

Sanchez, Rodzandra (COE)

From: Diaz-Greco, Gilma M. (COE)
Sent: Friday, August 05, 2016 10:25 AM
To: Sanchez, Rodzandra (COE)
Subject: FW: Tom Robertson, Former County employee, (Two-Year Rule) INQ 16-197
Attachments: Lawyer-Lobbyist Article.pdf

[INQ 16-197 Robertson](#)

From: Perez, Martha D. (COE)
Sent: Wednesday, August 03, 2016 9:48 AM
To: 'trobertson@brzoninglaw.com' <trobertson@brzoninglaw.com>
Cc: Centorino, Joseph (COE) <CENTORI@miamidade.gov>; Diaz-Greco, Gilma M. (COE) <GDIAZGR@miamidade.gov>; Turay, Radia (COE) <Radia.Turay@miamidade.gov>
Subject: Tom Robertson, Former County employee, Two-Year Rule, 16-197

Dear Mr. Robertson,

You inquire regarding the ethics restrictions that may apply to you following your retirement from the County Attorney's Office, specifically as it relates to participation in pre-application and pre-hearing meetings held by County staff prior to quasi-judicial hearings of the Environmental Quality Control Board (EQCB).

Background

You were employed as an Assistant County Attorney and Chief of the Environmental Section of the Miami-Dade County Attorneys' Office. You retired less than two years ago and have your own private practice. Your firm has been retained to represent private clients before the EQCB. You indicate that the process, as it relates to the Department of Environmental Resources Management (DERM), often involves pre-application and pre-hearing meetings with the applicant. You would like to attend those meetings as well as represent the applicant at the hearing before the EQCB. You have indicated that, while you generally attend the meetings with another attorney from the firm, you anticipate providing DERM staff with information regarding a particular application. The County Attorney's Office has advised you that you may not attend these meetings.

The EQCB is a County quasi-judicial board which hears petitions ranging from requests for variances to appeals of decisions of the Regulatory and Economic Resources Department (RER) and Fire Rescue Department appeals. The Board also reviews applications and considers requests for modifications or extensions for compliance pursuant to Chapter 24 of the County Code- the Environmental Protection Ordinance.

Applicants appearing before EQCB may avail themselves of the opportunity to attend a pre-application meeting. These meetings are primarily conducted by County staff prior to filing and are designed to provide the applicant with information regarding the hearing process and filing requirements. However, *during the course of these "informational" meetings, applicants are also able to explain the nature of their requests and engage staff in the presentation of information that may influence their recommendation.*

With respect to DERM matters, and as stated in the application package, an applicant will receive DERM's recommendation (for approval, denial or approval with conditions) prior to the quasi-judicial hearing before EQCB. The applicant may request a pre-hearing meeting to discuss the recommendation. During this meeting, *discussion with staff often results in an attempt by the applicant to influence DERM to reconsider (change or modify) the recommendation.*

It is also worth noting that any discussion with DERM staff in an attempt to persuade the County department to agree to a variance or a modification, etc., is still subject to final review and decision by the EQCB. In other words, even

if an applicant's representative/ attorney persuades DERM to agree on a course of action (for example, extension of time to comply), that recommendation (which is read into the record) will always be subject to the final decision by EQCB (appealable by judicial review), as provided by the standards set forth in Section 24-11 and 24-12 of the Miami-Dade County Code.

Analysis

Section 2-11.1(q) of the County Ethics Code, commonly referred to as the "Two- Year Rule", prohibits a County employee from lobbying the County for two years following separation from County employment. Lobbying activities as described in this post-employment ordinance are much more expansive than those found under the County's general lobbying ordinance at Section 2-11.1(s). Whereas the general lobbying ordinance characterizes lobbying as advocating for items that will foreseeably be decided or recommended by any County commission, County board or the County Mayor, the post-employment ordinance makes no such limiting connection to matters that will foreseeably be brought before voting bodies or the Mayor. Consequently, **advocating for decisions or recommendations that may be made at the sole discretion of County personnel are prohibited under the post-employment ordinance.**

The lines between practicing law and lobbying can get murky. While you are allowed to engage in interactions with County staff that are *ministerial* in nature, such as filing applications, requesting general information, asking procedural questions, confirming receipts of applications, or inquiring about the status of submitted documents (*See* RQO 04-33; INQ 10-189), you are prohibited from lobbying County staff. Similarly, while you are allowed to discuss litigation matters or the settlement of a pending lawsuit with attorneys for the government entity, you are prohibited from lobbying government attorneys (*See* RQO 13-04).

A. Quasi-judicial proceedings

Specifically excluded from the definition of lobbyists under Section 2-11.1(s)(1)(b) are "attorneys...retained or employed solely for the purpose of representing individuals, corporations or other entities during publicly-noticed quasi-judicial proceedings where the law prohibits ex-parte communications." This exception is narrow, exempting attorneys only in a very specific situation (*See* RQO 11-26; INQ 15-220; INQ 13-199; INQ 12-129; INQ 07-146). While the Ethics Commission determined in RQO 13-04, that "the timeframe for a quasi-judicial proceeding begins prior to the matter actually being heard and extends beyond the distinct hearing period to the time at which all appeals of the decision have been exhausted," any representation at these "pre" meetings is more likely to fall in the spectrum of lobbying if these meetings involve discussions with DERM staff in an attempt to persuade DERM to make/modify a recommendation or take any other action. Clearly, you may represent your private clients at the quasi-judicial proceedings before the EQCB, where ex-parte communications are prohibited. The question remains whether your attendance and participation at the "pre" meetings with County staff amounts to lobbying, thereby requiring you to abide by the County's post-employment ordinance ("Two-Year Rule").

B. Attendance and/or Participation at County meetings

You indicate in your inquiry that the County Attorney's refusal to attend the pre-hearing meetings where you are present representing your client is in direct conflict with RQO 11-26. RQO 11-26 is distinguishable from the facts described herein. RQO 11-26 dealt exclusively with the question of whether a former Assistant County Attorney may participate in eminent domain pre-suit negotiations *with the County Attorney*. The Ethics Commission opined that, although the lawyer may not participate in pre-suit negotiations involving eminent domain proceedings *with non-lawyer County personnel*, a former assistant county attorney may interact *with County attorneys in a quasi-judicial proceeding or in pre-suit negotiations strictly involving eminent domain proceedings, where negotiation is required by law.* *See* Section 75.015, Florida Statutes. In this instance, the pre-hearing meetings in question are held by DERM staff, not government attorneys. Furthermore, they are held for the purpose of affording the applicant an opportunity to discuss and persuade DERM staff on its recommendation, not to discuss litigation or statutorily-mandated law-related negotiations with government attorneys.

You specifically inquired about your ability to attend a meeting, even if you do not participate. Mere presence at a meeting is not per se "lobbying", HOWEVER, **you may not arrange or participate in meetings with County staff if the meetings are convened for the purpose of or result in a discussion, influence or persuasion of County staff to take a particular course of action on behalf of a client, thereby engaging in lobbying.** *See* RQO 02-139; RQO 04-33; RQO 12-

09. Moreover, **you are prohibited from engaging in any activity where you attend a meeting and are publicly identified as part of the “lobbying” team.** See RQO 01-38. As far as the County Attorney’s Office refusal to meet with you, please note that County personnel “always ha[s] the prerogative to refuse to meet with former employees if they believe that they...will be lobbied by former employees.” See RQO 04-33; RQO 08-31.

In light of the aforementioned opinions and given your former role as Assistant County Attorney in charge of the Environmental Section of the Office, former advisor to DERM and former counsel to the EQCB, it would be prudent to have someone else from the firm attend the “pre” meetings and communicate with County staff, including the County Attorney’s Office, while you are still bound by the Two-Year Rule, or wait until the two years have expired. Again, you are not prohibited from attending and representing private clients at quasi-judicial hearings before the EQCB. See Sections 2-11.1(s), (q), County Ethics Code. I am attaching an article written by former COE attorney Miriam Ramos, which discusses lawyers-lobbyists. Also, you may find all the additional cited COE opinions at <http://ethics.miamidade.gov>. This opinion is based on the facts as you have presented them to the Ethics Commission. Please contact us if these facts change. Inquiries regarding possible conflicts under State law should be directed to the Florida Commission on Ethics.

Sincerely,

Martha D. Perez

Staff Attorney

MIAMI-DADE COUNTY COMMISSION ON ETHICS & PUBLIC TRUST

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From: Thomas Robertson [<mailto:trobertson@brzoninglaw.com>]

Sent: Thursday, July 28, 2016 11:12 AM

To: 'ethics@miamidade.gov.' <ethics@miamidade.gov>

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Subject: Ethics Opinionon

I would like to seek an opinion from the Commission concerning proposed activity on my behalf. I am in private practice and have not yet completed the two year period since leaving the County. My firm has been retained to represent private clients before the Environmental Quality Control Board, a quasi-judicial board. As part of the process for the EQCB, the DERM requests a pre-application meeting with the applicant and often pre-hearing meetings with the applicant. Some of the meetings involve the County Attorney’s office. The County Attorney’s office is currently refusing to meet if I am present. I believe this is directly contrary to RQO 11-26 where in the Commission stated that a former County Attorney employee may directly participate in discussions that involve the County Attorney. They further say that I may not even attend the meetings.

It is my belief that for quasi-judicial matters such as the EQCB, I can participate in the hearing and in routine application matters such as the pre-application meeting and pre-hearing meetings. Certainly in any meeting involving the County Attorney. Please provide me with some assistance.

I am available for any questions.

Thank you.

Tom

[Bio](#)

[Vcard](#)

TOM ROBERTSON

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