BURR FORMAN LLP
results matter

**External Memorandum**

**MEMORANDUM**

**TO:** **Kerrie Stillman, Executive Director**
**State of Florida Commission on Ethics**
**325 John Knox Road**
**Building E, Suite 200**
**Tallahassee, FL 32303**
**(850) 488-7864**

**FROM:** **Jason R. Gabriel, Partner, Burr & Forman, LLP**

**CC:** **Karen Bowling, Chief Administrative Officer, City of Jacksonville**
**Robert M. Rhodes, Acting General Counsel, City of Jacksonville**
**Steven J. Zuilkowski, Deputy Director and General Counsel, Florida Commission on Ethics**

**RE:** **Practice of Law and Legal Representation by a Former City Council member appointed to serve as the General Counsel to the Consolidated City of Jacksonville and Post-Elected Office Restrictions**

**DATE:** **August 22, 2023**

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## I. INTRODUCTION.

Pursuant to Florida Administrative Rules 34-6.002(2) and 34-6.004, and on behalf of the Mayor of the Consolidated City of Jacksonville[1] (the "City"), I am writing to request a formal written opinion on the ethics law inquiry set forth below. Please be advised that I, as engaged outside special counsel to the City, along with members of the Office of General Counsel of the City, have discussed this inquiry with Mr. Steven Zuilkowski in prior telephone discussions.

## II. BACKGROUND FACTS.

[1] Pursuant to Section 1.101, Chapter 1, Article I, City Charter, the county government of Duval County, the municipal government of the City of Jacksonville, and a host of other former districts are all consolidated into a single body politic and corporate pursuant to the power granted by former Section 9, Article VIII of the Constitution of Florida of 1885, as amended, which section was continued by and remains in full force and effect as noted in Section 6(e) of Article VIII of the Constitution, of Florida of 1968, as amended. Additionally, the consolidated government has jurisdiction as a chartered county government and extends territorially throughout Duval County, and has jurisdiction as a municipality throughout Duval County except in the Cities of Jacksonville Beach, Atlantic Beach, and Neptune Beach and the Town of Baldwin.

The Honorable Donna Deegan was elected to serve as the Mayor of the City on May 16, 2023 and took office to serve her first four (4) year term on July 1, 2023. Among a multitude of tasks and responsibilities she recently undertook was an immediate City Charter-mandated requirement to choose a general counsel to serve as the City's "chief legal officer for the entire consolidated government, including its independent agencies."[2] The Mayor chose an Acting General Counsel (Mr. Robert M. Rhodes, Esq.) who is copied on this inquiry to serve for a temporary term of ninety (90) days as of July 1, 2023, which will expire by September 30, 2023. The Mayor also convened a qualification review committee[3] to consider candidates for the permanent selection. Following a review of submitted candidates and upon recommendation of the qualifications review committee, pursuant to the City Charter, Mayor Donna Deegan selected Ms. Randy DeFoor to serve as the permanent General Counsel, subject to City Council confirmation. Ms. DeFoor was previously elected to the City Council and represented District 14 in Jacksonville assuming office on July 1, 2019, leaving office on June 30, 2023. Ms. DeFoor is currently a Senior Vice President and National Agency Counsel for Fidelity National Financial, a fortune 500 company, and had previously been a practicing attorney in other places including a prestigious law firm and Regency Centers Corporation, another Fortune 500 company. She earned her bachelor's degree from The University of the South and JD degree from Cumberland School of Law. Ms. DeFoor previously served in a multitude of other voluntary board roles at the City and State levels.

The City Council is the City's 19-member legislative and governing body.[4] In the City's consolidated form of government the powers within are divided among the legislative, executive, and judicial branches of government to form one unitary consolidated government.[5] Under consolidated government, the City exists as one unitary body politic and corporate, a single political subdivision, which includes, inter alia, all elected officials, the legislative branch, and all executive branch departments, boards and commissions established by the City Charter or by City Council.[6]

Likewise, the General Counsel and the Office of General Counsel, which is established in the City Charter under Article VII, is the central unifying legal authority of the City, on behalf of the City. The Office of General Counsel has the responsibility for furnishing legal services to the

[2] See Sections 7.02, 7.03 and 7.05, Part 1, Article VII, City Charter
[3] See Section 7.03, Part 1, Article VII, City Charter
[4] The City Council has 14 district members and 5 at-large members. *See* Section 5 of the City Charter.
[5] *See* Section 4 of the City Charter.
[6] The City's independent agencies (i.e., JEA, Jacksonville Port Authority, Jacksonville Airport Authority, Jacksonville Housing Authority, Jacksonville Housing Finance Authority, Duval County School Board) exist as body politic and corporates, or political subdivisions. However, by City Charter, the independent authorities interface with the City Council for budget approval, they are subject to the City's ethics laws and inspector general oversight, and most importantly for purposes of this analysis, they are all provided central legal services through the Office of General Counsel and are bound by any opinions rendered by the General Counsel.

City and its independent agencies. For purposes of utilization of central services by the City and its independent agencies, the services of the office of general counsel are deemed to be central services to the entire City.[7]

The General Counsel, titled as the "head of the office of general counsel" in the City Charter, is "the chief legal officer for the entire consolidated government, including its independent agencies." The general counsel is required to devote his/her entire time and attention to the business of the office and is not authorized to engage in the private practice of law. Any legal opinion rendered by the general counsel constitutes the final authority for the resolution or interpretation of any legal issue relative to the entire consolidated government and is considered valid and binding in its application unless and until it is overruled or modified by a court of competent jurisdiction or an opinion of the Attorney General of the State of Florida dealing with a matter of solely state law.[8]

The General Counsel is required to devote necessary resources and attention to all of the elected officials (Mayor and City Council members included), departments and agencies of the consolidated City and shall make legal decisions on the merits for the consolidated government "without preference" to any official or agency.[9]

The General Counsel is required to work with those elected officials, departments and agencies to advise them on new or existing state laws interfacing their duties and responsibilities, as well as related standing ordinances and resolutions, and to educate them with regard to conflicting legal issues and to assist them in amicably resolving them. Typically this is done through the deployment of assistant general counsels hired by the office or outside special counsel engaged by the office, as the case may be.

Lastly, the person selected to serve as General Counsel by the Mayor requires confirmation approved during such Mayor's term of office by no less than 13 members of the Council serving during that Mayoral term, and the term of the General Counsel shall coincide with the term of the appointing mayor. The General Counsel may be removed by the Mayor for misfeasance, malfeasance or criminal conduct and would require confirmation by resolution of the Council approved by 13 or more members of the Council. The General Counsel can also be removed by the Council for misfeasance, malfeasance or criminal conduct, by resolution of the Council approved by 15 or more members.[10]

## III. QUESTION ASKED:

[7] See Section 7.01, Part 1, Article VII, City Charter.
[8] See Section 7.02, Part 1, Article VII, City Charter.
[9] See Section 7.02, Part 1, Article VII, City Charter.
[10] See Section 7.06, Part 1, Article VII, City Charter.

Is former City Council member Ms. Randy DeFoor, prohibited or limited by Florida Ethics Laws such as Article II, Section 8(f), Florida Constitution or Chapter 112.313(14), Florida Statutes, from serving as the general counsel (the chief legal officer) to the City (which includes the City Council and the Mayor's Office) and providing the legal services, counsel and representation required by virtue of that office to the City, within two years of leaving the City Council?

## IV. BRIEF ANSWER

No. Former Council member Ms. Randy DeFoor would not be prohibited or limited by Florida Ethics Laws such as Article II, Section 8(f), Florida Constitution or Chapter 112.313(14), Florida Statutes, from serving as the general counsel (the chief legal officer) to the City (which includes the City Council and the Mayor's Office) and providing the legal services, counsel and representation required by virtue of that office to the City, within two years of leaving the City Council. The practice of law and the legal duties and responsibilities of the General Counsel in the City of Jacksonville do not fall under the prohibitions of the above referenced Florida Ethics Laws as more fully discussed in this memo. At all times the General Counsel for the City would be legally representing the City Council (or government body) itself, and *not* any other person or entity before it. The professional activities of attorneys and the practice of law is governed by the Florida Supreme Court through the Florida Bar.

## V. RULES

The part of the Florida State Constitution dedicated to Ethics in Government provides, in relevant part under Article II, Section 8:

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> **SECTION 8. Ethics in government.** — A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:
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> ***
>
> (f) (1) For purposes of this subsection, the term "public officer" means a statewide elected officer, a member of the legislature, a county commissioner, a county officer pursuant to Article VIII or county charter, a school board member, a superintendent of schools, an elected municipal officer, an elected special district officer in a special district with ad valorem taxing authority, or a person serving as a secretary, an executive director, or other agency head of a department of the executive branch of state government.

(2) A public officer shall not lobby for compensation on issues of policy, appropriations, or procurement before the federal government, the legislature, any state government body or agency, or any political subdivision of this state, during his or her term of office.

(3) A public officer shall not lobby for compensation on issues of policy, appropriations, or procurement for a period of six years after vacation of public position, as follows:

a. A statewide elected officer or member of the legislature shall not lobby the legislature or any state government body or agency.

b. A person serving as a secretary, an executive director, or other agency head of a department of the executive branch of state government shall not lobby the legislature, the governor, the executive office of the governor, members of the cabinet, a department that is headed by a member of the cabinet, or his or her former department.

c. A county commissioner, a county officer pursuant to Article VIII or county charter, a school board member, a superintendent of schools, an elected municipal officer, or an elected special district officer in a special district with ad valorem taxing authority shall not lobby his or her former agency or governing body.

(4) This subsection shall not be construed to prohibit a public officer from carrying out the duties of his or her public office.

(5) The legislature may enact legislation to implement this subsection, including, but not limited to, defining terms and providing penalties for violations. Any such law shall not contain provisions on any other subject.

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The State Code of Ethics for Public Officers and Employees provides, in relevant part under Section 112.313(14):

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**(14) LOBBYING BY FORMER LOCAL OFFICERS; PROHIBITION**.—A person who has been elected to any county, municipal, special district, or school district office may not personally represent another person or entity for compensation before the government body or agency of which the person was an officer for a period of 2 years after vacating that office.

> For purposes of this subsection:
>
> (a) The "government body or agency" of a member of a board of county commissioners consists of the commission, the chief administrative officer or employee of the county, and their immediate support staff.
> (b) The "government body or agency" of any other county elected officer is the office or department headed by that officer, including all subordinate employees.
> (c) The "government body or agency" of an elected municipal officer consists of the governing body of the municipality, the chief administrative officer or employee of the municipality, and their immediate support staff.
> (d) The "government body or agency" of an elected special district officer is the special district.
> (e) The "government body or agency" of an elected school district officer is the school district. [Section 112.313(14), Florida Statutes]
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> ***

Article II, Section 8(f) of the Florida Constitution, as modified by constitutional amendments that took place in 2018 – through the initiative of Florida's Constitution Review Commission, its associated ballot measures and implemented in state statute through Laws of Florida 2022-140 – extended the period during which certain Florida government officials are prohibited from lobbying to six years after the conclusion of government service, among other things. Another part of the modified provisions which dealt with restricting *in-office* lobbying by officials *during* their terms in office was recently struck down by a federal court due to constitutional over-breadth issues.[11] In that case, the *post-office* provisions were not adjudicated because the plaintiffs did not have standing.

However, the *post-office* provision of the State Constitution would not in any way prohibit Ms. DeFoor from serving as General Counsel for the City because of the express terms in the Constitution itself and the definitions set forth in Section 112.3121, Florida Statutes. First, the *post-office* provisions of these specific rules ban or restrict lobbying on issues of policy, appropriations, or procurement, things which are not the province of the general counsel and not relevant to the instant case. Second, both the express provisions of the State Constitution itself and Subsection 112.3121(12), explicitly carve out *public officers* from carrying out their duties of public office, define lobbying with activities that are irrelevant to the duties of the City General Counsel and principally carve out legal services and representation altogether. Therefore, the analysis set forth in this memo predominantly focuses on Section 112.313(14) considerations.

[11] *See Garcia and Fernandez v. Stillman, Gilzean, Gaetz, Anchors, et al.,* Case No. 22-cv-24156-BLOOM/Otazo-Reyes.

Section 112.313(14) provides that a former Council member would be prohibited from: (1) personally representing (2) another person or entity (3) for compensation (4) before the government body or agency of which the person was an officer for a two year period after vacating the office. Prior Florida Commission on Ethics ("Ethics Commission" or "Commission") opinions regarding Section 112.313(14) have addressed former public officers retained by a *private* entity or person to represent "clients" for compensation before their former government agency. *See* CEO 16-15; CEO 13-10; CEO 07-06; CEO 05-04; CEO 94-8; CEO 94-25. Furthermore, prior to CEO 19-06, no prior Ethics Commission opinion pertaining to Section 112.313(14) had addressed whether a public officer may leave office within two years to take an employment position within the same political subdivision (i.e., in that case, an executive branch employment position) and represent agencies within the same political subdivision before the public officer's former agency. In that opinion the Commission decided that Council members would be prohibited from representing persons or entities *before* their former agency when employed by the executive branch within the same City. However, the instant case provides two distinct and substantial differences from that previous 2019 opinion. First, the employment of the General Counsel would not be within the executive branch, but within the Office of General Counsel, its own legal office that serves as the central legal services for the entire consolidated City, subject to termination by either the Mayor or the City Council for specified reasons. Second, the General Counsel provides legal advice, counsel and representation *to* the entire *government body* and represents it to the outside world. The General Counsel is duty-bound by the very law that created it *not* to represent any other parties or entities *before* the City Council (or the *government body* as defined in the Statute). It is mandated by law to represent the City Council (or the *government body*) itself.

## VI. ANALYSIS

### SUMMARY OF ISSUES

This inquiry is a case of first impression for the Commission with respect to Section 112.313(14) and the practice of law in a unified municipal setting, where a lawyer is representing the entire "government body or agency" in a consolidated government format. For the reasons outlined here, it is our opinion that the subject two year limitation on a former Council member representing another entity before their former body or agency is not applicable to the circumstances where the attorney is legally representing *the* government body to the outside world, not one component of government before the other. Put another way, the statutory prohibitions are not applicable to a situation where the chief legal advisor (employed within the same governmental body politic) is providing legal advice and representation *to* the entire government body on behalf of that entity, and not representing any other person or entity *before* that same government body. The consolidated government nature of the City coupled with the unified and centralized legal figure in whom all legal services for the City is vested (i.e., the General Counsel) only further underscores the lack of any conflict or elected office influence peddling that the statute seeks to disrupt. Therefore we respectfully submit this inquiry to the

Commission seeking an opinion and findings that no conflict of interest would exist under Section 112.313(14) based on the facts presented.

First, under prior Ethics Commission opinions it appears that the prohibition in Section 112.313(14) was primarily intended to apply in instances to prevent a public officer from exploiting any knowledge gained by virtue of the individual's former public office against the interests of that entity; hence the limiting notion spelled out in the statute where "representing another" before their former body is prohibited. As the Ethics Commission aptly recognized in CEO 05-04:

> … the purpose of the "revolving door" prohibitions is to prevent the appearance of impropriety by preventing public officials from *exploiting the special knowledge or influence gained from their public position* for private gain after leaving that position, and to restrict interactions between a former officer or employee and his or her former colleagues. *See* CEO 95-14, CEO 93-14, and CEO 02-12.

However, because an employment position in the City's central legal office (the Office of General Counsel) is: (1) within the same political subdivision as the City Council and the Mayor and (2) mandated to provide legal advice and representation (not any other advocacy or lobbying), the Council member cannot exploit special knowledge gained by virtue of the Council member's former public office. It is the same consolidated entity with unitary interests and a centralized legal role whereby the General Counsel is providing legal support, advice, counsel and representation *to* the former government body, not *before* them on behalf of another.

Further, there is no "special private gain" after leaving the position. In the instant case, attorneys within the Office of General Counsel regularly interface and communicate with the City Council, the Mayor's office and other agencies within consolidated government. Like former Council members, Office of General Counsel attorneys have also gained through their work a trove of knowledge regarding consolidated government and its systems, processes, and operations. In fact, it is likely that Office of General Counsel attorneys have more knowledge than Council members regarding internal consolidated government operations because of the crucial, intricate, day-to-day and often times long-term legal role that the lawyers engage in, often finding themselves at the very cross-streams of intergovernmental issues. This is different from the non-executory, policy-oriented, part-time role that the elected Council members have (in a collegial body setting subject to Sunshine Laws) with respect to the daily operation of the City to government. Thus, in the instant case the Council members are not in a position exploit any knowledge gained from their former office in the context of obtaining a job within the same political subdivision, but as a lawyer. If anything, Council members are just more familiar than the average person that would come from outside of the government without that understanding of the consolidated system.

Further, as mentioned above, the Office of General Counsel consists of attorneys employed by and part of the same political subdivision entity known as the City of Jacksonville. Therefore, a Council member becoming General Counsel (or being employed by the Office of General Counsel) would not be representing "*another entity*" before the City Council under Section 112.313(14). Instead they would be representing the same entity to the outside world. Based on the former Ethics Commission opinions, it is clear that the prohibition in Section 112.313(14) was intended to prevent former Council members from representing entities *before* the government body, not to prevent a Council member from legally representing that same government body to others outside of it.

## THE GENERAL COUNSEL

The General Counsel is the chief legal advisor to the entire consolidated City, with a cumulative budget of over $6 billion per year. This includes serving as chief legal officer to: (i) thirty-two elected officials; (ii) the independent agencies; (iii) all boards and commissions of the City; (iv) all departments and divisions of the Executive Branch; and (v) all departments and divisions of the Legislative Branch. Areas of law include complex subject matters at the core of government operations: sovereign immunity, civil rights, employment and labor issues, pension, elections, sunshine and public records law, procurement, land use, mobility, community redevelopment, port initiatives, utilities law, environmental law, public finance, ethics and constitutional law. The General Counsel is required to provide all centralized legal services to the entire consolidated City by either employing attorneys within the Office of General Counsel to advise and represent the legal interests of the unified City or to engage the necessary outside special counsel to do so. Either way, all of the legal services and representation of the consolidated City flow through the Office of General Counsel.

As noted above, Section 7.02 of the Jacksonville City Charter declares that the General Counsel shall be the chief legal officer for the City and its independent agencies ("Consolidated Government").[12] It states further:

> Any legal opinion rendered by the general counsel shall constitute the final authority for the resolution or interpretation of any legal issue relative to the entire consolidated government and shall be considered valid and binding in its application unless and until it is overruled or modified by a court of competent jurisdiction or an opinion of the Attorney General of the State of Florida dealing with a matter of solely state law.

As set forth in Section 7.02, the legislatively-approved and voter-upheld City Charter expressly confers on the General Counsel the authority to issue binding legal opinions on the entire government; an authority used to resolve intragovernmental conflict and unify the entire

[12] Section 18.07(d) of the Charter designates the independent agencies of the City of Jacksonville.

body corporate and politic. These opinions serve to educate the various departments and agencies of the government as to the extent of their own powers and protect the government from itself and from those who would usurp its powers or use them for selfish advantage.[13]

As former General Counsel Fred Franklin stated in 1997, in General Counsel Legal Opinion No. 97-1, "[t]he authority of the General Counsel to make binding legal decisions is the mortar that holds the structure of our consolidated government firm."

## GENERAL COUNSEL AS CHIEF LEGAL OFFICER FOR THE ENTIRE CITY

The history of the City Charter language setting forth the role of General Counsel demonstrates the role's importance. Consolidated Government's original Charter, Chapter 67-1320, Laws of Florida, contained Section 7.306, creating a legal division of central services run by a city attorney. The office had the "general responsibility for furnishing legal services to the consolidated government and to independent agencies, *except where the council may otherwise direct*." *Id*. (emphasis added). Additionally, the original Charter granted the Council power to "vary, alter or abolish any provision in this article 7" including the provisions related to legal services. The Council, under the original Charter, could have abolished the legal division of central services. Additionally, the Council could have amended the Charter to prohibit the General Counsel from representing independent agencies.

With Chapter 85-435, Laws of Florida, the Legislature modified the powers, responsibilities, and duties of the General Counsel, the City Council and each officer and agency of the City, declaring that the General Counsel be the chief legal officer for the independent agencies, making such declaration *without the proviso* that the Council could "otherwise direct." Chapter 85-435 also granted the General Counsel the power to issue binding legal opinions, a power consistent with and supportive of the duty to represent the Consolidated Government.

Chapter 85-435 amended Section 3.01 of the Charter in a manner that prohibited the Council from amending the Charter as it relates to the General Counsel (unless the electors approved such amendment by referendum). This amendment of Section 3.01 forever changed the relationship between the General Counsel and the City Council and placed within the hands of the voters (or the Legislature) the power to amend any part of Article 7. With this amendment, the Council may not amend the powers, duties, or responsibilities of the General Counsel; the Council may not modify the relationship between the General Counsel and the independent agencies; and the Council may not modify the binding legal authority of the General Counsel.

In sum, this Law of Florida confirmed the importance and significance of the General Counsel to the Consolidated Government by conclusively and unequivocally designating the

[13] *See Richard Martin, A Quiet Revolution; The Consolidation of Jacksonville-Duval County and the Dynamics of Urban Political Reform* (4th ed. 2008).

General Counsel as the chief legal officer for the Consolidated Government, including the independent agencies.[14]

In 2015 the electors of the City strengthened the principle that the responsibility to provide legal services to the entire City including the executive and legislative branches and the independent agencies belongs to the General Counsel. The electors did so by adding two new paragraphs to Section 7.01,[15] which states, in pertinent part:

> The General Counsel may authorize the independent agencies to engage outside counsel upon certification by the General Counsel of compliance [1] with the Charter and [2] with the agency's authority, and [3] a finding of necessity by the General Counsel.
> The General Counsel may authorize the City to engage outside private counsel upon written certification by the General Counsel of [1] its necessity, and [2] such engagement shall be in accordance with procedures set forth by the City Council.

The General Counsel's binding legal authority and responsibility of overseeing the hiring of any outside counsel for an independent agency or the City are two sides of one coin. As the chief legal officer of the Consolidated Government, the General Counsel takes a unitary position on any legal issue and takes the same legal position for each branch, officer, agency, and employee of the Consolidated Government, and this includes both the executive and legislative branches of City government.[16] The General Counsel cannot give differing legal opinions on a legal issue depending upon which branch, officer, agency, or employee asks the question. Just as the General Counsel may not take inconsistent positions, once the General Counsel has issued an opinion, the binding nature of that opinion prohibits any agency, branch, officer, or employee from engaging counsel to take an inconsistent position. Using the language of the Charter, no officer, agency, or employee can demonstrate the "need" to hire outside counsel if the purpose of that outside counsel is to take a legal position inconsistent with the General Counsel's binding legal opinion.[17]

## PROFESSIONAL RULES OF CONDUCT FOR ATTORNEYS

[14] Chapter 85-435, is now codified, in part, in Section 7.01 and 7.02, City Charter.
[15] *See* Ordinance 2014-723-E, where Council authorized a referendum to be held on the May 19, 2015 ballot where voters of Duval County approved, by a 70.64% majority, several amendments to the City's Charter modifying the General Counsel provisions of the Charter and, which among other things, expressly upheld the long-held requirement that the General Counsel is the ultimate resolving authority and chief legal officer for all local legal affairs concerning not just the City, but all of its independent agencies.
[16] General Counsel Opinion 97-2
[17] General Counsel Opinion 97-1, sets forth that "[N]o Charter authorization exists that would allow the Mayor to obtain independent legal counsel to challenge the General Counsel's determination."

Article V, Section 15 of the State Constitution provides that the Florida Supreme Court shall have *exclusive* jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted. The Judiciary (Florida Supreme Court) through its official arm (the Florida Bar) promulgates the Rules of Professional Conduct which provide the sole standards for the practice of law. In doing so, those same Rules of Professional Conduct govern an assortment of government lawyer activities (particularly with respect to former and current clients to and from the private sector) but stop short of imposing conflicts regulations on the internal parts within the Consolidated Government, as such issue is recognized by the Florida Bar as beyond the scope of the Rules of Professional Conduct. The Comment to Rule 4-1.11, Rules of Professional Conduct (Special Conflicts of Interest for Former and Current Government Officers and Employees), states, in part, that: "The question of whether 2 government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these rules."[18]

The Comment to Rule 4-1.7 (Conflict of Interest) notes the difference in representation in the government context as opposed to the private context, stating that "[G]overnment lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation."

Further guidance on this issue is found in Rule 4-1.13, which addresses a lawyer's duty when the organization is the client. Rule 4-1.13 states that a lawyer for an organization who knows that an officer, employee, or other person associated with the organization intends to act or refuses to act in a matter related to the organization that is a violation of a legal obligation to the organization or a violation of law that may be imputed to the organization and may result in substantial injury to the organization, shall proceed in the best interest of the organization. The Rule goes on to give suggestions of measures the lawyer may take to address the situation.

While the Rule gives suggestions as to how the matter could be addressed, the Charter mandates how the matter is to be addressed. The Charter has appointed the General Counsel as the chief legal officer for the Consolidated Government, and has given the General Counsel the ability to resolve any intragovernmental conflict by issuing a binding legal opinion that provides consistent, comprehensive and unitary legal advice to Jacksonville's vast web of City

[18] While the example given in connection with this comment is when a lawyer employed by the city then becomes employed by a federal agency, this same comment logically applies to a potential conflict between independent governmental agencies within a consolidated government.

departments and independent agencies. The Comment to Rule 4-1.13 highlights what a challenging task this can sometimes be.

> In addition, **duties of lawyers employed by the government** or lawyers in military service **may be defined by statutes and regulations**. **Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules**. Although in some circumstances the client may be a specific agency, it may also be a branch of the government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this rule. **Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This rule does not limit that authority**.

Partial Comment to Rule 4-1.13 (emphasis added).

While the Judiciary (via the Professional Rules of Conduct) set forth the sole jurisdictional regulations that govern the actual practice of law and the behavior and activities of lawyers within the trade, it is the Legislature (via the Charter, adopted as a special law of the Legislature) that creates the actual governmental entity (the consolidated City) and therefore the governmental attorney-client model which allows for the unique, unifying and binding nature of the General Counsel situated at the center of City operations, legally representing the entire governmental body.[19] The Legislature through authority derived from the State Constitution has deliberately created the consolidated City so that the Mayor and the City Council are a part of one and the same governmental body with one and the same chief lawyer and centralized legal services. To hold otherwise would completely obliterate Florida's only true consolidated form of local government, the City of Jacksonville.

The Charter creates one unitary City, which along with its independent agencies forms the Consolidated Government. Furthermore, the independent agencies are not separate agencies of the State of Florida. They are agencies of the City. Their independence and interdependence is defined by the Charter. For purposes of the Charter, the General Counsel is the chief legal officer

[19] See *Neu v. Miami Herald Pub. Co*., 462 So. 2d 821 (Fla. 1985).

of each and every component of the whole Consolidated Government and is considered a part of what is referred to in the Charter as "*central services*" for the entire government. The Charter makes no provision for separate entities or for piecemeal services. This unique form of streamlined government, a product of both legislative act and voter-upheld referendum, places Jacksonville, and in particular its legal office, the Office of General Counsel, at the very nucleus of its consolidated operations.

Lastly, furthering the point that in Florida it is the Judiciary (the Supreme Court of Florida) that is solely responsible for governing the practice of law in Florida and that it alone regulates the admission, practice and discipline of lawyers engaging in the practice law, it should be pointed out that the Rules of Conduct govern the regulation of lawyer employment and transfers between employment (private, government and otherwise). Post-employment prohibitions *cannot* apply to lawyers engaged in the practice of law. By way of example, Florida Bar Professional Rules of Conduct Rule 4-5.6 (Restrictions on Right to Practice) provides the following:

> A lawyer shall not participate in offering or making:
>
> (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
>
> (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

The Florida Bar "Comment" that follows the rule provides policy reasons for this regulation including defending the professional autonomy of the attorney and expanding the freedom of clients to choose their attorney. Note that this Florida Bar rule is very similar to the American Bar Association (ABA) Model Rule 5.6 governing Restrictions on Rights to Practice. According to a 2017 report from the ABA Center for Professional Responsibility Policy Implementation Committee, 49 of the 50 states, plus the District of Columbia, have adopted some form of the rules, only California has not.

The associated defined terms as set forth in the Florida Bar Rule – the Chapter 4 "Terminology" provisions and their associated "Comment" section – set forth that the terms "Firm" or "law firm" denote lawyers in *not only* a law partnership, *but also* in government agency in-house counsel settings.

Florida Bar Ethics Opinion 93-4 further elaborates on Rule 4-5.6. It states, in pertinent part: "Offending provisions create a substantial financial disincentive that would preclude a departing attorney from accepting representation of firm clients and impermissibly restricts the right of association among lawyers."

To provide further context, Florida Bar Professional Rules of Conduct Rule 4-1.11 commentary provides, in relevant part:

> . . . the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus, a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. . .The limitation of disqualification in subdivisions (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

In other words, any rules purporting to restrict the practice of law from one place of employment to another must be narrowly tailored to matters of which the attorney *participated personally and substantially*, and *not* extended to other matters.

While the facts of the instant case involve a former Council member seeking to practice law in the *same* political subdivision it was once elected to and providing legal representation *to* the same governmental body and *not before* that same body (and not of a former governmental attorney practicing elsewhere) the legal protections remain the same; the Judiciary has decided that for lawyers engaged in the practice of law, they cannot be encumbered from doing so as they traverse from one employment or office to another (except in specific instances of matters that they were *personally and substantially* involved with that they may be adverse to in the future).

**RESPONSIBILITIES OF THE GENERAL COUNSEL**

The Office of General Counsel is responsible for furnishing legal services to the City and its independent agencies. The City Charter further provides:

> The general counsel shall devote necessary resources and attention *to all of the elected officials*, departments and agencies of the consolidated City of Jacksonville and shall make legal decisions on the merits for the consolidated government *without preference to any official or agency.* The general counsel *shall work with those elected officials*, departments and agencies to advise them on new or existing state laws interfacing their duties and responsibilities, as well as related standing ordinances and resolutions, and to educate them with regard to conflicting legal issues and to assist them in amicably resolving them.
>
> Section 7.02 of the City Charter (*emphasis added*).

Pursuant to the City Charter and the Ordinance Code, the General Counsel's responsibilities are as follows:

**Devotion to the Office and Education**

• Serve as the head of the office of general counsel and be the chief legal officer for the entire consolidated government, including its independent agencies.

• Devote his/her entire time and attention to the business of the office and shall not engage in the private practice of law.

• Devote necessary resources and attention to all of the elected officials, departments and agencies of the consolidated City of Jacksonville.

• Make legal decisions on the merits for the consolidated government without preference to any official or agency.

• Work with those elected officials, departments and agencies to advise them on new or existing state laws interfacing their duties and responsibilities, as well as related standing ordinances and resolutions and educate them with regard to conflicting legal issues and to assist them in amicably resolving them.

**Legal Opinions**

• Render legal opinions to resolve or interpret any legal issue relative to the entire consolidated government (including independent agencies). Such legal opinions rendered by the general counsel shall constitute the final authority for the resolution or interpretation of and shall be considered valid and binding in its application unless and until it is overruled or modified by a court of competent jurisdiction or an opinion of the Attorney General of the State of Florida dealing with a matter of solely state law.

• Keep and compile by appropriate indexes, headnotes, footnotes and explanatory matters regarding advisory opinions issued and signed by the General Counsel

**Assistant General Counsels**

• Employ, supervise and terminate assistant counsels to assist with the efficient provision of legal services for the City's independent agencies.

• Designate an office of general counsel employee to serve as corporation secretary.

**Outside Counsel Engagements**

• Authorize the independent agencies to engage outside counsel upon certification by the General Counsel of compliance with the Charter and with the agency's authority and a written finding of necessity by the General Counsel.

• Authorize the City to engage outside private counsel upon written certification by the General Counsel of its necessity, and such engagement shall be in accordance with procedures set forth by the City Council (may).

**Litigation**

• Supervise all litigation prosecuted or defended by the Office of General Counsel and shall direct all Assistant General Counsels and special counsels authorized pursuant to Section 108.505 of the Code in the discharge of their respective duties.

• Promptly enter a defense on a claim made against the City, an independent agency, or officer or employee thereof.

• Establish in the office of general counsel, in the custody of the general counsel, a litigation imprest fund.

• Provide a copy of a complaint filed against the City involving litigation which has as its basis the appeal of a decision of the Council to either approve or deny a petition for rezoning property to the Assistant Council Secretary-Zoning within five (5) days of receipt.

**Duval County Legislative Delegation**

• Provide to any member of the Duval County legislative delegation who resides in Duval County upon request an opinion on any matter relative to the government of the City of Jacksonville or any of its independent agencies.

• Appoint a Legislative Delegation Coordinator and Legislative Delegation Secretary for the Duval County Legislative Delegation

**Child Support Enforcement Activities**

• Supervise support enforcement activities.

**"LEGAL" REPRESENTATION ACTIVITIES OF A LAWYER**

To further some of the conflation inherent in the terms used by the drafters of the rule, in Subsection 112.313(14) the Legislature employs the term "*lobbying*" in the title "Lobbying by former local officers; Prohibition" and yet uses the term "*personally represent*" in the text of the

rule itself. As a result, the Commission has relied upon statutes, judicial opinions, and prior CEO's interpreting those terms as used in Section 112.313(9) and Article II, Section 8 of the Florida Constitution (a/k/a the Sunshine Amendment). *See generally* CEO 90-4 (relying upon prior interpretations of Sunshine Amendment to answer question regarding Section 112.313(14) given the near identical language used in both provisions.

In the instant case the general counsel would be personally representing the interests *of* the government body *to* the rest of the world, not any particular interests of any internal components within the government *to* itself or *before* itself. A further distinction from the facts set forth in CEO 19-06.

As defined in Section 112.312(22), *Florida Statutes*, "*represents*" means "actual physical attendance on behalf of a *client* in an agency proceeding, the writing of letters or filing of documents on behalf of a *client*, and personal communications made with the officers or employees of any agency on behalf of a *client*."

As evidenced by the definition, the term "*represent*" is limited to the context of a *client* relationship. The term "*client*" is defined as "a person who pays a professional person or organization for services" or "a person or organization using the services of a lawyer or other professional person or company."[20] Under the instant facts, the "client" is the consolidated City, wholly inclusive of the "government body" itself. The general counsel represents that client in a host of legal activities which include providing legal advice, rendering opinions, preparing legislation, preparing transactional documents, forms, agreements, making appearances on behalf of and representing the City in federal, state or other local tribunals.

And even in the context of true lobbying, the Florida Supreme Court, the single authority on the regulation of Florida-barred attorneys, has held that the general practice of law, particularly providing legal advice, does *not* constitute lobbying.[21] In so finding, the Court defined or otherwise relied upon statutory definitions for "lobbying" and "lobbyist", and key elements for each term is the act of influencing legislative or executive action on behalf of another for compensation (discussing Sections 112.3215 (lobbying before the executive branch) and 11.045(1)(f) (lobbying before the legislative branch). In contrast, the practice of law includes, in addition to appearing before judicial courts and administrative tribunals, "'the giving of legal advice' and 'the preparation of legal instruments.'"[22] Here, the General Counsel is

[20] Merriam-Webster; Oxford Living Dictionary.
[21] *See Fla. Ass'n of Pro. Lobbyists, Inc. v. Div. of Legislative Info. Servs.*, 7 So. 3d 511, 516-17 (Fla. 2009).
[22] *Id.* at 517.

specifically charged with working with all elected officials, departments and agencies within the consolidated government, "to advise them on new or existing state laws interfacing their duties and responsibilities, as well as related standing ordinances and resolutions, and to educate them with regard to conflicting legal issues and to assist them in amicably resolving them." Simply put, the General Counsel provides legal advice and services *to* the City, and as the Florida Supreme Court has held, doing so does not constitute the act of lobbying.

Further, the General Counsel, as the chief legal officer would, in addition to the responsibilities set forth above, be providing legal counsel, advice and representation to the consolidated City which would include and not be limited to: (1) the preparation of contracts, agreements, instruments, ordinances, resolutions or other documents, (2) the appearances and representation of the City before other local, state or federal tribunals (court, governmental or otherwise), (3) providing legal advice and rendering legal opinions on the applicability of federal, state and local laws on the activities of the City, (4) defending and prosecuting claims, cases or suits in the appropriate jurisdiction, and (5) any other legal duties or responsibilities normally associated with the profession and practice of law. Day-to-day internal legal advice to the various internal parts of the consolidated government are handled by assistant general counsels.

As recently as August 9, 2023, the United States District Court in the Southern District of Florida struck down a lobbying ban that went into effect as a result of the 2018 Florida Constitution Revision Commission and in doing so pointed out that "Other States have managed to exclude the practice of law from lobbying restrictions without creating a content-based regulation of speech."[23] This statement was made in the Omnibus Order by the Court in response to highlighted testimony of the sponsor of the Amendment (a member of the Florida Commission on Ethics) that one of the concerns he had was protecting the practice of law (and other professions like engineering or accounting) from being caught up in the prohibitory definitions of lobbying when they promulgated these rules.

## PREVIOUS CEO OPINIONS

The facts of the instant inquiry do not require receding from any prior opinions, but a further consideration of the law to a novel set of circumstances – to the practice of law in a consolidated local government setting. In particular, the application of this area of law to the facts in CEO 90-4 and CEO 19-6 are most illustrative to the instant case both in the guidance that is derived from those analyses and at the same time in the differences to those circumstances that are at hand here.

[23] *See Garcia and Fernandez v. Stillman, Gilzean, Gaetz, Anchors, et al.,* Case No. 22-cv-24156-BLOOM/Otazo-Reyes.

In CEO 90-4, the Commission examined the situation of a former member of the Florida House of Representatives who served as General Counsel to the Governor. Based on CEO 81-57, the Commission concluded that Article II, Section 8(e), did not prohibit him from reviewing legislation, advising the Governor on legislative matters, and supervising members of the Governor's staff who were registered to lobby the Legislature, so long as he did not personally represent the Governor before the Legislature. As in CEO 81-57, it was concluded that he would not be prohibited from appearing before a committee or subcommittee of the Legislature in his capacity as General Counsel to the Governor when requested to do so by the chairman of the committee or subcommittee where authorized by legislative procedures. Answering a question that had not been presented in CEO 81-57, the Commission concluded that he would not be prohibited from appearing before an individual member of the Legislature at the member's request in his capacity as General Counsel pertaining to a legislative matter of interest to the Governor, to the extent that he would be providing a bona fide, good faith response to a request for information on a specific subject, not solicited directly or indirectly. This particular opinion provides a host of helpful representative circumstances where the provided "representation" is ok and not ok. However, in CEO 90-4, unlike in the instant case, the former House member represented, specifically, the Governor and executive branch interests, *before* his former government body. In the instant case, the former Council member would represent the former government body itself to others, *not* any person or entity before that former legislator's government body.

Likewise, in CEO 19-06, the Commission found that the former Council members would be prohibited from representing persons or entities (including departments of the executive branch) before their former agency, the City Council (including individual Council members or the City Council as a whole), as well as the chief administrative officer, and the "immediate support staff" of the City Council and the chief administrative officer, for two years after vacating public office. However, once again, in that instance, the former Council member would be employed by the Executive branch of the consolidated City to represent matters before the Legislative branch. In the instant case, the former Council member would be employed in the Office of General Counsel (a separate office) and would more importantly not represent the executive branch before the legislative or vice versa, but would represent the entire consolidated City – inclusive of both branches – to the outside world. It should be noted here that at the time of the drafting of CEO 19-6 (File 2734) there was a draft opinion *Alternative A* presented to the Florida Commission on Ethics at the time (attached here as Exhibit A) that stood for the proposition that there is no prohibition where "a former elected official is representing "another person or entity" when approaching the same City, wherein they held public office. However, the Alternative B opinion is what was ultimately adopted which became the basis for CEO 19-6. This circumstance is important to note because it highlights the inherent issues involved in applying a set of universal post-elected office behavioral laws within the infrastructure of a highly unique consolidated government structure at the local level that is unlike any of the 400-plus municipalities or 66 other counties in the State. More importantly that opinion did not analyze the

practice of law and the "legal" representation of the government body itself (as opposed to reviewing solely the representation of executive interests within the same political subdivision to its legislative body).

**CONSTRUCTION OF RULES**

Subsection 112.313(16), Florida Statutes which sets forth specific standards of conduct applicable to government lawyers specifically calls out subsections (2), (4), (5), (6), and (8) with modified application of subsections (3) and (7) [of that same statutory section] as applicable to "local government attorneys." Notably, it does not cite Subsection 112.313(14) as applicable to local government attorneys. In fact, it does not cite any *post-office* or *post-employment* prohibitions with respect to the practice of law (which the Legislature would be prohibited from doing anyhow since the Judiciary (Florida Bar) has already governed on that issue as discussed above).

Furthermore, Section 112.311(2), F.S, states the following:

> It is also essential that government attract those citizens best qualified to serve. Thus, the law against conflict of interest must be so designed as not to impede unreasonably or unnecessarily the recruitment and retention by government of those best qualified to serve. Public officials should not be denied the opportunity, available to all other citizens, to acquire and retain private economic interests except when conflict with the responsibility of such officials to the public cannot be avoided.

To the extent that the Commission were to debate the applicability under Section 112.313(14) to the instant circumstances any further than has been considered here, any such conflict or limitation would be negated by Section 112.316, *Florida Statutes*, which provides:

> **112.316 CONSTRUCTION**.—It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative employee of his or her duties to the state or the county, city, or other political subdivision of the state involved.

Given the practice of law and "legal" representation of the consolidated itself rather than any internal representation of any particular branch within, Section 112.316, *Florida Statutes*, should negate a harsh, mechanical application of Section 112.313(14). *See* CEO 12-03 (holding that Section 112.316 negated a conflict of interest where a former school board member within

two years of leaving office was employed by a direct support organization of the school board due to the unity of interests between the direct support organization and the school board).

## VII. CONCLUSION

Ms. DeFoor, as a former City Council member, would not be prohibited or limited by Florida Ethics Laws such as Article II, Section 8(f), Florida Constitution or Chapter 112.313(14), Florida Statutes, from serving as the general counsel (the chief legal officer) to the City (which includes the City Council and the Mayor's Office) and providing the legal services, counsel and representation required by virtue of that office to the City, within two years of leaving the City Council. The practice of law and the legal duties and responsibilities of the General Counsel in the City of Jacksonville do not fall under the prohibitions of the above referenced Florida Ethics Laws. At all times the General Counsel for the City would be legally representing the City Council (or government body) itself, and *not* any other person or entity before it.

The General Counsel to the City would not be engaging in any *lobbying* activities as set forth in Article II, Section 8(f), Florida Constitution as that term is defined and accordingly the restrictions and prohibitions set forth therein are not applicable to the instant analysis.

Additionally, Section 112.313(14) provides that a former Council member would be prohibited from: (1) personally representing (2) another person or entity (3) for compensation (4) before the government body or agency of which the person was an officer for a two year period after vacating the office.

In the instant case, Ms. DeFoor, as a former Council member would not be (1) personally representing (2) another person or entity (3) for compensation (4) before the government body or agency of which the person was an officer.

Instead, she would be (1) personally representing (2) the person or entity (the City, not another) (3) for compensation (4) before other local, state or federal tribunals (not before the government body or agency of which the person was an officer).

Therefore, a Council member would not be prohibited or limited by Section 112.313(14) from serving as the general counsel (the chief legal officer) to the unified City (which includes the City Council and the Mayor's Office) and providing the legal services, counsel and representation required by virtue of that office *to* the City, within two years of leaving the City Council. The professional activities of attorneys and the practice of law is governed by the Florida Supreme Court through the Florida Bar. Such an opinion is specific to the circumstances and set up of the consolidated City and the practice of law.

**EXHIBIT A**

**CEO 19-6 (File 2734) draft opinion *Alternative A***

ALTERNATIVE A

FILE 2734 – March 26, 2019

**POST-OFFICEHOLDING RESTRICTIONS**

**FORMER CITY COUNCIL MEMBERS EMPLOYED BY SAME CITY WITHIN TWO YEARS OF VACATING PUBLIC OFFICE**

*To: Jason R. Gabriel, General Counsel, and Lawsikia Hodges, Deputy General Counsel (Jacksonville)*

**SUMMARY:**

Neither Section 112.313(7)(a), nor Section 112.313(10)(a), Florida Statutes, would prohibit Jacksonville City Council members from applying for an employment position in the City's executive branch, with such employment beginning after the City Council member's term has expired. Section 112.313(14), Florida Statutes, would not prohibit the former members from "representing" executive branch departments before the City Council within two years of leaving the City Council. CEO 81-57, CEO 90-4, CEO 91-49, CEO 93-14, CEO 95-14, CEO 02-12, CEO 05-4, CEO 09-4, CEO 09-13, CEO 12-3, CEO 13-10, CEO 16-15, and CEO 18-2 are referenced.[1]

**QUESTION 1:**

Would a prohibited conflict of interest be created under Section 112.313(7)(a) or 112.313(10)(a), Florida Statutes, were members of the City Council to apply for public employment with the City's executive branch, with the employment to begin after their term of office has expired?

This question is answered in the negative.

In your letter of inquiry and conversations with our staff, you state you serve as General

Counsel and Deputy General Counsel, respectively, for the City of Jacksonville, and have been authorized to seek this opinion on behalf of certain members of the Jacksonville City Council (City Council or Council).[2] You relate that the Council members at issue were elected to the City Council in 2011 and re-elected in 2015. You further state that their terms as Council members expire on July 1, 2019, and that they have each expressed an interest in applying for employment positions within the City's executive branch. You relate that if hired their employment would not begin until after their City Council term expires.

Pursuant to its Charter, Jacksonville is a consolidated government having powers divided amongst the legislative, executive, and judicial branches of the consolidated government.[3] You state that under consolidated government, the City exists as one single unitary body politic and corporate, or political subdivision, which includes all elected officials, the legislative branch, and all executive branch departments, boards, and commissions established by the City Charter or by the City Council.[4] Pursuant to Section 5 of the City Charter, the City Council is vested with all legislative powers within the consolidated government, including but not limited to the authority

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[1] Prior opinions of the Commission on Ethics can be viewed at www.ethics.state.fl.us.

[2] Pursuant to Section 5 of the City Charter the City Council is comprised of 14 district members and 5 at-large members.

[3] See Section 1 of the City Charter. See also Section 4.01 of the City Charter which provides: "All powers and duties of the consolidated government which are legislative in nature shall be exercised and performed by the council. All powers and duties which are executive in nature shall be exercised or performed by the mayor or such other executive officer of the consolidated government as the mayor may designate, except as otherwise specifically provided herein. All powers and duties of the consolidated government which are judicial in nature shall be exercised and performed by the circuit court of the fourth judicial circuit of Florida . . . ."

[4] The City is also served by several independent agencies (i.e., JEA [formerly known as Jacksonville Electric Authority], Jacksonville Port Authority, Jacksonville Airport Authority, Jacksonville Housing Authority, Jacksonville Housing Finance Authority, Duval County School Board). This opinion does not analyze or address the application of Section 112.313(7)(a), 112.313(10)(a), or Section 112.313(14), Florida Statutes, in the context of employment with, or

to pass ordinances, approve the budget for the consolidated government and independent agencies, levy taxes, and confirm appointments to authorities and advisory boards, as well as executive department directors and chiefs.

Section 6 of the City Charter provides that the Mayor is the chief executive officer of the executive branch. You relate that within the executive branch the City has several departments (such as Planning and Development, Public Works, Neighborhoods, Finance and Administration, etc.) as well as boards and commissions. The prospective employment opportunities being considered by the City Council members involve positions in executive branch departments (such as department directors, chiefs, and departmental staff) or boards. You state that all executive department employees, including department directors and chiefs, report to the City's chief administrative officer, who reports directly to the mayor.[5] You state that executive department employees, especially department directors and chiefs, often interface with members of the City Council on various governmental matters, including executive department budgets, both during and outside of Council meetings.

Sections 112.313(7)(a) and 112.313(10)(a), Florida Statutes, provide:

> CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.—No public officer . . . shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . . ; nor shall any officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful

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representation of, any independent agency.

[5] Section 6.04 of the City Charter sets forth the powers and duties of the Mayor and provides that the "mayor shall appoint the directors and authorized deputy directors of each department and the chief of each division within each department, subject to confirmation by the council, and they shall serve at the pleasure of the mayor."

discharge of his or her public duties. [Section 112.313(7)(a), Florida Statutes.]

> EMPLOYEES HOLDING OFFICE.—No employee of a state agency or of a county, municipality, special taxing district, or other political subdivision of the state shall hold office as a member of the governing board, council, commission, or authority, by whatever name known, which is his or her employer while, at the same time, continuing as an employee of such employer. [Section 112.313(10)(a), Florida Statutes.]

Section 112.313(7)(a), Florida Statutes, prohibits a *public officer* from having certain employment or contractual relationships. See, for example, CEO 12-3 and CEO 13-10. In the instant matter, the Council members have indicated that, if selected for an executive branch employment position, they do not intend to begin any such employment with the City until after their term has expired (until after the member ceases to be a *public officer*). Thus, we find that the prospective employment would present no prohibited conflict of interest for the members under Section 112.313(7)(a).

Section 112.313(10)(a), Florida Statutes, prohibits one from holding office on a board that is, at the same time, his or her employer. However, because the facts in the instant matter indicate that any potential executive branch employment position, should the respective member obtain it, would not overlap in time with their service on the City Council, we find that their application for, possible offer of employment with, or employment with the City would not be prohibited by Section 112.313(10)(a).[6] See CEO 12-3.

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[6] The facts involved herein indicate that although the members have stated that they will not begin their employment with the City until after their term of office has expired, they may apply and be considered for the employment opportunities prior to vacating public office (i.e. while they are public officers on the City Council). Thus, and without in any way intending to suggest doubt as to the Council members' personal integrity, we note that the members should be cognizant of, and comply with, the provisions of Sections 112.313(6) and 112.313(8), Florida Statutes, which provide:

Question 1 is answered accordingly.

**QUESTION 2:**

Would Section 112.313(14), Florida Statutes, prohibit former City Council members from "representing" the executive branch before the City Council within two years of leaving the City Council?

This question is answered in the negative.

Section 112.313(14), Florida Statutes, provides:

> LOBBYING BY FORMER LOCAL OFFICERS; PROHIBITION.—A person who has been elected to any county, municipal, special district, or school district office may not personally represent another person or entity for compensation before the government body or agency of which the person was an officer for a period of 2 years after vacating that office. For purposes of this subsection:
> (a) The "government body or agency" of a member of a board of county commissioners consists of the commission, the chief administrative officer or employee of the county, and their immediate support staff.
> (b) The "government body or agency" of any other county elected officer is the office or department headed by that officer, including all subordinate employees.

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> MISUSE OF PUBLIC POSITION.—No public officer or employee of an agency shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties, to secure a special privilege, benefit, or exemption for himself or others. This section shall not be construed to conflict with s. 104.31. [Section 112.313(6), Florida Statutes]

> DISCLOSURE OR USE OF CERTAIN INFORMATION.—A current or former public officer, employee of an agency, or local government attorney may not disclose or use information not available to members of the general public and gained by reason of his or her official position, except for information relating exclusively to governmental practices, for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity. [Section 112.313(8), Florida Statutes]

These provisions prohibit the members from corruptly using their public office or the resources thereof, or using "inside information," for the purpose of benefitting themselves or any other person or entity.

> (c) The "government body or agency" of an elected municipal officer consists of the governing body of the municipality, the chief administrative officer or employee of the municipality, and their immediate support staff.
> (d) The "government body or agency" of an elected special district officer is the special district.
> (e) The "government body or agency" of an elected school district officer is the school district.

Section 112.313(14), Florida Statutes, places a two-year restriction on for-compensation representations by certain former local officers before their former government body or agency. The language mirrors the prohibition placed by Section 112.313(9), Florida Statutes, on various state officers and employees, and the prohibition placed by Article II, Section 8, Florida Constitution, on members of the Legislature.

In CEO 91-49, we stated

> As we noted in CEO 81-57, the post-officeholding provision in the Sunshine Amendment, Article II, Section 8(e), Florida Constitution, was intended to prevent influence peddling and the use of public office to create opportunities for personal profit once officials leave office. We believe this also to have been the Legislature's intent in extending the prohibition to apply to post-employment situations by the enactment of Section 112.3141(1)(d), Florida Statutes.[7]

In other advisory opinions we have noted the additional purpose of precluding the appearance of impropriety by preventing public officials from exploiting the special knowledge or influence gained from their public position for private gain after leaving that position, and to restrict interactions between a former officer or employee and his or her former colleagues. See CEO 18-2, CEO 95-14, CEO 93-14, CEO 02-12, and CEO 05-4.

Section 112.313(14)(c) defines the "government body or agency" of an elected municipal officer, as the City Council, the City's chief administrative officer, and the "immediate support

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[7] This statute was adopted first in 1989, when it was codified as Section 112.3141(1), Florida Statutes (1989). See Chapter 89-380, Laws of Florida, eff. July 1, 1989. In 1991, the statute was

staff" of the City Council and the chief administrative officer. In accordance with our prior opinions, the City Council member would be prohibited from personally representing *another person or entity* for compensation before the City Council (including individual Council members or the City Council as a whole), as well as the City's chief administrative officer, and the "immediate support staff" of the City Council and the chief administrative officer.

Although we have considered the parameters of Section 112.313(14) in the context of opinions involving prospective post-public-office employment with private entities, including limited liability companies, non-profit organizations, and a school district direct support organization, we have not previously considered facts, as here, involving the application of this statute to employment opportunities existing within the same government in which one held an elected office. See CEO 05-4, CEO 12-3, CEO 13-10, and CEO 16-15. Under the situation presented, were the former City Council members to be employed by the executive branch of the City, they would be doing so in a paid capacity (i.e., "for compensation") within two years of vacating public office. Thus, the matter at issue herein is whether the term "another person or entity" contained in Section 112.313(14) would prohibit the representation of a department of the executive branch before the legislative branch (City Council) of the same City.

In interpreting the language and extent of Section 112.313(14), Florida Statutes, the Commission has relied upon the extensive analysis of the similar post-officeholding restriction contained in Article II, Section 8(e), Florida Constitution, and Section 112.313(9)(a)3, Florida Statutes, which provides:

> 3.a. No member of the Legislature, appointed state officer, or statewide elected officer shall personally represent another person or entity for compensation before

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transferred to Section 112.313(9), Florida Statutes, by Chapter 91-85, Laws of Florida.

> the government body or agency of which the individual was an officer or member for a period of 2 years following vacation of office. No member of the Legislature shall personally represent another person or entity for compensation during his or her term of office before any state agency other than judicial tribunals or in settlement negotiations after the filing of a lawsuit.
> b. For a period of 2 years following vacation of office, a former member of the Legislature may not act as a lobbyist for compensation before an executive branch agency, agency official, or employee. . . [emphasis added]

There, we have found that the term "another person or entity" within the prohibition includes the representation of both public and private sector entities. In CEO 09-4 we found that the post-officeholding prohibition in Section 112.313(9)(a)3 prohibited a former member of the House of Representatives serving as a community college president from representing, for two years, his public employer before the Legislature. Critical to our finding that the phrase "another person or entity" would include both private and governmental entities was our acknowledgment that "public agencies represent a variety of interests, some of which compete with the interests of other public entities for the Legislature's attention." See also CEO 90-4 (wherein we advised that a former member of the Florida House of Representatives who served as General Counsel to the Governor would be prohibited for two years from representing the Governor before the Legislature with certain limited exceptions).

In accordance with these opinions, in analyzing the analogous prohibition contained in Section 112.313(14) applicable to elected public officers on the political subdivision level, the Commission has found that the term "another person or entity" includes the representation of any "legal person or entity distinct from, or not synonymous with, your natural self or your natural person." CEO 13-10. Most recently, in CEO 16-15, we explained that pursuant to this definition, Section 112.313(14) would prohibit a former county commissioner from representing an array of

clients before the county commission, for two years after leaving public office, including both for-profit and non-profit entities, as these entities constituted "legal persons or entities separate and distinct from you." We further explained that the prohibition applies even if the member's employer "is a non-profit organization or a consultant for another entity, as the statute does not distinguish between different types of clients." See also CEO 12-3.

In the instant matter, counsel for the Requestors of this opinion assert that the consolidated government, including all executive departments, executive administrative boards, and the City Council, are all part of the same political subdivision entity known as the City of Jacksonville. As such, they contend that each of the former City Council members, if employed by the executive branch, would not be representing "*another* person or entity" under Section 112.313(14). Moreover, they contend that because the employment positions would be in the City's executive branch (e.g., executive department or executive administrative board), which is within the same political subdivision as the City Council, the former Council members would not be in a position to exploit special knowledge gained by virtue of the Council members' former public office. They assert that the executive and legislative branches of government in Jacksonville ultimately work hand-in-hand to facilitate the unitary interests of the City. They further contend that it is disputable whether the former Council members would even be "representing" the executive branch under these facts in the context of Section 112.313(14). They state that, as defined in Section 112.312(22), Florida Statutes, "represents" means "actual physical attendance on behalf of a client in an agency proceeding, the writing of letters or filing of documents on behalf of a client, and personal communications made with the officers or employees of any agency on behalf of a client." They argue that the

definition of the term "represent" is limited to the context of a client relationship which does not include or encompass public employment by a governmental entity such as the executive branch of City government.

The arguments of the Requestors represent a departure from this Commission's past applications of the post-officeholding restriction contained in Section 112.313(14) and would require us to construe the term "another person or entity" so as to exempt from this prohibition representations of governmental entities located within the same political subdivision or government. While we remain persuaded that the appropriate interpretation of the term "person or entity" should continue to include the representation of both governmental entities as well as private entities,[8] we do not believe that a former elected official is representing "*another* person or entity" when approaching the same City, wherein they held public office, in the fulfillment of their executive employment public duties to the City. Here, the former members of the City Council are merely seeking to continue their public service by moving into the executive branch of City government as public employees for whom appearing before the City Council would be an integral responsibility of their public position. The circumstances in the instant matter do not involve the use of their public service careers as Council members and contacts developed in that capacity to enrich themselves at the expense of the public. Thus, under the facts presented, we find that Section 112.313(14) does not prohibit, during the two years after leaving public office, a former City Council member from being employed in a public capacity by the City and "representing" the City and its departments before the City Council or others of their former

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[8] While the definition of "represent" contains "client," the prohibition itself is anchored in "another person or entity" and is not limited to "clients."

government body or agency.[9]

Question 2 is answered accordingly.

GWN/cmk

cc: Mr. Jason R. Gabriel, Esq., and Ms. Lawsikia Hodges Esq.

[9] As noted *supra*, the Council members have indicated that they will not become an employee in the executive branch until after the Council member's term has expired. However, we note that the City Charter requires City Council confirmation of certain executive branch positions, including directors and chiefs. Were a Council member's application or recommendation for an executive branch employment position (to commence only after ceasing to be a public officer) to come before the City Council for confirmation prior to the member vacating public office, the member must comply with Section 112.3143(3)(a), Florida Statutes, regarding any Council votes/measures concerning the member/applicant, including abstention from voting on any measure(s) concerning the position, publicly stating to the Council the nature of his/her interest in any measure(s) concerning the position, and, within 15 days after the relevant vote(s), file a memorandum of voting conflict (CE Form 8B) disclosing the nature of his/her interest in the relevant vote(s)/measure(s).