

Advisory Opinion 05-01

Question

May a City employee, within one year of leaving City employment to become a member of a law firm (the “Firm”), provide as a member of the Firm legal services to the City in the same litigation the Attorney handled while working as a City employee?

Answer

Yes, pursuant to SMC 4.16.075(D) the Ethics Code’s post-employment restrictions in SMC 4.16.075(B)(1) and (B)(2) do not bar former City employees from performing work “on behalf of” the City or another governmental agency, so long as that work is not adverse to the City’s interests.

Facts

A Senior Assistant City Attorney (the “Attorney”) who serves as Director of the Utilities Section in the Civil Division of the Law Department will be leaving City employment to join the Firm. The Firm is organized as a Professional Limited Liability Corporation (“PLLC”), and the attorney will be a member of the PLLC. The Attorney has represented the City for more than twenty years, and is a recognized specialist in utilities litigation.

Over the course of the past three years, the Attorney has been the City’s lead counsel on several major cases that could have significant financial consequences for the City (the “Pending Litigation”). Before he leaves City employment, the Attorney will complete the briefing for the City’s appeal of a trial court ruling in one of the cases. In addition, trial is set for October 2005 on a related case (also assigned to the Attorney), which the Court of Appeals recently remanded. The City Attorney states that the Attorney can represent the City’s legal interests in these cases better than either any other Assistant City Attorney or any other outside private counsel.

The representation would be structured as follows: The City Attorney would enter into a contract with the Firm for the provision of legal services in the Pending Litigation. The contract would expressly name the Attorney as the individual who will provide the legal services.

The Attorney has not solicited this City work. The City Attorney has asked the Attorney whether he would be willing to continue to represent the City in the Pending Litigation, and the Attorney has informed the City Attorney that he would be willing to do so if permitted by the Code of Ethics.

Discussion

The Attorney's representation of the City in the Pending Litigation is exempted from the post-employment restrictions by SMC 4.16.075(D), which states that the Ethics Code's post-employment restrictions do not apply when a former City employee acts on behalf of a governmental agency and the representation is not adverse to the interest of the City.

SMC 4.16.075(D) states that Sections (B)(1) and (B)(2) “shall not apply to former employees acting on behalf of a governmental agency unless such assistance or representation is adverse to the interest of the City.”

The City is itself a governmental agency. There is nothing in the ordinance language that expresses an intent to limit the application of the section solely to work for *other* governmental agencies. The Commission takes administrative notice of the fact that New York City's Conflict of Interest Board (COIB) applies its comparable exemption – which exempts post city “representation on behalf of any local, state or federal agency” – to reach post-employment work for New York City. New York City Charter, Section 2406(d)(6).¹

Representing the City in litigation is also “on behalf of” the City and not “adverse to the City's interest”. Because “on behalf of” is not defined in the Ethics Code, the Commission looks to the plain meaning of the phrase. “On behalf of” is defined in *Merriam Webster's Collegiate Dictionary* (10th Ed.) as “in the interest of” or “as a representative of.” The term “on behalf of” plainly reaches a broader swath of arrangements than does the phrase “employed by,” or “under contract with,” phrases not employed by the Ethics Code's drafters. Accordingly, since the City is a “governmental agency,” and since the Attorney's continuing work on the Pending Litigation would be “as a representative of” the City, and acting “in the interest of” the City, the representation falls squarely within the plain language of SMC 4.16.075(D).²

One important caveat must be made regarding the scope of the exemption for post-City work on behalf of the City. In addressing any disputes over the quality or cost of the legal services provided, or any other matters in which the interests of the City differ from the interests of the Attorney or the Firm, the Attorney must avoid acting on behalf of the Firm in its dealings with the City. Such actions would not be “on behalf of the City,” could be adverse to the City's interests, would not qualify for the exemption, and would therefore violate SMC 4.16.075.

The Commission notes that some past Commission opinions, notably *Op. Sea. Ethics & Elects. Comm'n 19* (1995) and *Op. Sea. Ethics & Elects. Comm'n 4* (1998), have suggested that

¹ In explaining the purpose for the exemption, the COIB wrote that “[t]he drafters of [New York City's Ethics Code] recognized that the post-employment restrictions, in addition to preventing corruption and undue influence, could also work to the disadvantage of the public in certain cases, by preventing government from engaging former employees for legitimate purposes, and utilizing their talents and skills in the public interest.” COIB AO 93-12.

² If the Attorney advises the City on matters in which he was involved *other* than the Pending Litigation, or advises the City in official proceedings involving the law department, that advice would also fall squarely under SMC 4.16.075(D). If the Attorney advises the City on matters that are *not* the subject of official proceedings *and* in which he was not involved as a City employee, his advice would not raise issues under the post-employment restrictions.

working as an employee or subcontractor of a person working for the City – in other words, assisting someone who is assisting the City – would violate the Code’s post-employment restrictions. Because the discussion in those opinions was not relevant to the holdings in those opinions, and because the discussions failed to address the application of SMC 4.16.075(D), the Commission does not find these past opinions relevant to the issue of whether the Attorney can represent the City in the Pending Litigation.

Conclusion

The Commission holds that the Ethics Code’s post-employment restrictions in SMC 4.16.075(B)(1) and (B)(2) do not bar the Attorney, in his capacity as a member of the Firm, from representing the City in the Pending Litigation.³ The Attorney will be acting on behalf of the City, and so pursuant to SMC 4.16.075(D) the bar on assisting or representing persons in matters in which he was officially involved does not apply.

This Advisory Opinion deals solely with the application of SMC Chapter 4.16 to the facts presented. The Commission is not empowered to provide advice on whether the arrangement complies with other local, state and federal laws, or whether the arrangement is prudent or wise public policy.

APPROVED July 14, 2005, by vote of the Commission.

³ A third post-employment restriction – SMC 4.15.075(B)(3) – bars a former City employee in his or her first year after separating from the City from “[p]articipat[ing] as a competitor in any competitive selection process for a City contract in which he or she assisted the City in determining the project or work to be done or the process to be used.” This situation does not involve competitive bidding, so that restriction is not at issue here.