

Memo

To: Commissioners

From: Wayne Barnett

Date: November 25, 2008

Re: Possible Amendments to Ethics Code
Phase Three: Disqualification from Acting On City Business

Current Law

1. Disqualification From Acting On City Business.

- a. Engage or have engaged in any transaction or activity, which is, or would to a reasonable person appear to be, in conflict with or incompatible with the proper discharge of official duties, or which impairs, or would to a reasonable person appear to impair, the officer's or employee's independence of judgment or action in the performance of official duties and fail to disqualify him or herself from official action in those instances where the conflict occurs, except as permitted by Section 4.16.071;
- b. Have a financial or other private interest, direct or indirect, personally or through a member of his or her immediate family, in any matter upon which the officer or employee is required to act in the discharge of his or her official duties, and fail to disqualify himself or herself from acting or participating, except as permitted by Section 4.16.071;
- c. Fail to disqualify himself or herself from acting on any transaction which involves the City and any person who is, or at any time within the preceding twelve (12) month period has been a private client of his or hers, or of his or her firm or partnership;
- d. Have a financial or other private interest, direct or indirect, personally or through a member of his or her immediate family, in any contract or transaction to which the City or any City agency may be a party, and fails to disclose such interest to the appropriate City authority prior to the formation of the contract or the time the City or City agency enters into the transaction; provided, that this paragraph shall not apply to any contract awarded through the public bid process in accordance with applicable law.

Issues and possible changes

1. Section 1b's coverage is far too narrow in one sense...

Only a financial interest for a City officer or employee can violate section 1.b. This places Seattle's code far outside the mainstream. I strongly recommend that the law be amended to expressly bar City officers and employees from not only taking actions in which they directly or indirectly have a financial interest, but matters in which the following have a financial interest: immediate family members, businesses with which they are associated or are negotiating for future employment. I also recommend expanding the definition of immediate family so that the law expressly bars employees not only, for example, from hiring their children who live with them, but also from hiring their adult children. As currently drafted, the section does not adequately address the full spectrum of conflicts of interest.

2. ...and difficult to interpret in another.

Section 1b currently bars officers and employees from participating in matters in which they have a private interest as well as a financial interest. In almost thirty years, the Commission has yet to develop a definitive interpretation as to what it means to have a private, non-financial interest in a matter. We've looked at whether an officer or employee has a private interest in an organization that has a financial interest in a matter, which I believe is addressed by my proposed rewrite below.

3. It should be made explicit that you can't deal with matters involving your former employer for one year after joining the city.

Presently, the Ethics Code bars officers and employees from dealing with former clients. In the mid-90's the section was interpreted to treat former employers as clients. I have two problems with the opinion, despite my agreement with the outcome. First, the interpretation is difficult to square with the plain language of the ordinance. Second, someone reading the Code itself isn't on notice that he or she cannot have official dealings with a past employer.

4. Option: create the opportunity for senior management to override this bar on dealing with former employers/clients.

Sometimes, the bar on dealing with one's former employer can put the City at a disadvantage. A subject area expert may not be able to do what he or she has been hired to do because the work entails day-to-day dealings with a former employer. As an example, a couple years ago, the City hired an engineer who had designed a computer modeling program for the City when he was working for a consultant. Because the consultant still did the modeling, the employee was walled off from the program he'd created, since it necessarily involved reviewing the performance of his former employer. I remain troubled that in that case the Ethics Code worked against the City's interests.

5. In tandem with a substantial broadening of the types of financial interests that require recusal, create a mechanism for disclosing appearances of conflicts.

The current ethics code has only two settings: on or off, yes or no, black or white, recuse or freely participate. There is no mechanism for dealing with the many shades of gray in which questions come to me and the staff. For example, a City employee's high-school-age son was wrapping up his second summer working for a large consulting firm. The consulting firm was bidding for a contract with the employee's department. Can the employee participate in the review of the bids? I think this is a question on which reasonable minds can disagree. To take another example, the Code bars employees from dealing with past clients for a year. On Day 366, though, can the employee be assigned to monitor a multimillion dollar City contract held by a former client? I think the best reading of the code is that yes, the employee can take on that job.

I believe that the Code would be well-served by an amendment to create a third option for dealing with questions on which reasonable minds can and do disagree: that answer is a written public disclosure. These disclosures could be posted to the Internet to make them truly public in nature. Financial conflicts would still be verboten, but appearances of conflicts would be subject to review in the public square.

I want to stress, though, that this change is inseparable from the change to the way financial conflicts are addressed under the Ethics Code. Changing this section alone would significantly weaken the code.

Executive Director's proposed changes

SMC 4.16.030. Definitions

F. "Immediate family" means a spouse or domestic partner, child, step-child, brother, sister, parent or step-parent, or a person claimed as a dependent on the officer or employee's latest federal income tax return:

1. ~~A spouse or domestic partner as contemplated by Sections 4.30.010—4.30.020;~~
2. ~~Any dependent parent, parent in law, child or son in law or daughter in law; or~~
3. ~~Any parent, parent in law, child, son in law, daughter in law, sibling, uncle, aunt, cousin, niece or nephew residing in the household of the City officer or employee.~~

SMC 4.16.070. Prohibited conduct

1. Disqualification From Acting On City Business.

~~a. Engage or have engaged in any transaction or activity, which is, or would to a reasonable person appear to be, in conflict with or incompatible with the proper discharge of official duties, or which impairs, or would to a reasonable person appear to impair, the officer's or employee's independence of judgment or action in the performance of official duties and fail~~

to disqualify him or herself from official action in those instances where the conflict occurs, except as permitted by Section 4.16.071;

~~a. b.~~ Have a financial or other private interest, direct or indirect, personally or through a member of his or her immediate family, in any matter upon which the officer or employee is required to act in the discharge of his or her official duties, and fail to disqualify himself or herself from acting or participating; Participate in a matter in which (i) he or she, (ii) his or her immediate family member, (iii) an entity he or she serves as an officer, director, trustee, partner or employee, or (iv) a person or entity with which he or she is negotiating or has an arrangement concerning future employment, has a financial interest, except as permitted by Section 4.16.071;

~~b. c.~~ Fail to disqualify himself or herself from acting on any transaction which involves the City and any person who is, or at any time within the preceding twelve (12) month period has been a private client of his or hers, or of his or her firm or partnership Participate in a matter in which a person who employed him or her in the preceding 12 months, or retained him or her, or his or her firm or partnership in the past 12 months, has a financial interest;

~~c. d.~~ Have a financial or other private interest, direct or indirect, personally or through a member of his or her immediate family, in any contract or transaction to which the City or any City agency may be a party, and fail to disclose such interest to the appropriate City contracting authority prior to the formation of the contract or the time the City or City agency enters into the transaction; provided, that this paragraph shall not apply to any contract awarded through the public bid process in accordance with applicable law.

d. Act in a manner that would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy the officer or employee's favor in the performance of his or her official duties, or that he or she is likely to act or fail to act as a result of kinship, rank, position or undue influence of any person, without filing with the Commission a full written disclosure of the circumstances giving rise to such an appearance prior to engaging in such official duties. If such prior written filing is impractical, the officer or employee shall file such a disclosure as soon as practical.