



MONTGOMERY COUNTY ETHICS COMMISSION

Kenita V. Barrow

Chair

April 10, 2014

Mark L. Greenblatt

Vice Chair

Elizabeth Molloy

Chair

Commission on Common Ownership Communities

c/o The Montgomery County Office of Consumer Protection

100 Maryland Ave, Suite 300

Rockville, MD 20850

Dear Ms. Malloy:

Thank you for your letter of April 4, 2014, responding to the Ethics Commission's (MCEC) letter of February 4, 2014. The MCEC considered your letter at its Public Meeting held on April 8. The MCEC appreciates the thoughtful consideration of the Commission on Common Ownership Communities ("CCOC") to the issues raised by the MCEC and, furthermore, the interim steps taken by the CCOC to address the concerns raised by the MCEC. In particular, the MCEC recognizes the step taken to stop assigning new cases to panel chairs who represent parties before other CCOC panels pending resolution of the issues raised by the MCEC.

After considering your letter, the MCEC issues this guidance which interprets Chapter 19A of the Montgomery County Code.

The MCEC has been notified, informally and in writing, by unrelated parties of potential conflict of interest concerns related to hearings convened by the Chair of the CCOC. Panel chairs appointed by the Chair of the CCOC can represent clients before CCOC panels to which they have not been assigned. After consideration of the applicable laws, the MCEC concludes that representation of clients by CCOC panel chairs before the CCOC is inconsistent with the Montgomery County Public Ethics Law, Chapter 19A.

In accordance with Chapter 10B of the Montgomery County Code, the CCOC has established a list of volunteer panelists made up of persons who are "trained or experienced in common ownership community issues." 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 indicates that in 12 of 13 recent cases involving panel chairs acting as attorneys for a party before a CCOC panel,

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Docket 8(a)
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the panel chair/attorney represented the homeowners association. In just one of the cases, the panel chair/attorney represented the homeowner.

Section 19A-12 provides specific limitations on the activities of “public employees”:

(b) *Specific restrictions.* Unless the Commission grants a waiver under subsection 19A-8(b), a public employee must not:

- (1) be employed by, or own more than one percent of, any business that:
 - (A) is regulated by the County agency with which the public employee is affiliated; or
 - (B) negotiates or contracts with the County agency with which the public employee is affiliated; or
- (2) hold any employment relationship that could reasonably be expected to impair the impartiality and independence of judgment of the public employee.

A threshold question is whether volunteer panel members who serve as arbitrators on panels are “public employees.” The MCEC concludes that panel members are “public employees” as they exercise responsibility in adjudicating matters brought to the CCOC. Your letter indicates that you agree with this conclusion.

Because volunteer panel members are “public employees,” volunteer panel members may not be employed by businesses regulated by the CCOC pursuant to Section 19A-12(b)(1) of the Public Ethics Law. Your letter suggests that attorneys representing clients before the CCOC are not “employed by” their clients, but are employed by, in the typical case, a law firm; you believe the 19A-12(b)(1) restriction does not apply because the CCOC does not regulate law firms.¹ The MCEC concludes that the panel chairs are “employed by” the clients they represent before the CCOC for purposes of this guidance. 19A-4(f) defines “employer” as meaning “any person who pays or agrees to pay compensation for services rendered.” A client who pays for legal services is an employer, and for purposes of 19A-12(b)(1), the lawyer who provides the legal services for that client is deemed to be “employed by” that client. In addition, the MCEC concludes that a

¹ Your letter states “the CCOC has always viewed the attorneys that chair hearing panels as being employed by the law firms that compensate them . . . rather than by the parties themselves.” This position is belied by the 1994 MCEC opinion addressing an application for a waiver of section 19A-12(b) for a CCOC Commissioner seeking to engage in representation of an HOA before a CCOC panel. The HOA client (and not simply the attorney’s law practice) was considered to be the “employer” as 19A-12(b) was deemed to apply.

Notably, the MCEC’s Advisory Opinion 1994-7 stated that the MCEC would not issue a waiver of the prohibition of Section 19A-12(b) to the member of the CCOC because the statutory waiver standard could not be met. The opinion observes the “actual conflict that would occur in the event that the decision of the COCOC were appealed to the Circuit Court. Upon appeal, if you were to continue your representation, you would be taking a position adverse to the COCOC and the County, which creates an actual conflict of interest”

business with a matter before a CCOC panel is “regulated by the County agency with which the public employee is affiliated.” Therefore, the MCEC concludes that volunteer panel members are prohibited from compensated representation of businesses with a matter before a CCOC panel.

Section 19A-12(b)(1)’s prohibition only extends to outside employment by businesses. Section 19A-12(b)(2)’s reach is broader as “any employment relationship that could reasonably be expected to impair the impartiality and independence of judgment of the public employee” is prohibited. The MCEC concludes representation by panel members of clients before CCOC hearing panels that they are not currently sitting on is prohibited by 19A-12(b)(2). 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 Also, 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. Lastly, 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. The MCEC is cognizant of the facts and arguments iterated in your letter supporting your opinion that conflicts of interest are addressed and do not present an issue in connection with CCOC panels’ operations. Nonetheless, the MCEC has received four separate sets of allegations that the process employed by the CCOC seems unfair. In light of the construct of the County’s Public Ethics Law, the MCEC agrees that the relationships involved could be reasonably expected to impair the impartiality and independence of judgment of these public employees. The MCEC wishes to make clear that it is not aware of any impaired judgment of any individual in connection with a particular CCOC panel decision – a finding that there is a reasonable expectation of an impairment of judgment due to an institutional and systemic approach is different from making a finding that an impairment has occurred in an individual case. Moreover, the MCEC recognizes that the volunteer panelists affected by this opinion have offered their services to the County pursuant to a regimen established by others.

The MCEC realizes that it may well have been the expectation, when the CCOC authorizing legislation was enacted, that the volunteer panel chairs would include lawyers practicing before other CCOC panels. However, neither the CCOC authorizing legislation nor the Public Ethics

² “Although the rulings of the hearing panels are not binding on other hearing panels in different cases (they are, however, binding on the parties to the case resolved by the rulings), the panels’ explanations of the laws and the legal principles are a valuable source of information for those who seek guidance on the problems facing them as members or directors of the County’s community associations.” The CCOC Staff’s GUIDE TO THE PROCEDURES AND DECISIONS of the MONTGOMERY COUNTY COMMISSION ON COMMON OWNERSHIP COMMUNITIES, November 2012.

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Law included a provision that provide an exception for the CCOC panels from the requirements of the Public Ethics Law.

At its April 8, 2014, meeting the MCEC considered the amendment to Section 10B-12(c) suggested in your letter. The MCEC agrees that the amendment would resolve the inconsistency between the CCOC's practices as regards panel chairs representing clients before other panel chairs and current County law; but, the MCEC does not support this proposal as, in the MCEC's view, representation by panel chairs of clients before other CCOC panels inherently raises an appearance of a conflict of interest, whether it has been made legal or otherwise.

Should you have any questions, please refer them to Robert Cobb, Counsel to the MCEC at 240-777-6674.

Sincerely,



Kenita Barrow
Chair
Montgomery County Ethics Commission

cc: Craig Rice, Council President
Isiah Leggett, County Executive
Timothy Firestine, Chief Administrative Officer
Marc Hansen, County Attorney
Eric Friedman, Director of Consumer Protection
Steve Farber, Council Administrator

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