

February 26, 2015

Tamyra Rice
Assistant County Counsel
County of Santa Cruz
701 Ocean Street, Suite 505
Santa Cruz, CA 95060-4068

Re: Your Request for Advice
Our File No. A-15-013

Dear Ms. Rice:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ This advice applies only to the conflict of interest provisions of the Act and not other general conflict of interest prohibitions such as common law conflict of interest or Section 1090. Moreover, this letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

As the administrator of the Santa Cruz County's Criminal Defense Conflicts Program, are you prohibited from nominating an attorney for appointment to a case as the defense attorney or approving the attorney's claims for ancillary defense services where your husband receives consulting fees from that attorney?

CONCLUSION

Yes. If the attorney is a source of income to you, as discussed below, you are prohibited from making, participating in making or using your official position to influence decisions to nominate him for appointment to a case and to approve his claims for ancillary services

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 references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

You are an Assistant County Counsel and the administrator for the county's Criminal Defense Conflicts Program. The program started on December 1, 2014. One of your main duties as the program administrator is to establish and maintain a panel of qualified private attorneys to represent indigent defendants. Should the Public Defender and the alternate public defender firms declare a conflict of interest in a case, you nominate individual private defense attorneys for appointment by the Superior Court. You also approve the attorneys' claims for ancillary defense services such as experts, investigators, and interpreters.

Your husband is a private criminal defense attorney and a sole practitioner. Recently, your husband and another criminal defense attorney, Mark Garver, started sharing an office suite. Each one pays one-half of the rent and other office expenses. Mr. Garver is also a sole practitioner. Your husband and Mr. Garver are not partners or otherwise legally associated. However, your husband does refer cases to Mr. Garver and receives a consulting fee for those cases in which he serves as a consultant. You have indicated that your husband has received over \$1,000 in consulting fees from Mr. Garver in the past 12-months.

Mr. Garver has applied to be a panel attorney in the county's Criminal Conflicts Program. If he is accepted, you would be in a position to nominate him for appointment by the Superior Court to handle certain criminal cases, for which the County will owe him compensation. You would also be approving or denying his requests for ancillary defense services and processing his claim forms.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official's interests. (Section 87103.)

As an Assistant County Counsel for the County of Santa Cruz and the administrator for the Criminal Defense Conflicts Program, you are a public official within the meaning of the Act² and will be making, participating in making, or influencing a governmental decision when you nominate an attorney for appointment in a case and approve an attorney's claims for ancillary defense services.

² A "public official" is "every member, officer, employee or consultant of a state or local government agency . . ." (Section 82048.)

Of the interests recognized under Section 87103 of the Act,³ those interests that may be implicated by your account of the facts are the following:

- A business entity in which you have a direct or indirect investment of \$2,000 or more. (Section 87103(a).)
- A source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 87103(c).) Section 82030 defines the term “income” to include an official’s community property interest in the income of his or her spouse. (Section 82030(a).)

Your Husband’s Law Firm (Business Entity & Source of Income)

We assume that your husband has at least a \$2,000 ownership interest in his law firm. By virtue of his interest, you have an indirect interest in the firm and any investments that it might own. (Section 87103.) In addition, presumably the law firm pays your husband a salary and other compensation. You have an interest in your community property share of the income he receives from the firm, assuming your share is \$500 or more.⁴ Thus, the law firm is also a source of income to you.

Mr. Garver’s Law Firm (Source of Income)

Income of an individual includes a pro rata share of the income of a business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10 percent interest or greater. (Section 82030(a).) Thus, customers or clients of the business who are sources of income to that business are also considered sources of income to the public official. Your husband is 100 percent owner of his law firm. Thus, because Mr. Garver has paid your husband’s firm \$1,000 or more, your community property share of the income will be \$500 or more and Mr. Garver would be a source of the income to you.

Regulation 18702.1(a) provides, in relevant part, that the reasonably foreseeable financial effect of a governmental decision on a business entity (including a business entity that is a source of income) in which an official has a financial interest is material whenever the business entity:

“(1) Initiates the proceeding in which the governmental decision will be made by filing an application, claim, appeal, or request for other government action concerning the business entity;

³ Our analysis is limited to the interests you have identified.

⁴ Section 82030(a) provides that income includes “any community property interest in the income of a spouse.” The Commission presumes an equal community interest in the income of a spouse.

“(2) Offers to make a sale of a service or a product to the official’s agency;

. . .

“(7) Is otherwise subject to an action taken by the official’s agency, the effect of which is directed solely at the business entity in which the official has an interest.”

When you nominate Mr. Garver for a case or approve his claims for ancillary services, Mr. Garver will be (a) initiating the proceeding in which the governmental decision will be made by filing a claim concerning his business entity; (b) offering to make a sale of his services to the county; and (c) the subject of an action taken by the county, the effect of which is directed solely at his business. Therefore, the materiality threshold is met for both decisions.

Finally, under the applicable foreseeability rule set forth in Regulation 18706(a), a financial effect on Mr. Garver’s firm is presumed to be reasonably foreseeable

Accordingly, you are prohibited from making decisions to nominate Mr. Garver for a case or approve any of his claims for ancillary services for 12 months after the fee of \$1,000 or more was paid. Also, if in the future your husband continues to receive consulting fees from Mr. Garver and the fees are \$1,000 or more, you will once again be prohibited from making such decisions for the following 12 months.

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

Sincerely,

John W. Wallace
Assistant General Counsel

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl