



## MONTGOMERY COUNTY ETHICS COMMISSION

Kenita V. Barrow  
*Chair*

Mark L. Greenblatt  
*Vice Chair*

**August 21, 2015**

### **Advisory Opinion 15-08-011**

Rand Fishbein, Ph.D.  
Chair, Commission on Common Ownership Communities

This is in response to your letter of July 9, 2015, requesting, on behalf of the Commission on Common Ownership Communities (CCOC), among other things, a waiver of restrictions on outside employment as those restrictions apply to volunteer Panel Chairs of the CCOC in quasi-judicial hearings of the CCOC. In particular, the CCOC has requested that the Ethics Commission:

1. Approve new CCOC Ethical Standards for Hearing Officers on CCOC Panels.
2. Approve a new CCOC Conflict of Interest Disclosure form for attorneys who practice before the CCOC Hearing Panels.
3. Approve a Litigant Consent Form permitting parties, by mutual consent, to permit an attorney who practices before the Commission to serve as a Panel Chair in their case.
4. Grant a class waiver under Section 19A-8 of the County Code for attorneys who practice before the CCOC so they may also act as Panel Chairs without being in violation of 19A-12(b).

The request of the CCOC is made in the context of the Ethics Commission's issuance of "**Guidance on Representation of Clients before the Commission on Common Ownership Communities by CCOC Panel Chairs**" on April 10, 2014. That guidance found that representation by volunteer panel members of clients before CCOC hearing panels that they are not currently sitting on is prohibited by 19A-12(b)(2) of the Montgomery County Public Ethics Law.

The Ethics Commission has closely reviewed the requests in your July 9 letter with particular focus on the request for a waiver; the Commission has considered the presentations you and other representatives of the CCOC made at the Ethics Commission's public meetings on June 17 and July 21 of this year; and the Commission is appreciative of the extensive thought and effort that the CCOC has given to ensuring

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that CCOC hearing panels operate in a manner that is balanced and fair. After considerable thought and deliberation, however, the Commission denies the request for a waiver from the application of 19A-12(b)(2) to volunteer Panel Chairs with regard to their private representation of parties to CCOC hearing panels. The Commission believes the practice the CCOC would like waived is inherently inconsistent with the County's ethics law; if the practice is to be authorized, it must be authorized by County legislation.

As the Commission is not issuing a waiver, the request for approval of a consent is moot. As for the requested approvals for new Standards and Disclosure Form, the Commission is not statutorily authorized to "approve" supplemental standards of conduct for other agencies in County government. Presumably, as there is no statutory authority for the issuance of such standards, the standards would not have the force and effect of law. The Commission is authorized to issue regulations under the procedure associated with method (2) under County law, but only to implement the Public Ethics Law; there is no suggestion of implementing the proposed Standards as regulations under method (2). This said, the Ethics Commission is not opposed to the issuance of internal guidance by a County agency, as long as the standards are not inconsistent with the County's ethics laws or other law. The Commission notes that in the draft Standards you presented there is no reference to or summary of applicable County law on the subjects of conflict of interest as regards personal financial interests, outside employment activities, and post-employment activities, or with respect to disclosure of confidential information, ex parte communications, soliciting and acceptance of gifts, political activities and financial disclosure. These are the requirements covered by County law the violation of which can be addressed through civil and criminal sanction. The Commission believes there would be substantial opportunity for confusion among volunteer panel chairs who might conclude that the Standards you have proposed are the primary rules addressing their conduct to the exclusion of applicable law.

#### Waiver Request

The waiver standard applicable to the CCOC's request for a waiver of 19A-12(b) is found in 19A-8(b).

19A-8(b) provides:

- (b) After receiving a written request, the Commission may waive the prohibitions of subsection 19A-12(b) if it finds that:
  - (1) the waiver is needed to ensure that competent services to the County are timely and available;
  - (2) failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees; or
  - (3) the proposed employment is not likely to create an actual conflict of interest.

The Ethics Commission's decision whether to grant a waiver pursuant to 19A-8(b) is inherently discretionary.

The CCOC has provided information supporting the notion that a waiver is needed to bring on competent persons to perform the position of panel chairs. Representations have been made by the CCOC that recruiting competent professionals (without the 19A-12(b)(2) conflict) to perform the requested services has been very difficult; the CCOC has also indicated that obtaining retired members of the judiciary (one alternative that has been considered) is very difficult. The CCOC has vigorously expressed that the waiver is needed to ensure competent services to the CCOC. To the same extent, the CCOC has indicated that its ability to operate the CCOC hearing panels has been severely impaired by the Ethics Commission April 2014 guidance.

In the view of the CCOC, its panel chairs do not have an actual conflict of interest in representing parties before other panels. The CCOC contends that the high bar of professional ethics for Maryland lawyers and the idea that said lawyers are not going to compromise either their ethics or their careers to advance personal interests ahead of the duties and roles they have as Panel Chairs protects the integrity of the CCOC process and ensures the integrity of those serving as panel chairs.<sup>1</sup> Furthermore, the CCOC has expressed that the additional steps taken (including the new CCOC Ethical Standards for Hearing Officers on CCOC Panels, the new CCOC Conflict of Interest Disclosure form for attorneys who practice before the CCOC Hearing Panels, and the new Litigant Consent Form) would all serve to further protect the CCOC hearing panel process from actual conflicts of interest.

Notwithstanding the positions taken by the CCOC, the Ethics Commission is not inclined to exercise its discretion to issue a waiver of the requirements of 19A-12(b)(2). The Ethics Commission April 2014 guidance made clear the Commission believed “representation of clients by CCOC panel chairs before the CCOC is inconsistent with the Montgomery County Public Ethics Law, Chapter 19A.” The Commission described the activities of Panel Chairs as lawyers for parties before CCOC panels in terms of the relative balance of representation of homeowners versus residential associations:

The list of volunteer panelists is almost exclusively comprised of lawyers who practice in Montgomery County. Many of these lawyers represent clients in matters involving communities of common ownership and advertise that they represent homeowners associations and residential condominium associations. Your letter [letter from Elizabeth Malloy to Kenita Barrow dated April 4, 2014] indicates that in 12 of 13 recent cases involving panel chairs acting as attorneys for a party before a CCOC panel, the panel chair/attorney represented the homeowners association. In just one of the cases, the panel chair/attorney represented the homeowner.

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<sup>1</sup> The CCOC provided no support for this assertion. Such support may have included the volunteer attorney panel chairs seeking an opinion of the Maryland State Bar Association on the propriety of representing clients before the quasi-judicial agency for which the same attorneys serve as panel chairs.

This imbalance of representation evidenced concerns that institutional biases (rather than any intentional act) would influence the adjudicative process. These concerns were identified in the Ethics Commission guidance as follows:

1. Panelists who represent clients before other panels may be able to influence the resolution of matters before other panels by resolving matters that come before them in a way that favors their clients: adjudicative bodies are frequently influenced by how similar matters were decided even without formal reliance on precedence.
2. Panelists who represent clients before other panels could, in theory, be influenced by the prospect of gaining clients, such as a housing association with many matters coming before the CCOC, in adjudicating matters when serving as a panelist.
3. CCOC panels are collaborative bodies where give and take between panel members can be expected. Panel members appearing as attorneys before persons with whom this give and take has occurred cannot be looked at in a vacuum without regard for other potential official interactions. Under these circumstances, the representation of clients by CCOC panelists could be reasonably expected to impair the impartiality and independence of judgment of these public employees.

In consideration of whether a waiver should issue, the Commission addresses each of these concerns with reference to the Council “findings” in the CCOC’s enabling legislation:

The Council finds that there is often unequal bargaining power between governing bodies, owners, and residents of homeowners' associations, residential condominiums, and cooperative housing projects. . . . Owners and residents in common ownership communities require the protection of democratic governance. In furtherance of this goal, the Council finds a need to regulate . . . resolution of disputes with adequate due process protections. . . .

1. Potential for Resolving Matters In Ways That Will Benefit Clients

The proposed solutions do not materially address the concern that Panel Chairs will be institutionally biased to decide matters in a way that creates precedence in a manner that may favor the persons they represent contemporaneously and in the future. There is some legitimacy to questioning the level of this risk: the CCOC hearing decisions are not required to be precedential, so a hearing panel that considers a subsequent “Case B” that is similar to “Case A” that was previously adjudicated by an attorney/Panel Chair representing a party in Case B will not be bound by the Case A decision. In addition, one might question whether facts in two cases would be sufficiently similar to even consider whether the Case B decision could influence the decision in Case A. Accordingly, the attorney who was the Panel Chair in Case A would be unlikely to be tempted to rule in Case A in a way that would favor a client in a future Case B. On the other hand, the

institutional bias created in a person's representing and arguing on behalf of clients who are predominantly on one side of a set of issues could reasonably be expected to influence that person's perspective in cases where that person intends to be a neutral adjudicator of issues. Would a defendant in a criminal matter want to have his case judged by a current prosecutor? Would a prosecutor want a prosecution decided by a judge who currently handles only criminal defense work?

## 2. Spector of Gaining Clients, Particularly Housing Associations

The County's ethics law prohibits public employees from using the prestige of office for private gain (19A-14) and more specifically being hired by persons with business before the public employee's agency.

In theory, attorneys volunteering to be Panel Chairs who represent parties back to the CCOC Panels could be motivated by the prospect of handling themselves in a manner that is conducive to gaining clients. It is noteworthy that housing associations are likely to have a much greater need for legal services than an individual homeowner and would be more attractive for this reason to have as clients. Noting also, the reported prevalence of panel chairs representing housing associations (as they did in 12 of 13 cases as mentioned above), it seems that panel chairs would have an economic incentive to act in such a way as to not offend the panel chair's professional interests in representing housing associations. This creates an institutional bias toward favoring housing associations.<sup>2</sup>

We note each chair would be required by the CCOC's Standards to avoid circumstances creating "a perceived or actual conflict of interest." The Commission also observes that various mechanisms, such as requirements in terms of completing matters a certain time before being appointed a panel chair or beginning a new representation before a CCOC panel might tend towards addressing the theoretical issue of panel chairs trying to advance their professional interests through being a panel chair, but the Ethics Commission believes the ethics law, for good reason, does not allow public employees to try to advance their private interests through the conduct of their official positions.

## 3. Panel Members as Insiders Whose Relationships with other Insiders May Suggest a Process Imbalance

There is no way to avoid the appearance of incremental advantage that accrues from being a "person inside the tent". This appearance exists when a CCOC panel volunteer represents a party before a CCOC panel. Creating temporal separation that separates a volunteer Panel Chair from their role as practicing attorney for clients before CCOC panels could assist with the appearance issues but not eliminate them. To the

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<sup>2</sup> The statistics reported in Ms. Malloy's letter of April 4, 2014, regarding case outcomes suggest that no bias has actually occurred; however, the sample of cases is small and the variables associated with the cases could explain the results. The framework desired by the CCOC promotes institutional bias whereas the CCOC mandate is towards a leveling of bargaining power for residents.

Commission, representing parties before colleagues will always create an appearance of gaining an advantage in an adjudicative process.

The Ethics Commission believes the representation of clients by public employees to the very body the public employees serve by deciding similar cases is inherently conflicting, and not appropriate for a waiver.

Lack of Suitability of a Class Waiver

At the public Ethics Commission meeting on June 17, representatives of the CCOC told the Ethics Commission that volunteer Panel Chairs who would be representing parties before CCOC hearing panels frequently represent both residents and homeowners associations.<sup>3</sup> The Ethics Commission believes that while analyzing the make-up of represented clients is helpful in assessing the overall degree of institutional imbalance evidenced by the panel chairs representing clients before CCOC panels, it is not dispositive as to individual panel chairs, which is important in the consideration of the issuance of a class waiver. If some panel chairs represented only homeowner associations as opposed to both homeowner associations and homeowners, any rationale that there was balance to representative activity by panel chairs in general would fail as to those panel members.

Notwithstanding the great effort to establish systems to protect litigants through additional ethics rigor, policies, and consents, the waiver the CCOC requests would allow panel chairs whose business is representing homeowners associations to sit in judgment of disputes between homeowners and homeowners associations. This strikes the Commission as a fundamentally flawed construct for a class waiver.<sup>4</sup>

For the reasons stated, the Ethics Commission declines to issue the requested waiver. The Commission is hopeful that the effort the CCOC has put into managing its processes to ensure the equality and fairness in CCOC proceedings have been of benefit notwithstanding the Commission's unwillingness to grant the requested waiver. The Commission also appreciates the considerations that the CCOC has shown to the Commission in the addressing of this difficult issue.

For the Commission:



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Kenita V. Barrow, Chair

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<sup>3</sup> This representation is difficult to reconcile with the statistics reported in the Malloy letter (12 of 13 recent instances involved the representation of homeowners associations by attorneys who were volunteer panel chairs).

<sup>4</sup> The lack of suitability for a class waiver does not stand as encouragement for the application for the issuance of individual waivers. The three enumerated concerns above would also be present in the consideration of an individual waiver, even where an individual could demonstrate that the individual represented both residents and homeowner associations.