

[Waiver 1995-0]

March 21, 1995

TO: Charles W. Thompson, Jr.
County Attorney

FROM: Jay L. Cohen, Chair
Montgomery County Ethics Commission

Re: Supplement to Request for Waiver for Venable, Baetjer and Howard

On January 17, 1995* the Ethics Commission provided advice and a partial waiver to Venable, Baetjer and Howard (VBH) in response to the request of the County Executive and the County Attorney to approve the firm's representation of Montgomery County in litigation involving a challenge to the adequacy of funding for education provided by the State of Maryland. Subsequently, VBH requested that additional areas be considered by the Ethics Commission for inclusion in the waiver. Specifically, VBH would like to handle matters involving the following types of representation:

1. Clients who are seeking County approval through the issuance of a permit, license, special exception, variance, or zoning change so long as the County is not a party opponent.
2. Clients before a County quasi-judicial body so long as the County has not been a party opponent before that body. The quasi-judicial bodies identified by VBH are the Board of Appeals, Hearing Examiner, District Council, Historic Preservation Commission, Sign Review Board, Landlord-Tenant Commission, and Human Relations Commission.
3. Clients who have a claim against a member of the County's self-insurance fund so long as the member's budget is not approved or funded by the County.
4. Underwriters for County bonds.

As indicated in the previous waiver, the Ethics Commission relies upon the following sections of the Montgomery County charter and the Ethics Law.

Section 213 of the Charter:

[T]he County Attorney may, with the approval of the Council, temporarily employ special legal counsel to work on problems of an extraordinary nature when the work to be done is of such character or magnitude as to require services in addition to those regularly provided by the County Attorney . . .

* <<Original not found.>>

Section 411 of the Charter:

No person whose compensation is paid in whole or in part by the County shall (1) act as attorney, agent, broker, or employee for, or . . . receive compensation or anything of value from any person, firm or corporation transacting business of any kind with, or engaging in litigation against the County, or (2) represent or serve any client in any manner if that client's interest is adverse to that of the County, or in conflict with the person's official duties. The Council shall prescribe by law standards and procedures for the implementation of this Section when such waivers are deemed to be in the interest of the County after full public disclosure of all pertinent facts . . .

Section 19A-8(a) of the Ethics Law:

After receiving a written request, the Commission may grant . . . a waiver of prohibitions of . . . Section 411 of the Charter . . . if it finds that:

- (1) the best interests of the County would be served by granting the waiver;
- (2) the importance to the County of a public employee performing his or her official duties outweighs the actual or potential harm of any conflict of interest; and
- (3) granting the waiver will not give a public employee an unfair advantage over other members of the public

Based upon the information provided and the applicable law, the Ethics Commission grants the supplemental waiver request in part and denies it in part. The Commission grants the waiver request concerning the application for permits, licenses, special exceptions, variances and zoning changes, with the condition that the County is not a party to the matter. The Commission believes that there is little likelihood of a conflict of interest in these matters and they do not give VBH an unfair advantage over members of the public. In addition, the Commission grants the waiver request to appear before various quasi-judicial bodies so long as the County is not a party to the same proceedings. In these matters, the County does not appear to be in a position adverse to Mr. Titus' client and VBH would not have an unfair advantage over other members of the public in these proceedings. Moreover, the quasi-judicial nature of the proceedings provides additional protection against a conflict of interest occurring. The Commission further grants the waiver request as it pertains to underwriting bonds, because there is no conflict perceived with this type of work and it does not give VBH an unfair advantage over the members of the public.

An additional waiver must be sought if VBH wishes to participate in an appeal from the decision of a County quasi-judicial body. At the appellate level, the County often intervenes to protect the interests of the County. The participation of the County may be adverse to that of VBH's client, or their respective interests may be aligned. The determination cannot be made, however, until an actual appeal is taken in a particular

case. The Ethics Commission also must deny the request for a waiver regarding the handling of self-insurance matters. The County provides representation in all cases filed against the members of the self-insurance fund and, therefore, the potential for an actual conflict of interest to exist is greater for these matters. Both the administrative appeals and the self-insurance cases must be reviewed by the Commission on a case-by-case basis to determine whether any prohibitive conflict of interest exists.

The Commission finds that it is in the best interest of the County to grant the waiver as to the matters delineated in this memorandum. The Commission further finds that the importance of the representation provided by VBH to Montgomery County outweighs the actual or potential harm associated with the handling of the matters designated in this decision. Finally, the approval of the waiver as to these limited issues does not give VBH an unfair advantage over other members of the public. If you have any questions concerning this decision, please do not hesitate to contact the Ethics Commission.

cc: Marc P. Hansen, Senior Assistant County Attorney
Barbara McNally, Executive Secretary, Montgomery County Ethics Commission