

**MONTGOMERY COUNTY ETHICS COMMISSION**

**ADVISORY OPINION**

**February 10, 1999**

The Montgomery County Ethics Commission has been asked by an agency head for advice regarding the outside employment of a county employee as a private attorney. The question arises in connection with the consideration of an employment application by an individual who currently practices law as a sole practitioner and, if employed by the County, would want to continue practicing law on a limited basis. The agency head has sought an opinion on the question of whether the Montgomery County Ethics Law and the Ethics Commission would permit a county employee to engage in “outside employment” in the private practice of law as a sole practitioner.

**PERTINENT FACTS**

1. The applicant, a private attorney with a background in business counseling and an undergraduate degree in Finance, has applied for employment by Montgomery County as a Business Development Specialist.<sup>1</sup>
2. As a private attorney, the applicant counsels small businesses and employees on employment law issues, including drafting employment handbooks, employment contracts, non compete/non-solicitation/non-disclosure agreements, severance agreements, and retirement plans. The applicant also counsels private law clients on corporate and non-profit issues.

**APPLICABLE LAW**

This request implicates several provisions of the Montgomery County Public Ethics Law,<sup>2</sup> as well as Ethics Commission Regulation 32-97.

1. *“Other Employment” Provisions.*

---

<sup>1</sup> The Commission notes that this inquiry does not involve an application for employment as an attorney in the Office of the County Attorney. If it did, the Commission would have to disapprove the request because the Charter expressly prohibits the County Attorney and the staff of the County Attorney’s Office from engaging in any other law practice. Charter of Montgomery County §213. Neither does the applicant seek employment as a quasi-judicial officer, which would present different issues and might not be approved, depending upon the circumstances.

<sup>2</sup> Chapter 19A of the Montgomery County Code.

a. The Public Ethics Law. Section 19A-12 of the Public Ethics Law contains a number of general and specific restrictions on the “other” or “outside” employment of county employees. Subsection (a) generally prohibits a county employee from engaging in any “other employment” unless the employment is approved by the Commission.<sup>3</sup> If the Commission approves the “other” or “outside” employment, it may impose conditions on its approval. *Id.* Subsection (b) specifically prohibits a county employee from, among other things, holding any employment relationship that would impair the impartiality and independence of judgment of the county employee, unless the Commission grants a waiver under 19A-8(b). After receiving a written request and subject to statutory standards, the Commission also may waive any of these provisions. *Id.*

b. The Outside Employment Regulation. The “other employment” provisions of the Public Ethics Law are supplemented by an Outside Employment Regulation of the Commission.<sup>4</sup> In pertinent part, the Regulation prohibits county employees from being “employed by or having an economic interest in any business subject to the authority of or doing business with the county agency or department for which they work.” ¶ 4.4.<sup>5</sup> The Regulation also prohibits county employees from engaging in outside employment during the hours for which they are scheduled to work for the county, ¶ 4.1; and forbids the use of county property in the discharge of their outside employment, ¶ 4.5. Any provision of the Regulations may be waived in accordance with the criteria established in §19A-8 of the Code. ¶ 4.13.

## 2. *Conflicts-of-Interest Provisions.*

The conflicts-of-interest provisions of the Public Ethics Law are set forth at §19A-11(a). In pertinent part, these provisions prohibit one from participating as a county employee in, among other things:

- (1) any matter that affects, in a manner distinct from its effect on the public generally, any business in which the county employee has an economic interest;
- (2) any matter if he or she knows or reasonably should know that a party to the matter is a business in which the county employee has an economic interest as an employee; or

---

<sup>3</sup> The Public Ethics Law defines the term *employment or employ* to mean “engaging in an activity for compensation.” §§ 19A-4 (g) and (m) (1).

<sup>4</sup> The current regulation is Regulation 32-97, which was approved by County Council Resolution 13-1134.

<sup>5</sup> For these purposes, “doing business with” the County means: (1) being a party with a County agency to a transaction that involves at least \$1,000 during a year; (2) negotiating a transaction with a County agency that involves at least \$1,000 during a year; or (3) submitting a bid or proposal to a County agency for a transaction that involves at least \$1,000 during a year. Mont. Co. Code, §19A-4 (e).

(3) any business or individual that is a party to an existing contract with the county employee, if the contract could reasonably result in a conflict between private interests and official duties;

(4) any debtor of the county employee if the debtor can directly and substantially affect an economic interest of the county employee.

These provisions also prohibit a county employee from: (1) intentionally using the prestige of his or her office for private gain or the gain of another; (2) disclosing confidential information relating to or maintained by a County agency that is not available to the public; or (3) using confidential information for personal gain or the gain of another. §§19A-14 (a) and 19A-15 (a).

After receiving a written request, the Commission may waive any of these provisions if certain standards are met. §19A-8.

### *3. Underlying Policy and Liberal Construction of the Public Ethics Law.*

Both the “other employment” and “conflicts-of-interest” provisions are expressly intended to be “liberally construed” to accomplish the policy goals of the Public Ethics Law. Those goals are embodied in “legislative findings and statements of policy:

(a) Our system of representative government depends in part on the people maintaining the highest trust in their officials and employees. The people have a right to public officials and employees who are impartial and use independent judgment.

(b) The confidence and trust of the people erodes when the conduct of County business is subject to improper influence or even the appearance of improper influence.

(c) To guard against improper influence, the Council enacts this public ethics law. This law sets comprehensive standards for the conduct of County business and requires public employees to disclose information about their financial affairs.<sup>6</sup>

Ethics Law violations are subject to both civil and criminal sanctions.<sup>7</sup>

---

<sup>6</sup> § 19A-2.

<sup>7</sup> §§19A-27 through 32.

## ANALYSIS

As a general rule, the conflicts-of-interest provisions of the Montgomery County Public Ethics Law do not limit a county employee's activities as a *private* employee. A county employee's activities as a *county* employee, however, are limited by those provisions. For example, a county employee who engages in the private practice of law may not participate as a county employee in any matter if he or she knows or reasonably should know that a private client is a party to the matter. For these purposes, *participation* includes any action of any kind as a county employee, *e.g.*, it precludes the county employee from discussing any aspect of the matter with county colleagues, staff or any other Montgomery County official or employee. The county employee's recusal from the matter must be complete and total.

The conflicts-of-interest provisions of the Public Ethics Law also prohibit a county employee from intentionally using the prestige of his or her office for private gain or the gain of another, and from disclosing confidential information (relating to or maintained by a County agency) that is not available to the public or using confidential information for personal gain or the gain of another.

Although the conflicts-of-interest provisions do not limit directly a county employee's activities as a private employee, the "other employment" provisions of the Public Ethics Law do. In particular, these provisions prohibit a county employee from engaging in any "other employment" unless it is approved by the Commission, and that approval may contain conditions. § 19A-12(a). In addition, under certain circumstances an employee may not engage in outside employment unless the Commission grants a waiver in accordance with certain statutory standards. § 19A-12(b). There also is an Ethics Commission Regulation concerning outside employment. Among other things, the Regulation prohibits county employees from being employed by or having an economic interest in any business doing business with the county agency or department for which they work, § 4.5;<sup>8</sup> prohibits them from engaging in outside employment during the hours for which they are scheduled to work for the county, § 4.1; and forbids the use of county property in the discharge of their outside employment, § 4.5.

In sum, in order to engage in "outside employment" as a private attorney, a county employee must: (1) obtain the approval of the Commission; (2) comply with the conditions, if any, of that approval; and (3) refrain from engaging in any activity prohibited by the conflicts-of-interest provisions of the Public Ethics Law.

Attached is a copy of the General Supplemental Conditions the Commission would place on

---

<sup>8</sup> For these purposes, "doing business with" the County means: (1) being a party with a County agency to a transaction that involves at least \$1,000 during a year; (2) negotiating a transaction with a County agency that involves at least \$1,000 during a year; or (3) submitting a bid or proposal to a County agency for a transaction that involves at least \$1,000 during a year. Mont. Co. Code, §19A-4 (e).

any outside employment approval. In addition, the Commission could be expected to place the following kinds of special conditions on its approval of the outside employment of a county employee as an attorney engaged in the practice of law as a sole practitioner:

### ***Special Conditions***

1. The county employee must not participate as a private attorney in any *matter* (litigation, advice, research or any other kind of matter) involving:
  - (a) Montgomery County, Maryland;
  - (b) any officer, employee, agent or unit of Montgomery County, Maryland; or
  - (c) any other public officer, employee, agent or agency funded, in whole or in part, by Montgomery County, Maryland.<sup>9</sup>
  
2. Except as provided in §19A-11 (b) (1) of the Public Ethics Law, a county employee may not participate as a county employee in any matter that affects any of his or her private clients, unless the employee applies for and receives a waiver from the Commission with respect to that particular matter;<sup>10</sup> and
  
3. A county employee may permit biographical information published about the employee as a private attorney to note, along with other professional and legal accomplishments, that he or she is a county employee and the nature of the county employment. However, those kinds of statements must be limited to truly biographical information and may not be phrased to suggest that clients would benefit from the attorney's employment by the County.

### **ADVICE**

The Commission advised that, based on the information presented to the Commission and set forth above, a county business development specialist could engage in the private practice of law, as described above, without a conflict-of-interest within the meaning of the Public Ethics Law. Such an employee, therefore, could expect the Commission to approve a request to engage in such outside

---

<sup>9</sup> This restriction does not apply to litigation in the Circuit Court for Montgomery County not involving (1) Montgomery County, Maryland; (2) any officer, employee, agent or unit of Montgomery County, Maryland; or (3) any other public officer, employee, agent or agency funded, in whole or in part, by Montgomery County, Maryland.

<sup>10</sup>This prohibition does not apply to matters before the state courts in Montgomery County (*i.e.*, the Circuit Court for Montgomery County and the District Court of Maryland in Montgomery County) to which neither the County nor any agency, officer, employee or other agent of the County is a party.

employment, subject to the Commission's General Supplemental Conditions and the special conditions set forth above.

This advice did not constitute either an approval of outside employment or a waiver for the purposes of the Public Ethics Law.<sup>11</sup> Thus, if employed by the County, the individual must comply with all applicable provisions of the Public Ethics Law, including, by way of example but not limitation, the prohibition of the intentional use of the prestige of his/her office for private gain or that of another (§19A-14) and the prohibition of the disclosure of confidential information (§19A-15). If particular circumstances arise that require a waiver and appear to meet the appropriate standard, the employee may request a waiver.<sup>11</sup>

---

<sup>11</sup> This advice also is limited to the requirements and restraints of the Public Ethics Law, and implementing regulations, policies, *etc.* It does not address any other applicable requirement or restraint, *e.g.*, those arising out of CAO regulations, personnel regulations, department policy, or the Maryland Lawyers' Rules of Professional Conduct.

<sup>11</sup> *See, e.g.*, §19A-8 of the Public Ethics Law and ¶4.13 of Regulation 32-97.