

August 28, 2014

John Maguire
6001 Riverside Blvd., Apt 210
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-14-143

Dear Mr. Maguire:

This letter responds to your request for advice regarding “revolving door” provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) We offer no opinion on the application of laws other than the Act, such as the post-employment provisions of Public Contract Code Section 10411.²

QUESTIONS

May you do the following once you have left employment with the Department of Motor Vehicles (DMV):

(1) Represent clients who may have cases which will be heard before the DMV, Driver Safety Branch. You would be participating in administrative hearings regarding the driving privilege of the client and representing them through the final outcome of a decision which may include suspension, revocation, restriction, and/or set aside of a department action. It is also possible that you may participate in reexaminations, hearings, and or interviews for clients who are facing the loss of their license by the DMV.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² While the Commission may provide assistance regarding Government Code Section 1090, which also provides limitations on certain post governmental conduct, it does not appear to apply to your facts. Section 1090 applies only if you participated in making the contract as a state official including any preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (See *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.)

- (2) Represent clients in drunk driving cases in court.
- (3) Accepting a volunteer position at the Attorney General's Office preparing cases.

CONCLUSIONS

(1) – (3) The permanent ban would apply to those lawsuits against the DMV in which you participated. However, the permanent ban would not prohibit you from representing clients in new cases, representing clients in criminal cases in court, or working as a volunteer with the Attorney General's Office preparing cases. However, the one-year ban would prohibit you from influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a license before DMV, except for appearances before a court or administrative law judge.

FACTS

You currently work for the State of California as a Driver Safety Manager II at the Department of Motor Vehicles. You stated in your August 24, 2014 communication that you are a designated employee in DMV's conflict of interest code and are required to file a Form 700. As a Driver Safety Manager II, you have worked overseeing three different sections, one of which processes incoming subpoenas. In that position, you have worked on preparing documents related to lawsuits filed against DMV and prepared chronologies regarding drivers and also prepared Request for Admissions as well as other documents which went to the Legal Office for final approval.

You are preparing to retire from service from the State of California. Your last working date with the State will be December 30, 2014. However, you will be on vacation for approximately two months prior to this date and will not be returning to work over that time period.

You are an attorney licensed to practice law in California. However you have never held an attorney position with the state. It is your plan to actively practice law after you retire. As part of that practice, you may do the following:

- Represent clients who may have cases which will be heard before the DMV's Driver Safety Branch. This would mean you would be participating in administrative hearings regarding the driving privilege of the client and representing them through the final outcome of a decision which may include suspension, revocation, restriction, and/or set aside of a department action. It is also possible that you may participate in reexaminations, hearings, and or interviews for clients who are facing the loss of their license by the DMV.

- You may likely also represent clients in drunk driving cases in court which would not be related to the administrative action taken by the DMV.

In the performance of future legal duties, you may have cause to seek legal remedies against the Department. This would most likely take the form of filing a writ of mandamus against the department seeking relief from an action taken by the DMV.

Finally, you are also considering applying for a volunteer position at the Attorney General's Office preparing cases.

ANALYSIS

Officials who leave state service are subject to two types of restrictions under the Act. The first is a permanent ban, and the second is a one-year prohibition. Both restrict post-governmental employment only when compensated. Thus purely volunteer activities would not be affected.

Permanent Ban on "Switching Sides"

Sections 87401 and 87402 (collectively, the "permanent ban") prohibit former state administrative officials from advising or representing any person for compensation in any judicial or other proceeding in which the official participated while in state service. (Sections 87401 and 87402.) Specifically, Section 87401 provides:

"No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

"(a) The State of California is a party or has a direct and substantial interest.

"(b) The proceeding is one in which the former state administrative official participated."

Section 87402 provides:

"No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any

proceeding in which the official would be prohibited from appearing under Section 87401.”

The prohibitions of Sections 87401 and 87402 apply to any state administrative official if all of the following criteria are met:

“(1) The official has permanently left or is on a leave of absence from, as defined in Regulation 18746.4(a), any particular state office or employment.

“(2) The official is compensated, or is promised compensation, for making an appearance or communication, or for aiding, advising, counseling, consulting, or assisting in representing another person, other than the State of California, in a judicial, quasi-judicial or other proceeding. For purposes of Section 87401 and 87402, a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services is not considered compensation.

“(3) The official makes an appearance or communication, or aids, advises, counsels, or assists in representing another person, other than the State of California, in making an appearance or communication, before any officer or employee of any state administrative agency for the purpose of influencing, as defined in Regulation 18746.2, a judicial, quasi-judicial or other proceeding, including but not limited to any proceeding described in Regulation 18202, subdivisions (a)(1)-(a)(7).

“(4) The judicial, quasi-judicial or other proceeding includes any proceeding in which the official participated personally and substantially by making, participating in the making, or influencing of a governmental decision, as defined in Regulations 18702.1-18702.4, but excluding any proceeding involving the rendering of a legal advisory opinion not involving a specific party or parties. A supervisor is deemed to have participated in any proceeding that was “pending before,” as defined in subdivision (b) of Regulation 18438.2, the official’s agency and that was under his or her supervisory authority. For purposes of this regulation, a proceeding is under a supervisor’s “supervisory authority” if any of the following applies to the supervisor:

“(A) The supervisor’s duties include the primary responsibility within the agency for directing the operation or function of the program where the proceeding is initiated or conducted. However, this provision does not apply to a supervisor who is only responsible for the general oversight of the administrative actions or functions of a program in which the responsibilities concerning the specific or final review of the proceeding are expressly delegated to other persons in the agency.

“(B) The supervisor directly supervises the person performing the investigation, review, or other action involved in the proceeding including, but not limited to, assigning the matter for which the required conduct is taken.

“(C) The supervisor reviews, discusses, or authorizes any action in the proceeding.

“(D) The supervisor has contact with any of the participants in the proceeding regarding the subject of the proceeding.

“(5) The judicial, quasi-judicial or other proceeding is the same proceeding in which the official participated.” (Regulation 18741.1.)

The permanent ban would apply to those lawsuits against the DMV in which you participated, but not new lawsuits. However, the permanent ban would not apply to new lawsuits that were initiated after you left the agency. According to your facts, none of your proposed activities appear to involve judicial, quasi-judicial or other proceedings in which you were involved as a state employee. Therefore, the permanent ban would not apply to these future activities.

One-Year Ban

In addition to the permanent ban, the Act prohibits for a year a former officer of a state administrative agency from being paid to communicate with or appear before his or her former agency to influence specified actions. Section 87406(d) specifically provides:

“No designated employee of a state administrative agency, any officer, employee, or consultant of a state administrative agency who holds a position which entails the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest, and no member of a state administrative agency, for a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. For purposes of this paragraph, an appearance before a state administrative agency does not include an appearance in a court of law, before an administrative law judge, or before the Workers’ Compensation Appeals Board.”

As a former employee of the DMV, you are subject to the one-year ban. Thus, for one year after leaving state service, you may not represent any person by appearing before or communicating with any DMV officer or employee to influence administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

You have asked specifically about representing clients who may have cases which will be heard before the DMV's, Driver Safety Branch. This would mean you would be participating in administrative hearings regarding the driving privilege of the client and representing them through the final outcome of a decision which may include suspension, revocation, restriction, and/or set aside of a department action. It is also possible that you may participate in reexaminations, hearings, and or interviews for clients who are facing the loss of their license by the DMV.

While, Section 87406(d)(1) generally applies only to communications relating to administrative or legislative actions, and not to judicial or quasi-judicial agency actions, the statute explicitly covers "license revocation" proceedings and therefore you would be prohibited from participating in license revocation cases while the one-year ban applies. Thus, for one-year you would be prohibited from participating in license revocation proceedings.

However, Section 87406 expressly excludes appearances before an Administrative Law Judge from the general prohibition against appearances before an individual's former agency. (See Section 87406(d) ["For purposes of this paragraph, an appearance before a state administrative agency does not include an appearance in a court of law, before an administrative law judge, or before the Workers' Compensation Appeals Board"].) Moreover, we have construed this exception to extend to appearances or communications in the administrative hearing and prehearing communications interconnected with the hearing appearance. (*Baxter* Advice Letter, No. I-12-119.)

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel,
Legal Division

JWW:jgl