FILE 2803 – October 20, 2023

CONFLICT OF INTEREST; VOTING CONFLICTS

MEMBER OF COUNTY COMMISSION LOBBYING FOR COMPENSATION ON BEHALF OF MUNICIPAL CLIENTS BEFORE FEDERAL AND STATE GOVERNMENT AGENCIES OTHER THAN HIS COUNTY

To: Geoffrey D. Smith, Esq. (Melbourne)

SUMMARY:

Under the specific circumstances presented, a prohibited conflict of interest would not be created under Section 112.313(7)(a), Florida Statutes, were a county commissioner, who is a non-attorney employee of a law firm, to lobby for compensation on behalf of municipal clients, so long as the lobbying is not before the County where he serves. Votes concerning the municipal clients also would not present a conflict for the commissioner under Section 112.3143(3)(a), Florida Statutes, as the law expressly exempts from its requirements measures affecting a principal by whom one is retained, if that principal is a public "agency." Referenced are CEO 22-1, CEO 20-8, CEO 20-6, CEO 19-10, CEO 19-2, CEO 18-12, CEO 16-2, CEO 15-8, CEO 15-1, CEO 14-27, CEO 14-2, CEO 13-4, CEO 12-21, CEO 10-24, CEO 10-20, CEO 09-10, CEO 08-20, CEO 08-13, CEO 07-13, CEO 06-12, CEO 04-6, CEO 03-11, CEO 03-3, CEO 02-7, CEO 00-3, CEO 97-10, CEO 96-1, CEO 95-21, CEO 94-41, CEO 94-5, CEO 90-8, CEO 89-29, CEO 88-8, CEO 80-79, CEO 80-25, and CEO 77-22.

QUESTION 1:

Will a member of a county commission have a prohibited conflict of interest under

Section 112.313(7)(a), Florida Statutes, if he lobbies for compensation on behalf of municipal clients before the federal government, the state legislature, state government bodies or agencies, or political subdivisions of the state other than his county?

Question 1 is answered as follows.

In your letter of inquiry and additional information provided to our staff, you indicate you are inquiring on behalf of a County Commissioner whether he will have a prohibited conflict of interest were he to lobby for compensation on behalf of municipal clients before federal, state, and local government agencies other than the County where he is serving. You relate the County Commissioner was recently appointed to the Board of County Commissioners. You state the Commissioner—who is not an attorney—served as the Director of Government Relations at your law firm prior to being appointed, and still holds that position. You indicate the Commissioner was responsible for providing lobbying services on behalf of the firm for three municipalities within his County—the City of Satellite Beach, the City of Indialantic, and the City of Cape Canaveral. You relate the municipalities paid the firm a monthly flat fee for the Commissioner's services.

However, you indicate the Commissioner resigned from all lobbying engagements, including lobbying on behalf of the three municipalities, once he was appointed to the County Commission in June 2023. His reason for stepping back from lobbying was to comply with Article II, Section 8(f)(2) of the Florida Constitution, a prohibition that stated:

> A public officer shall not lobby for compensation on issues of policy, appropriations, or procurement before the federal government, the legislature, any state government body or agency, or any political

subdivision of this state, during his or her term of office.[1]

You relate that once the Commissioner resigned from lobbying, the City of Cape Canaveral cancelled its contract with the firm and sought its lobbying services elsewhere. The other two municipalities—the Cites of Satellite Beach and Indialantic—began contracting with a consultant outside the firm to assume lobbying duties, and the consultant subcontracted with the firm for it to provide legal support as needed related to the lobbying. You relate that since June 2023, when the Commissioner was appointed and lobbying services were transferred to the consultant, no legal support has been required of the firm.

Your inquiry stems from the fact that a federal district court recently issued a permanent injunction against enforcing the prohibition in Article II, Section 8(f)(2), Florida Constitution, against all public officers, finding it unconstitutional. See Garcia v. Stillman, Case No. 22-CV-24156, 20235095540 (S.D. Fla. August 9, 2023). In light of the injunction against enforcing the constitutional prohibition, you ask whether the Commissioner will have a prohibited conflict of interest under any other prohibitions over which the Commission on Ethics has jurisdiction were he to begin lobbying again for one or more of these municipal clients. From what you indicate, the lobbying contracts would be between the municipalities and the firm—although the Commissioner would be named in the contract as the designated lobbyist—and would be, as before, for a flat fee. You state the Commissioner would be lobbying for the municipalities before the federal government, the state legislature, state government bodies and agencies, and political subdivisions of the state, although you emphasize he would not engage in any lobbying before the County where

[1] The term "public officer," as used in the constitutional prohibition, was defined in Article II, Section 8(f)(1), Florida Constitution, to include county commissioners.

he is serving as a County Commissioner.[2]

As you indicate in your materials, Section 112.313(7)(a), Florida Statutes, is the statute most relevant to your inquiry. It states:

> 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, any 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 the statute prohibits the County Commissioner from having a contractual relationship with a business entity or an agency if that entity or agency is doing business with, or is subject to the regulation of, the Commissioner's agency. For purposes of Section 112.313(7)(a), the "agency" of a county commissioner is the county commission. See CEO 20-6, n.3 and CEO 19-10, Question 1. Here, then, the question under the first part of Section 112.313(7)(a) is whether the Commissioner will have an employment or contractual relationship with a business entity or agency that is engaged in a business or regulatory interface with the County Commission were he to lobby for the municipalities pursuant to a contract between the municipalities and his firm.

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[2] While the prohibition in Article II, Section 8(f)(2), Florida Constitution, would have been relevant to your question, we confine our analysis here to laws that are currently in effect. We note the decision permanently enjoining the constitutional prohibition has been appealed, and a motion has been filed to stay the injunction during the pendency of the appeal. If the stay is granted or if the permanent injunction is overturned, the Commissioner should contact the Commission on Ethics for further guidance regarding the constitutional prohibition's applicability to the scenario presented.

Clearly, the County Commissioner will have an employment or contractual relationship with his law firm in this scenario. And we recognize that, in the past, we consistently have found that members of law firms—such as partners, shareholders, and associates—have a contractual relationship with each client of the firm, regardless of whether they perform or supervise work regarding that particular client. See CEO 10-20 and CEO 94-5. This reflects the legal principle that each attorney at a law firm has a professional obligation to fulfill the firm's client contracts. See CEO 02-7, Question 1 and CEO 80-79. However, we have never extended this reasoning, which is based on the fiduciary obligations of attorneys, to non-attorney employees of a firm, finding instead that their relationship is only with the firm itself. See CEO 94-41 (finding for purposes of Section 112.313(7)(a) that a paralegal has only an employment relationship with her law firm); see also R. Regulating Fla. Bar 4-8.8(a) (stating a "contract for legal services [only creates] legal relationships between the client and the law firm and between the client and the individual members of the law firm").

Here, you indicate the County Commissioner is not an attorney. As such, he is not subject to the same obligations as the lawyers at the firm, and may not own an interest in or serve as a corporate director or officer of the firm. See R. Regulating Fla. Bar 4-5.4(e). Moreover, you state any potential lobbying contract will be between the municipalities and the law firm, not the municipalities and the County Commissioner personally. For these reasons, we find the County Commissioner will only have a contractual relationship to his employer, the law firm, and, therefore, that the first part of Section 112.313(7)(a) will be inapplicable, as there is no indication that the law firm is engaged in a business or regulatory relationship with the County.

In coming to this conclusion, we are aware that the County Commissioner's experience

and status as the Director of Government Relations at the firm likely will be what attracts the municipal clients to use the firm's lobbying services. Indeed, you indicate the lobbying contracts will designate that he will be performing the lobbying. In the past, we have found a public officer may not be insulated from the first part of Section 112.313(7)(a) when a client is contracting with that officer's company for the specific intent and purpose of receiving his or her services. See CEO 19-2, CEO 14-27, and CEO 14-2. However, these opinions, which essentially find the public officer to be in privity with those entities contracting with his or her company, have been limited to situations where the public officer was an owner or principal of the company. See CEO 19-2, Question 4 (reaching this conclusion as the public officer was the "human principal or owner" of the company). This is because the concept of holding an individual responsible for a corporation's obligations is tied to "piercing the corporate veil," a legal principle allowing a shareholders to be held responsible, in certain situations, for the actions of their companies due to their close oversight of those companies. See Segal v. Forastero, Inc., 322 So. 3d 159, 162 (Fla. 3d DCA 2021). Piercing the corporate veil typically is used when shareholders form a corporation to accomplish a fraudulent purpose or intend for the corporation to engage in fraudulent conduct, and exercise such dominion and control over the corporation that it has no existence apart from them. See BEO Management Corp. v. Horta, 314 So. 3d 434, 437 (Fla. 3d DCA 2020). The Commission on occasion has applied this concept to the first part of Section 112.313(7)(a), finding that a public officer cannot escape the application of the statutory prohibition simply by forming a corporation to enter into contracts that he or she would be prohibited from entering into personally. See CEO 14-2, Question 2 and CEO 80-25 (stating a public officer should not be allowed to "circumvent" Section 112.313(7)(a) by "own[ing] a

corporation" and using it to enter into otherwise prohibited relationships).

However, as mentioned, the Commission has never applied this concept to find mere employees of a business (i.e., non-principals/non-owners) in privity with the business's clients. Here, the County Commissioner is not an owner or shareholder of the law firm, and there is no indication that he exercises any comparable control over the firm itself. Accordingly, while we acknowledge clients will likely use the firm's lobbying services with the expectation that the Commissioner will be involved, this does not mean he has a contractual relationship with those clients. His contractual relationship will only be with the firm itself, and, assuming the firm continues to have no business or regulatory interface with the County, the first part of Section 112.313(7)(a) will not apply if the firm assigns him to lobby on behalf of municipal clients.[3]

Turning to the second part of Section 112.313(7)(a), the statute prohibits the County Commissioner from holding employment or a contractual relationship that would create a continuing or frequently recurring conflict between his private interests and the performance of his public duties or that would impede the full and faithful discharge of his public duties. See CEO 22-1 and CEO 18-12. For the purposes of the statute, the phrase "conflict of interest" is defined in Section 112.312(8), Florida Statutes, to mean "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest." To determine whether such a conflict has occurred, the Fourth District Court of Appeal held in Zerweck v. State, Commission on Ethics, 409 So. 2d 57, 61 (Fla. 4th DCA 1982), that the Commission must examine:

> The nature and extent of the public officer's duties together with a

[3] As should be clear from this discussion, this opinion is narrowly tailored to your inquiry's unique facts (i.e., the County Commissioner being a non-attorney, non-shareholder employee of a law firm) and should not be interpreted as being automatically applicable to attorneys employed by or affiliated with the firm.

> 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.'

Because a particular set of circumstances tempting dishonor could be conceived for any number of employment or professional opportunities available to a public officer, we traditionally confine our analysis under the second part of Section 112.313(7)(a) to whether there is something inherent in the proposed employment or contract that is likely to create a prohibited conflict. See CEO 08-20. The question here, therefore, is whether—under the second part of Section 112.313(7)(a)—the County Commissioner's contractual relationship with the law firm inherently could tempt him to compromise his public duties if the firm assigns him to lobby on behalf of these municipal clients.

One example where a prohibited conflict has been found under the second part of the statute is if the public officer is personally representing or lobbying a client on a matter before his or her own board. See CEO 20-8, Question 1 and CEO 00-3, Question 2. For this reason, the County Commissioner here would be prohibited from personally lobbying the County Commission on behalf of a municipal client. But you indicate the Commissioner would confine his lobbying to federal and state government agencies other than the County (i.e., the federal government, the state legislature, state government bodies/agencies, and political subdivisions of the state other than his county). In the past, when a public officer has sought to represent and/or lobby clients before governmental entities other than his or her own, we have found such conduct, without more, does not create a prohibited conflict of interest under second part of Section 112.313(7). See CEO 03-11 (finding a member of the Florida Senate could represent a public hospital on a variety of issues, including representation before county governments); CEO

77-22 (finding a member of the Florida Senate could appear on behalf of private clients before the board of county commissioners of a county within his district). We adhere to these prior opinions here, as it cannot be said that lobbying government agencies other than the County—presumably on issues unrelated to the County—will inherently tempt the County Commissioner to compromise his public duties. This answers the relatively straightforward question of whether the County Commissioner will have an inherent conflict of interest under Section 112.313(7)(a) if he lobbies before government agencies other than the County.

Your inquiry becomes more complex, however, as you indicate the three municipal clients here have interlocal agreements with the County. From what you relate, you are unaware of the specific details of the agreements, although you believe they pertain to sharing the cost for different projects and services (i.e., environmental projects and ocean lifeguards), and for the provision of services (fire rescue automatic aid). You believe that issues regarding these agreements do not frequently come before the County Commission.

Importantly, there is no indication in your inquiry that the County Commissioner's law firm intends to lobby the County regarding any of these agreements, which is an issue separate and apart from whether the Commissioner can lobby before other government agencies, and would require a separate analysis under the second part of Section 112.313(7)(a). However, even assuming the law firm is not involved with these interlocal agreements, we still must examine whether the County Commissioner will be in violation of the second part of Section 112.313(7)(a) if he lobbies on behalf of the municipalities while they simultaneously have agreements with the County.

This question is not new. In the past, we have considered whether a public officer may

accept employment, or enter into a contractual relationship, with an employer or client that has matters coming before the officer's own board. Consistently, we have found the second part of Section 112.313(7)(a) will not be violated, so long as the public officer refrains from lobbying his or her own agency on the client's behalf.

For example, in CEO 89-29, we addressed whether the second part of Section 112.313(7)(a) would be violated were a city commissioner to be employed as the executive director of a municipal chamber of commerce when that chamber was lobbying the city commission on matters of community interest. We stated the following:

> We are of the opinion that so long as your employment does not encompass activities related to lobbying the City Commission, your employment [with the chamber] would not be violative of Section 112.313(7)(a). In our view, lobbying activities include not only actual contact through physical attendance at meeting of City officials and employees, the submission of written materials, and personal communication with City officials and employees in an effort to encourage the passage, defeat, or modification of any measure before the City Commission, but also directing the activities of those who will contact the City, participating in setting the strategies of whom to contact and what to say, and assisting in preparing amendment to documents in support of the Chamber's position. In other words, a city commissioner should not be banned from being employed by an entity which engages in lobbying the city on a regular basis regarding issues of the nature described here, but this employment should be completely separated from the lobbying activities of his employer.

(emphasis added).

We later used this reasoning in CEO 15-1, Question 1, which involved a city councilmember serving as president of a chamber of commerce that received an annual grant from the city and lobbied the city on issues of general interest in the community. We advised the councilmember, pursuant to CEO 89-29, that he would not have a conflict under the second part

of Section 112.313(7)(a) if he "divorced" his chamber role from any lobbying before the council.

Similarly, in CEO 04-6, a city councilmember was employed by a private economic development council that occasionally requested funding from the city council and lobbied the city council on various other issues. Even though the councilmember was employed by a private entity that was—in a strict sense—lobbying her agency, we concluded there was no potential conflict with her public responsibilities under the second part of Section 112.313(7)(a). We based our reasoning on the fact that the development council's lobbying efforts before the city council were minimal, although we emphasized the councilmember should not advocate on behalf of the development council before the city.[4]

These opinions deal with employers other than law firms. As previously discussed, attorneys at law firms have a contractual relationship—and, therefore, a duty of loyalty—with each client of their firm. This can create a conflict under the second part of Section 112.313(7)(a) if a client has a matter before an attorney's public board. See CEO 10-24, 09-10, 07-13, Question 1, and CEO 96-1. However, the County Commissioner here is not an attorney and, for that reason, the analysis under the second part of Section 112.313(7)(a) is more akin to three opinions cited above.

Moreover, we have recognized that, even with law firms, the nature of the client and the

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[4] In addition to these opinions, we consistently have held that members of the State Legislature may accept employment or enter into contractual relationships with business entities that lobby the Legislature, so long as they play no role in the efforts to lobby the Legislature. See CEO 13-4, Question 2, CEO 08-20, CEO 06-12, CEO 03-11, CEO 03-3, Question 1, CEO 95-21, and CEO 90-8, Question 2. We note the dynamics of local government (where even populous counties are governed by boards with relatively small memberships) is qualitatively different than that of the State Legislature (a two-house body totaling 160 members). For this reason, the opinions addressing the State Legislature, while offered here for context, have limited applicability at the local level. See CEO 09-10 and CEO 03-3, n.11.

frequency of the client's interface with the public officer's agency may, on occasion, weigh against a strict application of the second part of Section 112.313(7)(a). In CEO 12-21, a candidate for county commission inquired whether, if elected, his firm could serve as special counsel for a municipality within the county. The county and the municipality were engaged in litigation and had several interlocal agreements between them. First and foremost, we noted the commissioner's firm was not providing legal services to the municipality in any matters involving the county. We then determined that while "there may be some who have concerns that the candidate would lack objectivity or be biased in favor of the City due to his long-time representation of it[,]" the second part of Section 112.313(7)(a) would nevertheless be inapplicable. Key to our reasoning was that the county and the city were separate agencies, and the county commission did not exercise any budgetary or regulatory authority over the city. We also noted that the interface between the county and the city was infrequent. In other words, despite the presence of interlocal agreements between the commissioner's agency and a client, the clear separation and infrequent contact between his agency and the client negated the application of the second part of the statute.

Consistent with these past opinions, we find the second part of Section 112.313(7)(a) will not apply to the scenario you present, provided that the County Commissioner refrains from lobbying, or assisting anyone in lobbying, the County on behalf of the municipal clients. Several other reasons unique to your inquiry buttress this finding.

First, it appears the interface between the County and the municipal clients will be limited. While the municipalities are all located within the County, we note that counties and

cities are separate "agencies"[5] and "political subdivisions."[6] As such, this is not an instance where the County Commissioner will be called upon regularly to make budgetary or regulatory decisions favorable to the municipalities, as the County lacks that degree of oversight. See CEO 12-21 (stating "[c]ounties do not 'regulate' municipalities"). And while there are interlocal agreements between the County and the municipal clients, you believe issues regarding them will be presented to the County Commission only infrequently. These same factors alleviated our concerns in CEO 12-21, which dealt with very similar facts, as described above.

Second, while an argument could be made that the County Commissioner may be more predisposed towards his municipal clients when issues concerning the interlocal agreements do arise, however infrequent, this is countered by the nature of the Commissioner's employment with the law firm. As a non-attorney, he does not owe a fiduciary duty of loyalty to the municipal clients, unlike the attorneys employed by his firm. See CEO 09-10 and CEO 96-1, Question 1. Even more importantly, you indicate the firm pays the County Commissioner a set annual salary that does not fluctuate up or down, except for the type of periodic pay increases offered by any business. And while you indicate all members of the firm are eligible for periodic bonus compensation, there is no right or entitlement to a bonus. Because the County

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[5] The term "agency" is defined in Section 112.312(2), Florida Statutes to mean:

> Any state, regional, county, local, or municipal government entity of this state, whether executive, judicial, or legislative; any department, division, bureau, commission, authority, or political subdivision of this state therein; any public school, community college, or state university,; or any special district as defined in s. 189.012.

[6] The term "political subdivision" is defined in Section 1.01(8), Florida Statutes, to mean counties, cities, towns, villages, special tax school districts, special road and bridge districts,

Commissioner's salary does not depend upon his acquiring or retaining clients, it does not create an incentive for him to decide matters in favor of any municipal clients assigned to him. In short, his salary will remain the same regardless of whether he votes in favor or against the interests of a municipal client as a County Commissioner.

Third, it is unlikely the issues for which he will be lobbying other government agencies will be related to the interlocal agreements with the County. Given the insular nature of interlocal agreements, which conceivably are of relevance only to the agencies involved, it is unlikely that municipal clients will be hiring the County Commissioner to lobby other agencies on matters pertaining to the County.

And, fourth and finally, we assume the issues for which he will be lobbying other governmental agencies will not be contrary to the County's interests. However, were municipal clients to ask him to lobby on matters that could be detrimental to the County, such as, for example, to obtain scarce resources or grants for which the County is also competing, or on issues related to litigation against the County, the second part of Section 112.313(7)(a) could apply. See, generally, CEO 16-2 (finding a teacher's personal representation of a client in a legal proceeding against her school district created an adversarial relationship that could affect her ability to fully discharge her public duties), CEO 97-10 (finding public officer's service as a personal representative to an estate involved in litigation against his agency violated the second part of Section 112.313(7)(a)), and CEO 88-8 (advising a mayor that his employment with a law firm engaged in litigation against his city created a conflict under the second part of Section 112.313(7)(a)).

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bridge district, and all other districts in this state.

Although the County Commissioner will not have a prohibited conflict of interest under Section 112.313(7)(a) if he lobbies for compensation on behalf of municipal clients before government agencies other than the County, we caution him that such lobbying is rife with ethically complex scenarios, and may make his ethical obligations as a steward of the public trust complicated to navigate. For this reason, we offer the following discussion to highlight other ethical standards under the Code of Ethics with which he will have to comply.

In particular, we draw attention to the prohibitions in Article II, Section 8(h)(2), Florida Constitution,[7] and Section 112.313(6), Florida Statutes,[8] which prohibit him from misusing or abusing his public position or the resources of his position to benefit himself or an employer, among others. While the scenario presented here does not automatically present a prohibited conflict of interest under these prohibitions, the County Commissioner will have to be vigilant and careful not to use his position in any way to further the lobbying interests of any municipal client. For instance, using his position as a County Commissioner to arrange a meeting or gain

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[7] Article II, Section 8(h)(2), Florida Constitution, states:

> A public officer or public employee shall not abuse his or her position in order to obtain a disproportionate benefit for himself or herself; his or her spouse, children, or employer; or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest.

[8] Section 112.313(6), Florida Statutes, states, in relevant part:

> No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resources 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.

access to persons or information, but then using that meeting or access for the benefit of a client, might violate these prohibitions.

Moreover, Section 112.313(2), Florida Statutes,[9] will prohibit him from soliciting or accepting anything of value based on an understanding that his official action or judgment will be influenced. And, similarly, Section 112.313(4), Florida Statutes,[10] will prohibit him from accepting anything of value when he knows, or should know, that it is being given in an effort to influence him. If, for example, a municipal client were to extend a lucrative lobbying contract to the County Commissioner's firm, and the circumstances indicated the client expected favorable treatment in return on matters before the County Commission, these statutes might apply.

Further, Section 112.313(8), Florida Statutes,[11] will prohibit the County Commissioner

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[9] Section 112.313(2), Florida Statutes, states:

> No public officer, employee of an agency, local government attorney, or candidate for nomination or election shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, based upon any understanding that the vote, official action, or judgment of the public officer would be influenced thereby.

[10] Section 112.313(4), Florida Statutes, states:

> No public officer, employee of an agency, or local government attorney or his or her spouse or minor child shall, at any time, accept any compensation, payment, or thing of value when such public officer, employee, or local government attorney knows, or, with the exercise of reasonable care, should know, that it was given to influence a vote or other action in which the officer, employee, or local government attorney was expected to participate in his or her official capacity.

[11] Section 112.313(8), Florida Statutes, states:

> A current or former public officer, employee of an agency, or local

from sharing any nonpublic information with a municipal client that he obtained by means of his position on the County Commission, if it might benefit the client.

Question 1 is answered accordingly.

QUESTION 2:

Does a member of a county commission have a voting conflict under Section 112.3143(3)(a), Florida Statutes, were he to vote on measures affecting municipal clients of his law firm for whom he is performing lobbying services?

Question 2 is answered as follows.

You also inquire whether the County Commissioner will have any voting conflicts under Section 112.3143(3)(a), Florida Statutes, were votes to arise concerning municipalities for which he is performing lobbying services. Section 112.3143(3)(a), which is the portion of the voting conflict statute applicable to local officers, provides:

> 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 corporation parent 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 insure to the special private gain or loss of a relative or business associate of the public officer.

> government attorney may not disclose or use information not available to members of the general public and gained by reason of his or her official position, except for information relating exclusively to governmental practices, for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity.

The statute, among other things, prohibits the County Commissioner from voting on any measure that will inure to his special private gain or loss, or to the special private gain or loss of a principal by whom he is retained. And Section 112.3143(1)(d), Florida Statutes, states the phrase "special private gain or loss" means "an economic benefit or harm ... ."

Importantly, the term "principal by whom retained" is defined in Section 112.3143(1)(a), Florida Statutes, to mean "an individual or entity, other than an agency defined in s. 112.312(2), that for compensation, salary, pay, consideration, or similar thing of value" has directed the public officer to act on its behalf, "and includes, but is not limited to, one's client [or] employer[.]" (emphasis added). In the past, we have found non-attorney lobbyists employed by law firms should treat their firms and their individual clients as "principals" for purposes of Section 112.143(3)(a). See CEO 08-13. Here, however, the clients in question would be municipalities, which are considered "agencies" under Section 112.312(2), and, therefore, are expressly exempt from the definition of "principal by whom retained." See CEO 15-8, Question 2. Accordingly, the County Commissioner would not be presented with a voting conflict under Section 112.3143(3)(a) regarding votes bringing special private gain or loss to municipal clients, but must treat as a voting conflict any measure that, directly or indirectly, could bring special private gain or loss to his firm.

Question 2 is answered accordingly.

AL/gps/ks

cc: Geoffrey D. Smith, Esq.

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August 14, 2023

Kerrie Stillman VIA EMAIL (Stillman.Kerrie@leg.state.fl.us) AND REGULAR MAIL
Executive Director
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RE: Request for Ethics Opinion

Dear Ms. Stillman,

On behalf of Commissioner Jason Steele, District 5 Commissioner – Brevard County, Florida, the undersigned attorney requests an ethics opinion regarding whether a prohibited conflict of interest or recurring voting conflict would exist if Commissioner Steele were to lobby for compensation on behalf of municipalities located in Brevard County before the federal government, the state legislature, any state government body or agency, or any political subdivision of the state other than Brevard County. The following is a summary of the basis for this request.

On June 9, 2023, Governor DeSantis announced the appointment of Jason Steele to the Brevard County Board of County Commissioners. Commissioner Steele is the Director of Government Relations at Smith & Associates. Prior to his appointment to the Brevard County Board of County Commissioners, Commissioner Steele lobbied for compensation on behalf of Satellite Beach, Cape Canaveral, and Indialantic (the "Municipal Clients"), all of which are municipalities located within Brevard County. Upon his appointment, Commissioner Steele resigned from all lobbying engagements, including these municipalities, because of Article II, Section 8(f)(2) of the Florida Constitution, which provides:

> A public officer shall not lobby for compensation on issues of policy, appropriations, or procurement before the federal government, the legislature, any state government body or agency, or any political subdivision of this state, during his or her term of office.

As you are undoubtedly aware, on August 9, 2023, the United States District Court for the Southern District of Florida permanently enjoined the enforcement of Article II, Section 8(f)(2) of the Florida Constitution. *Garcia v. Stillman*, No. 22-CV-24156, 2023 WL 5095540, at *20 (S.D. Fla. Aug. 9, 2023). With the blanket prohibition on lobbying by public officials so lifted, Commissioner Steele inquires whether lobbying on behalf of one or more of the Municipal Clients before the federal government, the state legislature, any state government body or agency, or any political subdivision of the state other than Brevard County will present a prohibited conflict of interest under Sections 112.313(7)(a) or 112.3143, Florida Statutes, or any other prohibition within the jurisdiction of the Commission on Ethics.

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Regarding Section 112.313(7)(a), Florida Statutes, the provision states:

> 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, any agency of which he 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 private interests and the performance of his public duties or that would impede the full and faithful discharge of his public duties.

The first part of the statute addresses a public officer's or employee's holding employment or a contractual relationship with a business entity or a public agency which is subject to the regulation of or which is doing business with his or her public agency. While the Municipal Clients are located within Brevard County, they are incorporated municipalities with local government home rule authority and cannot rightly be said to be "subject to the regulation of" Brevard County. *See* CEO 12-21 (finding that "counties do not 'regulate' municipalities"); *see also* Art. VIII, Fla. Const., setting forth the relative duties of counties and municipalities.

There are any number of interlocal agreements for the provision of governmental services between Brevard County and the Municipal Clients, for example, fire rescue automatic aid agreements, cost share funding agreements for environmental projects, and agreements for the provision of ocean lifeguard services. However, the Commission on Ethics has found that such intergovernmental agreements do not constitute "doing business" for purposes of Section 112.313(7)(a). *See* CEO 12-21, CEO 96-20, CEO 95-5, CEO 93-33, CEO 92-39, and CEO 83-5.

The second part of the statute addresses a public officer's or employee's holding a 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 faith and discharge of those duties. In CEO 12-21, the Commission on Ethics conducted such an inquiry and determined that a prohibited conflict of interest would not be created were the law firm of a county commissioner to serve as special counsel to a municipality located within the county.

> In Zerweck v. State Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982), the District Court of Appeal stated that [the second part of the prohibition in Section 112.313(7)(a)]

> 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." [409 So. 2d at 61.]

Also, the Code of Ethics defines "conflict" as

> a situation in which regard for private interest tends to lead to disregard of a public duty or interest.

> ...We also recognize that there may be some who have concerns that the candidate would lack objectivity or be biased in favor of the City due to his long-time representation of it. In CEO 12-12, we concluded that a county commission candidate, should he be elected and take office, could not be simultaneously employed by the county sheriff's office, given the role of county commissioners in approving, amending, modifying, increasing, reducing, or scrutinizing budgets or proposed budgets of sheriff's offices. However, we do not believe that those concerns are present here as the County Commission does not exercise that type of authority over municipalities. Thus, it is our view that your client's continued representation of the City as special counsel would not be a prohibited conflict of interest under the second part of the statute should he be elected and take office as County Commissioner.

CEO 12-21.

This situation is analogous to the facts presented in CEO 03-11, in which the Commission found that no prohibited conflict of interest exists where a state senator/attorney represents a client before county commissions and in various other matters not involving the state legislature, because his representation of the client was before local (not state-level) agencies. Here, Commissioner Steele would potentially represent one or more of the Municipal Clients before state and federal agencies (not Brevard County).

Regarding Section 112.3143, Florida Statutes, which deals with voting conflicts,

> [n]o county . . . 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.

Commissioner Steele would not be expected to have frequent voting conflicts in matters before the Brevard County Board of County Commissioners relating to the Municipal Clients. Even if he lobbies on behalf of the Municipal Clients before governmental entities other than Brevard County, he would not stand to incur a special private gain or loss from matters before the County Commission in which he is not engaged as a lobbyist.[1] Further, the Municipal Clients do not qualify as a "principal by whom retained," as each Municipal Client is an "agency" specifically carved out of said definition in accordance with Section 112.3143(1)(a), Florida Statutes.[2]

Please let me know if any additional information is needed and it will be promptly provided for your consideration. If you have any questions or concerns, please do not hesitate to contact me.

Respectfully,

/s/ Geoffrey D. Smith

Geoffrey D. Smith

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[1]Section 112.3143(1)(d), Florida Statutes, "Special private gain or loss" means an economic benefit or harm that would inure to the officer, his or her relative, business associate, or principal, unless the measure affects a class that includes the officer, his or her relative, business associate, or principal, in which case, at least the following factors must be considered when determining whether a special private gain or loss exists:

1. The size of the class affected by the vote.
2. The nature of the interests involved.
3. The degree to which the interests of all members of the class are affected by the vote.
4. The degree to which the officer, his or her relative, business associate, or principal receives a greater benefit or harm when compared to other members of the class.

The degree to which there is uncertainty at the time of the vote as to whether there would be any economic benefit or harm to the public officer, his or her relative, business associate, or principal and, if so, the nature or degree of the economic benefit or harm must also be considered.

[2]Section 112.3143(1)(a), Florida Statutes, "Principal by whom retained" means an individual or entity, other than an agency as defined in s. 112.312(2), that for compensation, salary, pay, consideration, or similar thing of value, has permitted or directed another to act for the individual or entity, and includes, but is not limited to, one's client, employer, or the parent, subsidiary, or sibling organization of one's client or employer.

Steverson, Kathryn

From: Steverson, Kathryn
Sent: Tuesday, August 15, 2023 10:02 AM
To: 'Geoff Smith'; Dianne Penso
Subject: RE: Request for Ethics Opinion

Thank you,

Kathryn Steverson
Assistant to the Executive Director
Florida Commission on Ethics
P.O. Drawer 15709
Tallahassee, FL 32317-5709
(850) 488-7864
(850) 488-3077 (Fax
www.ethics.state.fl.us

Physical address:
325 John Knox Road
Building E, Suite 200
Tallahassee, FL 32303

From: Geoff Smith <geoff@smithlawtlh.com>
Sent: Tuesday, August 15, 2023 9:42 AM
To: Steverson, Kathryn <STEVERSON.KATHRYN@leg.state.fl.us>; Dianne Penso <Dianne@smithlawtlh.com>
Subject: RE: Request for Ethics Opinion

Thank you. Please let me know if you need anything at all on our end.

GEOFFREY D. SMITH
SMITH & ASSOCIATES

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Melbourne, Florida 32901
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Facsimile: (321) 676-5558

Cellular: (850) 559-5935
geoff@smithlawtlh.com

From: Steverson, Kathryn <STEVERSON.KATHRYN@leg.state.fl.us>
Sent: Tuesday, August 15, 2023 9:38 AM

To: Dianne Penso <Dianne@smithlawtlh.com>
Cc: Geoff Smith <geoff@smithlawtlh.com>
Subject: RE: Request for Ethics Opinion

Good morning,

Thank you for your Opinion request. It will be assigned to a member of our legal team and they will reach out to you soon.

Thank you,

Kathryn Steverson
Assistant to the Executive Director
Florida Commission on Ethics
P.O. Drawer 15709
Tallahassee, FL 32317-5709
(850) 488-7864
(850) 488-3077 (Fax
www.ethics.state.fl.us

Physical address:
325 John Knox Road
Building E, Suite 200
Tallahassee, FL 32303

From: Stillman, Kerrie <STILLMAN.KERRIE@leg.state.fl.us>
Sent: Monday, August 14, 2023 2:23 PM
To: Steverson, Kathryn <STEVERSON.KATHRYN@leg.state.fl.us>
Subject: FW: Request for Ethics Opinion

From: Dianne Penso <Dianne@smithlawtlh.com>
Sent: Monday, August 14, 2023 2:01 PM
To: Stillman, Kerrie <STILLMAN.KERRIE@leg.state.fl.us>
Cc: Geoff Smith <geoff@smithlawtlh.com>
Subject: Request for Ethics Opinion

Please see attached correspondence from Attorney Geoffrey Smith.

Dianne V. Penso
Office Administrator – Melbourne Office
SMITH & ASSOCIATES
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Melbourne, FL 32901
(321) 676-5555
(321) 676-5558 (Fax)
dianne@smithlawtlh.com

Schafer, Grayden

From: Schafer, Grayden
Sent: Friday, September 22, 2023 11:46 AM
To: Schafer, Grayden
Subject: FW: Questions on Ethics Inquiry

Correspondence regarding Formal #2803

From: Schafer, Grayden
Sent: Wednesday, September 13, 2023 4:26 PM
To: geoff@smithlawtlh.com
Subject: Questions on Ethics Inquiry

Mr. Smith:

Thank you for taking my call this afternoon. Below are the questions that we discussed. If you would, please provide your answers to these questions in a response to this email.

1. Am I correct in understanding that Mr. Steele is not a licensed attorney?

2. Does your firm serve in a "General Counsel" capacity to any of three municipalities mentioned in your letter?

3. Does your firm contract to perform legal research or legal work for any of the municipalities on an as-needed basis? If so, how frequently does this occur?

Thank you,

Gray Schafer
Assistant General Counsel
Florida Commission on Ethics
(850)-488-7864

From: Geoff Smith <geoff@smithlawtlh.com>
Sent: Wednesday, September 13, 2023 5:03 PM
To: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Subject: RE: Questions on Ethics Inquiry

Please see my responses below. Let me know if you need any additional information.

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geoff@smithlawtlh.com

From: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Sent: Wednesday, September 13, 2023 4:26 PM
To: Geoff Smith <geoff@smithlawtlh.com>
Subject: Questions on Ethics Inquiry

Mr. Smith:

Thank you for taking my call this afternoon. Below are the questions that we discussed. If you would, please provide your answers to these questions in a response to this email.

1. Am I correct in understanding that Mr. Steele is not a licensed attorney?

You are correct. Mr. Steele is our non-attorney Director of Government Relations.

2. Does your firm serve in a "General Counsel" capacity to any of three municipalities mentioned in your letter?

We are not General Counsel to any of the municipalities. Our legal work has been limited in scope and has pertained to legal research and support related to lobbying engagements.

3. Does your firm contract to perform legal research or legal work for any of the municipalities on an as-needed basis? If so, how frequently does this occur?

Yes. We have sub-contracted with former Sen. Mike Haridopolos who took over lobbying for the City of Satellite Beach and City of Indialantic when Mr. Steele was appointed to the County Commission. We continue to contract to provide legal support related to lobbying engagements as needed. However, we have had no assignments for legal support since June 2023 when Mr. Steele was appointed to the County Commission. We anticipate that there could be legal work during the Florida legislative session in connection with any legislative issues that affect the City.

As set forth in our prior letter we are seeking clarification as to whether Mr. Steele can again act as a lobbyist for the municipalites on matters before the state legislature or state executive branch agencies, and not on any matters that would come before the County Commission.

From: Schafer, Grayden
Sent: Thursday, September 14, 2023 9:06 AM
To: Geoff Smith <geoff@smithlawtlh.com>
Subject: RE: Questions on Ethics Inquiry

Mr. Smith:

Thank you for this information. Just to clarify, my understanding then is that your firm's subcontract with former Senator Haridopolos is current, although you have otherwise not entered into any contracts for legal support since June 2023. Is that correct?

Thank you,

From: Geoff Smith <geoff@smithlawtlh.com>
Sent: Thursday, September 14, 2023 9:22 AM
To: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Subject: RE: Questions on Ethics Inquiry

Yes, the subcontract with former Sen. Haridopolos is current. I think this is a better description of the events and arrangement is this:

The three municipalities (City of Satellite Beach, City of Indialantic, and City of Cape Canaveral) had each separately retained our firm, and our contracts for services designated that Jason Steele, our Director of Government Relations, would provide lobbying services, and the firm would provide the legal support as needed, for a monthly flat fee. When Mr. Steele was appointed to the County Commission he notified each of the three municipalities that he could no longer serve as lobbyist based on the recent change in law. (the law now declared invalid) The firm then sub-contracted with Former Senator Mike Haridopolos to take over all lobbying aspects, with the firm's attorneys continue to be available to provide any legal support. Since June 2023 when lobbying duties were transferred to former Sen. Haridopolos, no legal support has been required. We anticipate that we may be asked for legal input or analyses during the state legislative session. Of the three original municipality contracts, Indialantic and Satellite Beach, continued with the lobbying work being subcontracted to Sen. Haridopolos. The City of Cape Canaveral elected to cancel the contract with our firm, and seek separate arrangements as to any need for lobbyist services.

Let me know if that helps clarify.

GEOFFREY D. SMITH
SMITH & ASSOCIATES

From: Schafer, Grayden
Sent: Thursday, September 14, 2023 9:44 AM
To: Geoff Smith <geoff@smithlawtlh.com>
Subject: RE: Questions on Ethics Inquiry

This information is very helpful. Thank you, again.

From: Schafer, Grayden
Sent: Monday, September 18, 2023 9:23 AM
To: Geoff Smith <geoff@smithlawtlh.com>
Subject: RE: Questions on Ethics Inquiry

Mr. Smith:

Good morning. I have just two more questions for you regarding the ethics opinion:

1. Am I correct in understanding that any lobbying contracts will be between your firm and the municipal clients, as opposed to being between the firm and Commissioner Steele personally?

2. You indicate in the letter that—in the past—lobbying clients would pay the firm a flat fee. Do you anticipate this is how payment for future lobbying contracts would be structured as well?

Thank you again,

Gray Schafer
Assistant General Counsel
Florida Commission on Ethics
(850)488-7864

From: Geoff Smith <geoff@smithlawtlh.com>
Sent: Monday, September 18, 2023 9:30 AM
To: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Subject: RE: Questions on Ethics Inquiry

Thanks. See below.

GEOFFREY D. SMITH
SMITH & ASSOCIATES

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Cellular: (850) 559-5935
geoff@smithlawtlh.com

From: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Sent: Monday, September 18, 2023 9:23 AM
To: Geoff Smith <geoff@smithlawtlh.com>
Subject: RE: Questions on Ethics Inquiry

Mr. Smith:

Good morning. I have just two more questions for you regarding the ethics opinion:

1. Am I correct in understanding that any lobbying contracts will be between your firm and the municipal clients, as opposed to being between the firm and Commissioner Steele personally?

Yes. However, we would designate that Jason Steele would be the designated and registered lobbyist within the firm.

2. You indicate in the letter that—in the past—lobbying clients would pay the firm a flat fee. Do you anticipate this is how payment for future lobbying contracts would be structured as well?

Yes.

From: Schafer, Grayden
Sent: Monday, September 18, 2023 4:10 PM
To: Geoff Smith <geoff@smithlawtlh.com>
Subject: Further Questions on Ethics Inquiry

Mr. Smith:

In researching the issues presented by your ethics inquiry, I have run across two more questions for you. I apologize for sending you questions piecemeal. I just want to make sure my information is complete at the time that I finalize the draft and present it to the Commission. Here are the questions:

1. Is Commissioner Steele's salary from the law firm a flat fee or does it increase/decrease based on some variable, such as the amount of clients for whom he performs services?

2. In your inquiry, you mention several interlocal agreements between the County and the municipal clients. One example you provide is "cost share funding agreements for environmental projects." Please provide more detail regarding this type of agreement. For instance, is this a grant agreement whereby the municipalities receive County funding? What are the specific projects involved?

Thank you again,

Gray Schafer
Assistant General Counsel
Florida Commission on Ethics
(850)488-7864

From: Geoff Smith <geoff@smithlawtlh.com>
Sent: Monday, September 18, 2023 6:04 PM
To: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Subject: RE: Further Questions on Ethics Inquiry

No worries. I want to be sure you have complete information in issuing your opinion. My responses are below.

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SMITH & ASSOCIATES

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Telephone: (850) 297-2006
Facsimile: (321) 676-5558

Cellular: (850) 559-5935
geoff@smithlawtlh.com

From: Schafer, Grayden <SCHAFER.GRAYDEN@leg.state.fl.us>
Sent: Monday, September 18, 2023 4:10 PM
To: Geoff Smith <geoff@smithlawtlh.com>
Subject: Further Questions on Ethics Inquiry

Mr. Smith:

In researching the issues presented by your ethics inquiry, I have run across two more questions for you. I apologize for sending you questions piecemeal. I just want to make sure my information is complete at the time that I finalize the draft and present it to the Commission. Here are the questions:

1. Is Commissioner Steele's salary from the law firm a flat fee or does it increase/decrease based on some variable, such as the amount of clients for whom he performs services?

Mr. Steele is paid a set annual salary. It does not fluctuate up or down, except for periodic pay increases like any business.

All members of the firm, including Mr. Steele, also receive periodic bonus compensation, that is based on numerous factors considered by the majority shareholders of the firm. (My wife and I own the majority shares and have typically made the decisions on bonus compensation.) We typically have done mid-year and year end bonuses. There is no employee right or entitlement to any bonus compensation. And there is not a set list of factors used to compute a bonus amount. The setting of bonus compensation is subjective and completely at the discretion of the majority shareholders based on their evaluation of employee's overall performance. Some of the things we consider are how a member of the firm contributes to our success, not just financially, but also substantively. So knowledge base and skill set is a factor. We also look at hourly billings, and amount collected on billed hours for the employee. Customer service and maintaining good client relationships is also an important consideration, as is new business development.

2. In your inquiry, you mention several interlocal agreements between the County and the municipal clients. One example you provide is "cost share funding agreements for environmental projects." Please provide more detail regarding this type of agreement. For instance, is this a grant agreement whereby the municipalities receive County funding? What are the specific projects involved?

I don't think I can provide a great deal of detail about the intricacies of interlocal agreements. From past practice, and from discussions with current and former County attorneys and Assistant County Attorneys, I know that there are occasionally budget items or grant projects where cities are asked to share the costs with the County. I think a current example here in Brevard is discussion on how to use local tourist tax dollars to help fund the cost of lifeguards on the county's beaches. Although the County Commission approves the tourist tax funding, they may seek contributions from municipalities to also contribute to the costs. I think the County Attorney, Morris Richardson, could provide greater insight into specific examples of cost sharing arrangements and inter-local agreements, and the frequency with which those issues come before the Commission. My somewhat educated guess is that such issues are not frequent.