

Advisory Opinion 08-03

Question

Under what circumstances may an Assistant City Attorney (the “Employee”) accept payment for speaking engagements or consultations related to the work he performs for the City?

Answer

Generally speaking, the Employee may accept payment for work that he performs on his own time, using his own resources, without violating the Ethics Code. Following the receipt of such a payment, however, the Employee must for a year disqualify himself from official dealings involving the individual or entity who makes the payment, and any party that the Employee knows or reasonably should know recommended the Employee’s services to the individual or entity making the payment.

Facts

The Employee is an Assistant City Attorney Supervisor assigned to the Public & Community Safety Division of the City Attorney’s Office. One of his duties is supervising prosecutions in Seattle Municipal Court’s Mental Health Court (“MHC”). Seattle’s MHC is one of fewer than 150 such courts nationwide.

MHC is a “therapeutic”, or “collaborative”, court in which the focus is on using a team approach to resolving cases. The team consists of the judge, prosecutors, defense attorneys and others. Although the prosecution and defense attorneys are often in agreement, they still represent different clients and fulfill an adversarial role. The Employee has a counterpart, who is the supervising public defender in MHC.

Over the past decade, the Employee has developed an expertise in mental health issues and the criminal justice system. As part of his job duties, he has presented across the state, outside the state, and in Vancouver, British Columbia; sometimes upon unsolicited request and sometimes by submitting a proposal to present. Those presentations have been unpaid and undertaken on behalf of the City Attorney’s office. He has begun receiving unsolicited offers to present for remuneration.

Analysis

1. *The Employee can present and consult for a fee so long as he (1) uses his own time and his own resources, (2) does not use privileged or proprietary information in connection with his private work, and (3) obtains a departmental determination that the work cannot be performed by the Employee as part of his official duties.*

SMC 4.16.070.2.b provides in relevant part that no City employee may “[u]se or permit the use of any person, funds, or property under his or her official control, direction, or custody,

or of any City funds or City property, for a purpose which is, or to a reasonable person would appear to be, for other than a City purpose....”

SMC 4.16.070.4 provides that no City employee may “[d]isclose or use any privileged or proprietary information gained by reason of his or her official position for a purpose which is for other than a City purpose; provided, that nothing shall prohibit the disclosure or use of information which is a matter of public knowledge, or which is available to the public on request.”

The first two conditions on the Employee’s outside consulting are long established, and flow easily from these two provisions. In order to comply with SMC 4.16.070.2.b, the Employee may not use City time or City facilities – such as telephones, computers, printers, or paper – to further his private consulting work. *See Advisory Opinion 92-38*. And in order to comply with SMC 4.16.070.4, the Employee may not use non-public City information in connection with his private work. *Id.* The Employee will have to be especially attuned to this latter provision because, unlike most City employees, he has access to privileged communications in his work for the City Attorney’s office.

The final condition, that the Employee must obtain a departmental determination that the work cannot be performed on City time using City resources, is rooted in SMC 4.16.070.2.a, which provides in relevant part that no City employee may “[u]se his or her official position for a purpose that is, or would to a reasonable person appear to be primarily for the private benefit of the officer or employee, rather than primarily for the benefit of the City; or to achieve a private gain or an exemption from duty or responsibility for the officer or employee....” If the circumstances surrounding a solicitation from an entity suggest that the entity was soliciting the Employee’s assistance in his capacity as a Seattle City employee, and not in his private capacity, then the Employee would be misusing his position, or at least appearing to a reasonable person to misuse his position, if he responded to such a solicitation in his private capacity, either seeking or accepting remuneration for his efforts. In determining whether the offer is extended to the Employee in his official or private capacity, the Commission will consider the totality of the circumstances, including whether the offer came to the Employee at his City office or at a gathering the Employee attended in his official capacity, whether the Employee had prior dealings with the entity in his official capacity, and whether the initial invitation explicitly suggested that the entity was willing to pay the Employee for his work. No one factor is dispositive, although an explicit offer of remuneration would strongly suggest that the offeror did not contemplate the Employee performing the work as part of his official duties.

When the totality of the circumstances suggests that the Employee has received a solicitation in his official capacity, the Employee must obtain a departmental determination that the request cannot be accommodated using City time and resources. The Commission would consider a written determination from the Employee’s department head as sufficient evidence of such a departmental determination.

The Commission rejects a more drastic reading of SMC 4.16.070.2.a, one that would bar the Employee from accepting payment for *any* consulting work that he was initially offered in the course of his City employment. To bar the Employee from consulting in all such

circumstances would deny the entity who solicited the Employee's assistance from tapping his expertise, while serving no commensurate City purpose. When the Employee's department determines that the department lacks the capacity to provide assistance within the scope of the Employee's official duties, there is no public benefit in denying the Employee the ability to provide consulting services for a fee. He has not misused his position.

So long as the Employee complies with these conditions, he can solicit consulting opportunities or speaking engagements, or accept unsolicited offers to consult or speak, without violating the Ethics Code.

2. *The Employee must disqualify himself for a year from official dealings with (1) any individual or entity that either pays him for speaking or consulting, or (2) any individual or entity that recommends his services to someone who pays him for speaking or consulting.*

SMC 4.16.070.1.a and .c together provide that no City employee may:

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; [or]

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.

Under these two provisions, once an entity has paid the Employee for consulting or speaking, the Employee cannot take official actions in which the entity would have an interest. While SMC 4.16.070.1.c bars only "acting on transactions," accepting a payment constitutes a transaction or activity within the scope of SMC 4.16.070.1.a that would, to a reasonable person, appear to impair the Employee's independence of judgment on official duties involving the entity.

Similarly, when another individual or entity has recommended the Employee's services to a party that eventually hires him, the Employee's acceptance of such a referral would constitute a transaction or activity that would cause a reasonable person to question his independence of judgment on official duties involving the source of the referral. In the past, the Commission has suggested a one year "cooling off" period between engaging in such a transaction or activity and taking official duties. *See Advisory Opinions 05-02 and 06-02.* This means that if the Employee's counterpart in the public defender's office recommends the Employee's services to a party that hires the Employee, the Employee may not have official

dealings with the public defender's office for a year. A reasonable person would believe that the public defender's role in generating business opportunities for the Employee would impair the Employee's ability to zealously represent the City's interests in MHC proceedings.

Nothing in the Ethics Code, however, bars the Employee from recommending the services of his counterpart in the public defender's office. And nothing in the Ethics Code bar the Employee from offering his services *pro bono* when an opportunity is referred to him by his counterpart in the public defender's office. And if the Law Department can arrange the Employee's workload to isolate him from participating in matters in which the public defender's office has an interest, then he may accept referrals from the public defender's office.

Conclusion

The Ethics Code does not bar City officers and employees from consulting or speaking for a fee, so long as they do so using their own time and their own resources. When an invitation is initially directed to an employee in his or her official capacity,¹ however, converting that invitation into a private business opportunity would be a misuse of position unless the employee's department head makes a written determination that the employee cannot perform the services as part of his or her official duties. Finally, a City employee must, for a year, avoid official dealings with any party who pays him or her for a consulting or speaking engagement, or any party who refers such an opportunity to the employee.

¹ Note that this opinion is limited to offers directed *to the Employee*. If the Employee were to learn of an opportunity directed either to his department or to another City employee, it would be inappropriate for him to offer to perform such services for a fee, regardless of whether his department had determined that it was not possible to perform the work on City time using City resources.