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July 23, 2020

Via U.S. & Electronic Mail

Victoria Mendez, Esq.  
City Attorney  
Miami Riverside Center  
444 Southwest Second Avenue  
Miami, Florida 33130

Re: Ethics Inquiry Request, INQ 20-77, City of Miami's Retainer of Benedict P. Kuehne, of the law firm Kuehne Davis Law and Commissioner Joe Carollo Voting Conflict, Sections 2-11.1 (b) (13), and 2-11.1 (d) of the County Ethics Code

Dear Ms. Mendez:

Thank you for engaging with the Miami-Dade Commission on Ethics and Public Trust and seeking ethics guidance regarding the application of the contract staff and voting conflict provisions of the Miami-Dade County Code of Ethics and Conflict of Interest Ordinance ("Ethics Code").

We respond as follows:

Facts:

The City of Miami (City) has advised that pursuant to City Commission Resolution R-20-0188, the City has filed a lawsuit in the case styled City of Miami v. Miami-Dade County, et al., Case No. 20-14640 CA 01 (Miami-Dade County Circuit Court), seeking declaratory and injunctive relief related to its request that Miami-Dade County designate additional early voting sites for the upcoming August 18, 2020, primary election in the City's predominantly Hispanic-American neighborhoods (the Lawsuit). Pursuant to City Commission Resolution R-20-0201, the City is considering engaging outside counsel to assist it in the prosecution of the Lawsuit.

The City believes that Benedict P. Kuehne, of the law firm Kuehne Davis Law, is one of only a handful of elections law specialists in the Miami area, and thus has been identified as potential outside counsel for the Lawsuit.

Mr. Kuehne also represents City Commissioner Joe Carollo in the recently-filed declaratory judgment action in the matter of Joe Carollo v. Robert F. Piper, III, et al., Case No. 20-14475 CA 01 (10) (Miami-Dade County Circuit Court), pertaining to the recall effort. Todd Hannon, in his official capacity as Clerk of the City of Miami (“Clerk”), is properly named as a defendant in that lawsuit.

Because Mr. Kuehne, if engaged as outside counsel for the Lawsuit, would be engaged simultaneously in litigation on behalf of and adverse to the City, a conflict may be presented under the Rules Regulating the Florida Bar. Mr. Kuehne has advised the City that he has consulted with the Florida Bar ethics hotline and has been informed that the conflict presented is waivable, so long as consent of all clients is obtained. Because Mr. Kuehne is a subject-matter expert in the area of election law, and the two lawsuits are not in any way related, the City is considering the required waiver so that Mr. Kuehne can represent the City as outside counsel in the Lawsuit. The waiver will be presented to the Miami City Commission for consideration and vote.

#### Issues:

Whether any provisions in the County Ethics Code would apply to Ben Kuehne should he be retained as the City’s outside Counsel in the Lawsuit.

Whether Commissioner Joe Carollo, who is currently represented by Mr. Kuehne in litigation against a City Charter Officer, has a prohibited voting conflict that would preclude his consideration and vote on waiving dual representation conflicts and allowing for Mr. Kuehne’s retainer as outside counsel for the City in the Lawsuit.

#### Discussion:

The County Ethics Code is applicable to County and municipal elected and appointed officials, employees, board members, their family members, and certain persons that transact with local government. (covered persons) These categories of covered persons are enumerated in Section 2-11.1 (b) of the County Ethics Code. Relevant to the questions posed by the City of Miami, Section 2-11.1 (b) (13) of the Ethics Code provides as follows:

The term "contract staff" shall mean any employee and/or principal of an independent contractor, subcontractor (of any tier), consultant or sub-consultant (of any tier), designated in a contract with the County [City] as a person who shall be required to comply with the provisions of Subsections 2- 11.1(g), (h), (j), (l), (m), (n) and (o) of the Conflict of Interest and Code of Ethics Ordinance. Prior to determining whether to designate a person as contract staff in a RFP, RFQ, bid or contract, the Mayor [Manager] or his or her designee shall seek a recommendation from the Executive Director of the Ethics Commission.

Arguably, if the City chose to avail itself of the allowance to designate its retainer of Mr. Kuehne or the Kuehne Davis firm as an independent contractor under Section 2-11.1 (b) (13) of the Ethics Code, then Mr. Kuehne might be subject to its various provisions. However, it is our understanding

that the City is not seeking this designation if he is retained by the City to serve as outside counsel in the Lawsuit.

As regards Commissioner Joe Carollo's consideration and vote on any dual representation conflicts and Mr. Kuehne's retainer as outside counsel for the City in the Lawsuit, as a Commissioner he is a covered party under Section 2-11.1 of the Code of Miami-Dade County ("Ethics Code"). Specifically, as a Commissioner he is a covered person pursuant to Section 2-11.1 (b) (1) of the Ethics Code that applies to members of County and municipal elected legislative bodies.<sup>1</sup>

Because he is a covered party under the Ethics Code, then Section 2-11.1 (d) of the Code likewise applies to you. The second part of Section 2-11.1 (d) of the Ethics Code provides that a Commissioner shall not:

(b)(1) ... vote on or participate in any way in any matter presented to the Board of County Commissioners [City Commission] if said person has any of the following relationships with any of the persons or entities which would be or might be directly or indirectly affected by any action of the Board of County Commissioners: (i) officer, director, partner, of counsel, consultant, employee, fiduciary or beneficiary; or (ii) stockholder, bondholder, debtor, or creditor, if in any instance the transaction or matter would affect the person defined in subsection (b)(1) in a manner distinct from the manner in which it would affect the public generally. Any person included in the term defined in subsection (b)(1) who has any of the above relationships *or* who would or might, directly or indirectly, profit or be enhanced by the action of the Board of County Commissioners shall absent himself or herself from the Commission meeting during the discussion of the subject item and shall not vote on or participate in any way in said matter. (emphasis added)

Section 2-11.1(d) is stricter than the State Ethics Code in providing for a voting conflict where the official "would or might, directly or indirectly, profit or be enhanced by the action..." as opposed to the State standard contained in Section 112.3134 (3) (a), Florida Statutes, (3)(a) that limits the county or municipal public officer from voting upon any measure "which would inure to his or her special private gain or loss."

In INQ15-201 the Ethics Commission considered whether a prohibited voting conflict would preclude a Councilman from considering or voting on the retainer of a law firm as municipal counsel when a company that he had an ownership interest in, was represented by the law firm.

In that case, the Ethics Commission advised the Councilman that his part ownership of an entity represented by the law firm would not necessarily create a voting conflict under Section 2-11.1(d) of the Ethics Code, since the Councilman's entity would not be expected to be affected directly or

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<sup>1</sup> The Ethics Code constitutes the minimum standard of ethical conduct and behavior for all municipal officials and officers. See Section 2-11.1 (2), Ethics Code.

indirectly by the vote, and he would not likely profit or be enhanced by the vote, *unless* there were some expectation that his business would receive some special benefit from the firm as a result of its retainer as municipal counsel. Pursuant to the facts that you have provided herein, the possibility that Commissioner Carollo's professional relationship with Mr. Kuehne would profit or be enhanced by his vote on the subject Resolution is speculative. *See* INQ 17-06.

In INQ 15-248 the Ethics Commission considered whether a prohibited voting conflict would preclude a Commissioner from considering or voting on a zoning variance when the applicant was represented by an attorney that was also representing the elected official in an unrelated matter.

In that case, the Ethics Commission advised the Commissioner that, unless her relationship with the attorney might provide her with some benefit or advantage, for example, in terms of future services or fees connected to the attorney's representation of her, then she would not have a prohibited voting conflict under Section 2-11.1 (d) of the Ethics Code.

In INQ 13-148 and RQO 12-03, the Ethics Commission considered somewhat related scenarios involving local elected officials that had prior business relationships with developers that were going to be affected by votes of that city's commission. While opining that the elected officials did not have *per se* voting conflicts pursuant to Section 2-11.1 (d) of the Ethics Code prohibiting their consideration and vote on matters that would affect the developers, the Ethics Commission advised that:

The County's Conflict of Interest and Code of Ethics provides a minimum standard of conduct for public officials. It does not directly address "appearance of impropriety" issues that should guide the actions of all public servants, nor does it address the subjective mindset of a public official who, for reasons outside of the Code, does not feel capable of being fair or objective in a particular matter, due to personal considerations or recent financial arrangements. Any public official under such circumstances must use his or her own judgment in determining the proper course of action when conducting public business.

#### Conclusion:

Because the City is not seeking to designate Mr. Kuehne or the Kuehne Davis law firm as city contractors under Section 2-11.1 (b) (13) of the Ethics Code, then if the City retains him as outside counsel for the City in the Lawsuit, then he would not be a covered party under the County Ethics Code and would not be subject to the Ethics Code's various provisions.

Applying the rationale underlying the Ethics Commission's conclusions in the opinions cited above, Commissioner Carollo would not have a voting conflict pursuant to Section 2-11.1 (d) of the Ethics Code that would prohibit his consideration and vote on dual representation conflicts and Mr. Kuehne's retainer as outside counsel for the City in the Lawsuit.

This latter conclusion is premised on the fact that there has been no evidence presented that his affirmative vote to waive representation conflicts and to retain Mr. Kuehne as outside counsel might provide him with some benefit or advantage and with the understanding that the Ethics Code

provides the minimum standard of conduct for local officials and does not address “appearance of impropriety” issues.

We hope that this opinion is of assistance and we remain available to discuss any matters addressed in this letter, if necessary, at your convenience.

Sincerely,

*Jose J. Arrojo /s/*

Jose J. Arrojo  
Executive Director

Martha D. Perez  
General Counsel

cc: George Wysong, Esq., Assistant City Attorney  
All Commission on Ethics Attorneys

INQs are informal ethics opinions provided by the legal staff after being reviewed and approved by the Executive Director. INQs deal with opinions previously addressed in public session by the Ethics Commission or within the plain meaning of the County Ethics Code. RQOs are opinions provided by the Miami-Dade Commission on Ethics and Public Trust when the subject matter is of great public importance or where there is insufficient precedent. While these are informal opinions, covered parties that act contrary to the opinion may be referred to the Advocate for preliminary review or investigation and may be subject to a formal Complaint filed with the Commission on Ethics and Public Trust.