

MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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Via U.S. and Electronic Mail: gscholl@sibfl.net

April 11, 2019

Mayor George "Bud" Scholl
City of Sunny Isles Beach
18070 Collins Avenue
Sunny Isles Beach, Florida 33160

Re: RQO 19-01, Exploitation of official position prohibited, Section 2-11.1 (g) of the Miami-Dade Code; Actions Prohibited when financial interests involved, Section 2-11.1(n) of the Miami-Dade Code; and Recommending Professional Services, Section 2-11.1(p), of the Miami-Dade Code, Municipal Counsel Opinions Affecting Terms and Conditions of Their Employment

Dear Mayor Scholl:

IN A PUBLIC MEETING on April 10, 2019, the Miami-Dade Commission on Ethics and Public Trust ("Ethics Commission") opined that the Sections 2-11.1(g) and (n) of the Ethics Code, prohibits a city attorney, in-house or as a member of a private firm, from providing a legal opinion in his or her official capacity when the subject of the of the opinion could directly affect the terms and conditions of the attorney's employment, or of a small class of employees that includes the attorney, or the firm's retainer terms.

If during the city attorney's employment, a question arises regarding an interpretation of his or her employment agreement, or the interpretation and application of a municipal ordinance or rule to his or her employment terms, or the terms of a firm's retainer as municipal counsel, the city attorney should refrain from advising the elected body or other municipal employees in his or her official capacity and those duties should be performed by another attorney.

Section 2-11.1(p) of the Ethics Code, allows a city attorney to retain lawyers and experts, without consulting with the municipal elected body in the discharge of his or her official duty to provide competent counsel to the city, but the allowance is not without restriction. When the matter under

consideration by the municipality involves terms and conditions of the city attorney's employment or the firm's retainer as described herein, then the city attorney may recommend or retain the outside attorney in advance of public meeting, consistent with the requirements of the city's charter and ordinances, but the recommendation or retainer should be presented to the city commission or council in a Sunshine meeting as soon as practicable.

Enclosed you will please find the supporting legal memorandum presented and approved by Commission on Ethics in open session.

Thank you again for contacting the Miami-Dade Commission on Ethics and Public Trust and for requesting guidance on this issue.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jose J. Arrojo', written over a horizontal line.

JOSE J. ARROJO
Executive Director

Enclosure

cc: MDCLC, City Attorneys Advisory Committee



MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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MEMORANDUM

TO: H. Jeffrey Cutler Esq., CHAIR
Nelson C. Bellido Esq., VICE-CHAIR
Judge Lawrence A. Schwartz
Dr. Judith Bernier
Jan L. Jacobowitz, Esq.

FROM: Jose Arrojo, Executive Director
Commission on Ethics

SUBJECT: RQO 19-01, Mayor George "Bud" Scholl, Sunny Isles Beach
Exploitation of official position prohibited, Section 2-11.1 (g) of the Ethics Code;
Actions prohibited when financial interests involved, Section 2-11.1(n) of the
Ethics Code; and Recommending Professional Services, Section 2-11.1(p), of the
Ethics Code, Municipal Counsel Opinions Affecting Terms and Conditions of their
Employment or Firm Retainer

DATE: April 10, 2019

CC: All COE Legal Staff

I. Issues

1. Should a city attorney recuse himself or herself from providing a legal opinion in his or her official capacity when the subject of the opinion could directly affect the terms and conditions of the attorney's employment, or his or her firm's retainer?
2. In those instances when the municipal attorney is prohibited from providing an opinion that will affect the terms and conditions of his or her own employment, or his or her firm's retainer, may the attorney retain or recommend the services of conflict counsel to provide the opinion?

II. Brief Answers

1. Yes, a city attorney should recuse himself or herself from providing a legal opinion in his or her official capacity when the subject of the opinion could directly affect the terms and conditions of the attorney's employment, or his or her firm's retainer.
2. Yes, the city attorney may retain or recommend the services of conflict counsel to provide the conflict opinion in advance of public hearing, but the retainer or recommendation should be presented to the elected body as soon as practicable thereafter.

III. Background

As a matter of policy oversight, a municipal mayor reviewed the terms and conditions of employment of two charter officers including the in-house City Attorney. Part of this review included consideration of the charter officers' financial terms and benefits. The mayor thereafter decided that he might place the matter before the elected body as an agenda item at public hearing.

The mayor then sought guidance regarding limitations contained in the County Ethics Code on the municipal attorney's ability to provide a legal opinion when the subject of the opinion could directly affect the terms and conditions of the attorney's employment and also whether the municipal attorney was permitted to retain conflict counsel.

The mayor was subsequently advised by letter that the Ethics Commission has issued a very limited number of opinions regarding the application of Sections 2-11.1(g), (n) and (p) of the County Ethics Code to the factual scenario he presented. Accordingly, the mayor's query was presented as an agenda item at a public meeting of the Ethics Commission on January 9, 2019.

At that meeting, the Ethics Commission declined to opine on the matter absent input from municipal attorneys. The Executive Director was told to confer with municipal attorneys and to present the matter anew for consideration at a future public meeting. Subsequent consultations with municipal attorneys took place.

IV. Legal Analysis

1. Three sections of the County Ethics Code are relevant to the analysis of this issue:
 - a. Section 2-11.1(g), Exploitation of official position prohibited. No person included in the terms defined in subsection (b)(1) through (6) and (b)(13) shall use or attempt to use his or her official position to secure special privileges or exemptions for himself or herself or others except as may be specifically

permitted by other ordinances and resolutions previously ordained or adopted or hereafter to be ordained or adopted by the Board of County Commissioners.

- b. Section 2-11.1(n), Actions prohibited when financial interests involved. No person included in the terms defined in subsections (b)(1) through (6) and (b)(13) shall participate in any official action directly or indirectly affecting a business in which he or any member of his immediate family has a financial interest. A financial interest is defined as a special financial interest, direct or indirect, as that term is used in Section 4.03 of the County's Charter; or as a financial interest as defined in Section 769 of the Restatement of the Law of Torts as an investment or something in the nature of an investment. This section shall not prohibit any official, officer, employee or person from taking official action (1) to promote tourism or downtown development or redevelopment within the County or any portion thereof, or (2) to authorize the expenditure of public funds for promoting tourism or downtown development or redevelopment, so long as no such authorized public funds are to be paid to such person or a member of his or her immediate family or any business in which he or she or any member of his or her immediate family has a financial interest.
- c. Section 2-11.1(p), Recommending professional services. No person included in the terms defined in subsections (b)(1) through (6) may recommend the services of any lawyer or law firm, architect or architectural firm, public relations firm, or any other person or firm, professional or otherwise, to assist in any transaction involving the County or any of its agencies, provided that such recommendation may properly be made when required to be made by the duties of office and in advance at a public meeting attended by other County officials, officers or employees.

Research by Ethics Commission staff revealed that there was scant ethics opinion precedent regarding the application of Sections 2-11.1(g), 2-11.1(n) and 2-11.1(p) to in-house municipal attorneys generally and to the fact pattern presented herein, specifically. None of the opinions were directly on point.

2. Exploitation and Prohibited Financial Interest Provisions: Sections 2-11.1(g) and (n)

In one past opinion regarding municipal counsel, the Ethics Commission opined that city attorneys employed by a *private law firm* are, by virtue of their retainer as City Attorney, covered parties under the County Ethics Code. As such, the attorneys would be prohibited from participating in their official capacity in any matter directly or indirectly affecting their employing law firm. Moreover, the firm and its attorneys could not provide advice or guidance to municipal officials concerning the selection process for a hiring of a new City Attorney. (See INQ 14-24)

Again, because of the lack of ethics opinion precedent applicable to the unique facts of this fact scenario, the Ethics Commission should additionally consider the *reasoning and rationale* underlying prior ethics opinions limiting action by officials when the official might directly or indirectly profit or be enhanced by the action as well as state ethics commission and appellate court decisions interpreting and applying state statutes in factually similar scenarios.

For example, the voting conflict section contained in Section 2-11.1 (d) of the Ethics Code prohibits an elected official from voting or participating in any way in any matter if he or she would or might, directly or indirectly profit or be enhanced by the action. While applying only to elected officials voting on matters presented to the elected body, the reasoning and rationale underlying prior Ethics Commission opinions on voting conflicts is instructive to this factual scenario.¹ In those cases, the Ethics Commission has repeatedly opined that the analysis should focus on whether the proposed Board action will present any likelihood that the official would, personally or professionally, be affected in any way by the item.

The Ethics Commission should also consider provisions in state statutes that address a city attorney's ability to advise on the terms and conditions of his own employment. Section 112.313 (5), Florida Statutes, provides "no local government attorney shall be prevented from considering a matter affecting his or her salary, expenses, or other compensation as the local government attorney, as provided by law."

However, that section is limited by prohibitions on misuse of public position similar to Section 2-11.1(g) of the Ethics Code. Section 112.313 (6), Florida Statutes, prohibits a public officer, employee of an agency, or local government attorney from corruptly using or attempting to 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.

In In Re: Renee Lee, the State Commission on Ethics found that the County Attorney for Hillsborough County violated Section 112.313 (6), Florida Statutes, and misused her official position when she self-opined that she was justified in 1% raise in salary for herself without first

¹ Section 2-11.1(d), of the Ethics Code provides in relevant part that, "Any person included in the term defined in subsection (b)(1) [Mayors and Members of the Commission] 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)

seeking approval of the raise by her client, the County Commission.² In doing so, the State Commission on ethics rejected the attorney's reliance on Section 112.313 (5), Florida Statutes, as authorization to opine on a matter affecting her salary.

In Fernandez v. City of Miami, the court rejected a city attorney's reliance on Section 112.313 (5), Florida Statutes, in an appeal of a final judgment denying the attorney's action for breach of contract and seeking severance and other benefits after termination due to a criminal conviction while in office.³ In limiting the authorization contained in that section, the appellate court held, in part, that this section does not allow a municipal attorney to breach his fiduciary duty to the city by ghostwriting an employment memorandum for a city commissioner that redounded exclusively to the benefit of the attorney without proposing or suggesting independent legal review.

Collectively, the plain reading of Sections 2-11.1(g) and (n) of the Ethics Code, limited ethics opinion history, the rationale supporting prior opinions regarding the voting conflict sections of the Code, as well as state statutes and State Ethics Commission and appellate court decisions, support the conclusion that subsection (g) and (n) are implicated when a municipal attorney opines in his or her official capacity on a matter related to his or her terms or conditions of employment, or his or her firm's retainer.

Of course, the Ethics Commission should be cognizant of the importance of the municipal attorney's function in advising municipal elected officials and staff, the obligations imposed on them by various municipal charters and ordinances, and their individual obligations under the Rules of Professional Conduct as members of the Florida Bar. As such, the Commission should give significant weight to comments provided in open session by the municipal attorneys' representative.⁴

² Final Order in Complaint No. 09-115 entered September 12, 2012 by the State of Florida Commission on Ethics, *Per Curiam Affirmed*, Lee v. Comm'n on Ethics, 141 So. 3d 187 (Fla. 2 DCA 2013)

³ Fernandez v. City of Miami, 147 So. 3d 553 (Fla. 3 DCA 2014)

⁴ Consultations regarding this opinion were held by the Executive Director and members of the Miami-Dade County League of Cities' City Attorneys Advisory Committee. That committee includes the City Attorneys for Miami, Miami Gardens, and Coral Gables, an Attorney employed by a private firm that serves as City Attorney for several cities, and the Executive Director for the League. The City Attorney for the City of Coral Gables presented on this matter before the Commission on Ethics, in open session.

Therefore, the Ethics Commission should recognize that there is a myriad of scenarios where municipal attorneys may be called upon to opine on matters relating to terms and conditions of employment that impact employee benefits. For example, municipal counsel may be regularly called upon to opine on collective bargaining agreements, pension ordinance terms or insurance benefit agreements that could apply to entire classes of employees, in some cities numbering in the thousands. In these scenarios, the city attorney's terms and conditions of employment, including financial benefits, may be affected as part of a much larger class.

Accordingly, the Ethics Commissions should conclude that the limitations of Section 2-11.1(g) of the Ethics Code should apply only when the opinion by the attorney in his or her official capacity will directly affect the terms and conditions of the attorney's employment or the terms and conditions of employment of a very small class of municipal employees that includes the municipal attorney.⁵ As regards a retained City Attorney that is a member of private law firm, then both Sections 2-11.1(g) and (n) would prohibit providing legal guidance on terms and conditions of employment as well as selection, negotiation, and related issues regarding the retainer of a firm as municipal counsel.

3. Recommending or Retaining Conflict Counsel

In one past opinion, the Ethics Commission concluded that Section 2-11.1 (p) applies to city attorneys but that in the discharge of their duty to provide competent counsel to their government, they may augment their legal expertise by recommending and hiring specialized attorneys, expert witnesses and others and that this conduct does not constitute: "making recommendations to assist in transactions involving their governments." Consequently, this conduct would not ordinarily fall within the prohibition of Section 2-11.1 (p). (See RQO 10-12)

The facts underlying that opinion did not involve a matter relating to the city attorney himself or herself and certainly did not involve terms and conditions of employment, including financial terms. That opinion was issued in response to a query by a city attorney that sought guidance on whether he could recommend bond counsel to the mayor, city manager, or finance director to assist

⁵ The term "official capacity" is used to distinguish between the attorney opining as City Attorney when required by the duties of office on a matter that may affect the terms and conditions of his or her employment or firm's retainer, as opposed to the attorney self-evaluating his or her performance at rehire or renegotiating terms of employment, individually as a city employee or as a lawyer employed with a private firm. Nothing in this opinion should be taken to limit an attorney or firm in that scenario from advocating for himself or herself, or the firm, rather only that the attorney should not opine in his or her official capacity.

in securing a loan to the city without making a recommendation at a public meeting; and whether he could retain expert witnesses to use in litigation, again without the necessity to conduct a public meeting or obtain municipal approval for the retention of the expert.

Recognizing that there are varying municipal charter provisions and ordinances that govern the retainer of outside professional services and attorneys, the Commission should conclude that in those scenarios where Sections 2-11.1(g) or (n) are implicated by the municipal attorney's opinion on a matter that will directly affect his or her terms and conditions of employment or firm's retainer, then Section 2-11.1(p) demands that while the recommendation or retainer of conflict counsel may be done in advance of public hearing, it should be presented for consideration as soon as practicable to the municipality's elected body.

Conclusion

Sections 2-11.1(g) and (n) of the Ethics Code, prohibits a city attorney, in-house or as a member of a private firm, from providing a legal opinion in his or her official capacity when the subject of the opinion could directly affect the terms and conditions of the attorney's employment or of a small class of employees that includes the attorney, or the firm's retainer terms.

If during the city attorney's employment, a question arises regarding an interpretation of his or her employment agreement, or the interpretation and application of a municipal ordinance or rule to his or her employment terms, or the terms of a firm's retainer as municipal counsel, the city attorney should refrain from advising the elected body or other municipal employees in his or her official capacity and those duties should be performed by another attorney.

Section 2-11.1(p) of the Ethics Code, allows a city attorney to retain lawyers and experts, without consulting with the municipal elected body in the discharge of his or her official duty to provide competent counsel to the city, but the allowance is not without restriction. When the matter under consideration by the municipality involves terms and conditions of the city attorney's employment or the firm's retainer as described herein, then the city attorney may recommend or retain the outside attorney in advance of public meeting, consistent with the requirements of the city's charter and ordinances, but the recommendation or retainer should be presented to the city commission or council in a Sunshine meeting ⁶ as soon as practicable.

⁶ Section 286.011(1), Florida Statutes, provides that all meetings of any board or commission of any state agency or authority or of any agency or authority of any country, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are

This opinion is limited to the facts as presented to the Commission on Ethics and is further limited to an interpretation of the County Ethics Code only. It is not intended to interpret state laws or duties imposed on members of the Florida Bar by the Rules of Professional Conduct. Questions regarding state ethics laws should be addressed to the Florida Commission on Ethics and professional conduct rules, to the Florida Bar.

declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.