

July 30, 2012

Elisa J. Dozono
111 SW 5th Avenue, Suite 3400
Portland, OR 97204-3699

Dear Ms. Dozono:

This is in response to your correspondence dated July 10, 2012, requesting an opinion on two issues related to conflicts of interest.

OREGON GOVERNMENT ETHICS COMMISSION STAFF ADVISORY OPINION NO. 12S-001

STATED FACTS: You are a non-equity partner in the Miller Nash law firm. Miller Nash provides services to at least one client who is an Oregon State Lottery (Lottery) retailer, and it is possible that there are other clients who are Lottery retailers as well. The known Lottery retailer is not your client but is a client of other Miller Nash staff. You do not receive a share of firm profits, and except when you personally provide services, you do not receive any financial benefit when legal services are obtained from Miller Nash. Consequently, you do not receive any financial benefit from the known Miller Nash client who is a Lottery retailer. You have submitted an interest form to serve on the Oregon State Lottery Commission (OSLC). You indicated that OSLC sets the terms and conditions for all Lottery retailers but does not oversee or approve individual retailer contracts.

QUESTION #1: Under these circumstances, does the fact that other Miller Nash staff provide legal services to a client who is a Lottery retailer present me with a conflict of interest that would prevent me from serving on the Oregon State Lottery Commission?

DISCUSSION #1: If you are appointed to the Oregon State Lottery Commission, you will hold a position as a public official, and the Oregon Government Ethics provisions in ORS 244 will apply to you. All public officials need to ensure that their actions comply with the statutes in ORS 244, including the conflict of interest provisions.

A public official could face either an actual conflict of interest or a potential conflict of interest. The difference between an actual conflict of interest and a potential conflict of interest is determined by the words “would” and “could.” [ORS 244.020(1) and ORS

244.020(12)] An **actual** conflict of interest occurs when an official action, decision, or recommendation of a public official **would** affect the financial interests of the public official, the public official's relative or household member, or any business with which the public official or a relative or household member is associated. In contrast, a **potential** conflict of interest exists when the official action, decision, or recommendation of a public official **could** have a financial impact on that public official, the public official's relative or household member, or any business with which the public official or a relative or household member is associated.

Statute defines a person as "associated with" a private business if are the director, officer, owner, employee, or agent of that business, or if they own or have owned \$1,000 or more of stock, equity interest, stock options, or debt instruments in that business at any point in the preceding calendar year. [ORS 244.020(3)(A)] A person is "associated with" a publically traded company if they are a director or officer of that company, or if they own or have owned more than \$100,000 worth of stock or other form of equity interest, stock options or debt instruments at point in the preceding calendar year. [ORS 244.020(3)(b-c)] Finally, a person is a "associated with" a business if they are required to file an annual statement of economic interest by ORS 244.050 and that business is a "source of income" as defined in ORS 244.060(3). [ORS 244.020(3)(d)]

Your question centers around a client that receives services from the business in which you are a non-equity partner, but not from you personally as a service provider. Based on the information you provided, Miller Nash is a business with which you are associated. However, but that client of Miller Nash is not a business with you are associated. And if neither you nor any of your relatives or household members are "associated with" that client, then matters involving that client would not present a conflict of interest to you.

ANSWER #1: Statute requires you to refrain from participating in a vote only when faced with an actual conflict of interest. If a matter does not present you with an actual conflict of interest, then ORS 244.120(2) does not prohibit you from voting on that matter.

QUESTION #2: Does this circumstance present me with a conflict of interest that would prevent me from voting as a member of the Oregon State Lottery Commission?

DISCUSSION #2: If you were to face a conflict of interest as a member of the OSLC, the law would require you to publically announce the nature of the conflict of interest on each occasion a conflict of interest is met, and, were to you to face an actual conflict of interest, to also refrain from participating as a public official in the discussion, debate or vote on that matter. [ORS 244.120(2)] None of the Oregon Government Ethics statutes

prohibit a person who will or may face a conflict of interest as a public official from holding that position as a public official.

It is not the holding of a position that creates a conflict of interest. Rather, it is the opportunity to perform a specific official act that either could cause or would cause a personal financial benefit for the public official, their relative or household member or business with which any of them are associated, that presents a conflict of interest to a public official.

In addition, if your official action would affect "to the same degree a class consisting of ... an industry, occupation or other group" which included you or your relative or household member, or a business with which you or relative or household member "is associated, is a member, or is engaged", then the opportunity to perform that official action would not present a conflict of interest to you. [ORS 244.020(12) and ORS 244.020(1).

ANSWER #2: No, the fact that Miller Nash has a client who is a Lottery retailer would not prevent you from serving on the OSLC.

Please note: the above analysis is based on the assumption that any official actions which you might have the opportunity to perform as a member of the Oregon State Lottery would not result in either a pecuniary benefit or detriment for Miller Nash, which is a business with which you are associated. If an official action would or could result in a private pecuniary benefit or detriment for Miller Nash, then you would be faced with a conflict of interest.

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS 244 TO THE FACTS STATED HEREIN. ANY RELEVANT INFORMATION, WHICH WAS NOT INCLUDED BY THE REQUESTER OF THIS OPINION IN THE STATED FACTS, COULD COMPLETELY CHANGE THE OUTCOME OF THIS OPINION. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. THIS OPINION DOES NOT EXEMPT A PUBLIC OFFICIAL FROM LIABILITY UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS ONLY MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT ETHICS COMMISSION.

Elisa J. Dozono
Commission Staff Advisory Opinion 12S-001
July 30, 2012
Page 4

Please contact this office again if you would like this opinion submitted to the Oregon Government Ethics Commission for adoption as a formal advisory opinion pursuant to ORS 244.280.

Sincerely,

Ronald A. Bersin
Executive Director

RAB/br 12S-001

ADDENDUM

RELEVANT STATUTES: The following Oregon Revised Statutes (ORS) are applicable to the issues that are addressed in this opinion:

ORS 244.020(14) “Public official” means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body as defined in ORS 174.109 as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services.

ORS 244.020(1) “**Actual conflict of interest**” means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person’s relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (12) of this section.

ORS 244.020(12) “**Potential conflict of interest**” means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person’s relative, or a business with which the person or the person’s relative is associated, unless the pecuniary benefit or detriment arises out of the following:

- (a) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.
- (b) Any action in the person’s official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person’s relative or business with which the person or the person’s relative is associated, is a member or is engaged.
- (c) Membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.

OAR 199-005-0003(2) “**Decision**” as used in ORS 244.020(9)(a) and (b) means an act that commits the public body to a particular course of action within the public official’s scope of authority and that is connected to the source’s economic interest. A decision is not a recommendation or work performed in an advisory capacity.

ORS 244.020(15) “**Relative**” means:

- (a) The spouse of the public official or candidate;
- (b) Any children of the public official or of the public official’s spouse;

- (c) Any children of the candidate or of the candidate's spouse;
- (d) Siblings, spouses of siblings or parents of the public official or of the public official's spouse;
- (e) Siblings, spouses of siblings or parents of the candidate or of the candidate's spouse;
- (f) Any individual for whom the public official or candidate has a legal support obligation;
- (g) Any individual for whom the public official provides benefits arising from the public official's public employment or from whom the public official receives benefits arising from that individual's employment; or
- (h) Any individual from whom the candidate receives benefits arising from that individual's employment

ORS 244.020(2) "**Business**" means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official or a relative of the public official is associated only as a member or board director or in a non-remunerative capacity.

ORS 244.020(3) "**Business with which the person is associated**" means:

- (a) Any private business or closely held corporation of which the person or the person's relative is a director, officer, owner or employee, or agent or any private business or closely held corporation in which the person or the person's relative owns or has owned stock, another form of equity interest, stock options or debt instruments worth \$1,000 or more at any point in the preceding calendar year
- (b) Any publicly held corporation in which the person or the person's relative owns or has owned \$100,000 or more in stock or another form of equity interest, stock options or debt instruments at any point in the preceding calendar year
- (c) Any publicly held corporation of which the person or the person's relative is a director or officer;
- (d) For public officials required to file a statement of economic interest under ORS 244.050, any business listed as a source of income as required under ORS 244.060(3).

ORS 244.120 **Methods of handling conflicts; Legislative Assembly; judges; appointed officials; other elected officials or members of boards.**

- (1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:
 - (a) If the public official is a member of the Legislative Assembly, announce publicly, pursuant to rules of the house of which the public official is a

- member, the nature of the conflict before taking any action thereon in the capacity of a public official.
- (b) If the public official is a judge, remove the judge from the case giving rise to the conflict or advise the parties of the nature of the conflict.
 - (c) If the public official is any other appointed official subject to this chapter, notify in writing the person who appointed the public official to office of the nature of the conflict, and request that the appointing authority dispose of the matter giving rise to the conflict. Upon receipt of the request, the appointing authority shall designate within a reasonable time an alternate to dispose of the matter, or shall direct the official to dispose of the matter in a manner specified by the appointing authority.
- (2) An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:
- (a) When met with a **potential conflict of interest**, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or
 - (b) When met with an **actual conflict of interest**, announce publicly the nature of the actual conflict and:
 - (A) Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.
 - (B) If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.
- (3) Nothing in subsection (1) or (2) of this section requires any public official to announce a conflict of interest more than once on the occasion which the matter out of which the conflict arises is discussed or debated.
- (4) Nothing in this section authorizes a public official to vote if the official is otherwise prohibited from doing so.

ORS 244.130 Recording of notice of conflict; effect of failure to disclose conflict.

- (1) When a public official gives notice of an actual or potential conflict of interest, the public body as defined in ORS 174.109, that the public official serves, shall record the actual or potential conflict in the official records of the public body. In addition, a notice of the actual or potential conflict and how it was disposed of may in the discretion of the public body be provided to the Oregon government Ethics Commission within a reasonable period of time.
- (2) A decision or action of any public official or any board or commission on which the public official serves or agency by which the public official is employed may not be voided by any court solely by reason of the failure of the public official to disclose an actual or potential conflict of interest