



To: Commissioner Michael Mena

From: Miriam S. Ramos, Deputy City Attorney for the City of Coral Gables

Approved: Craig E. Leen, City Attorney for the City of Coral Gables

A handwritten signature in blue ink, appearing to be "C. Leen", is written over the word "Approved" and extends to the right.

RE: Legal Opinion Regarding Continued Relationship with Akerman LLP as Special Counsel to the City Attorney's Office

Date: June 9, 2017

On April 28, 2017, Michael Mena took office as Commissioner of the City of Coral Gables after winning the run-off election the Tuesday prior. Commissioner Mena is currently a partner at the law firm of Akerman LLP (Akerman). Since approximately 2004, when Elizabeth Hernandez was City Attorney, the City Attorney's Office has used attorneys at Akerman as special counsel. After Elizabeth Hernandez retired and Craig E. Leen was named City Attorney the relationship with Akerman continued. Notably, Akerman represented the City in litigation involving Florida Power and Light, has represented the City in several police matters and Elizabeth Hernandez has provided assistance to the City Attorney's Office based on her historical knowledge, given her previous position as City Attorney for over 15 years. At no time has Commissioner Mena worked as special counsel for the City on any matters.

Pursuant to Sec. 2-677 of the City Code, "the city attorney shall perform all legal services required to accomplish the purposes of their [sec] office, and shall have the authority to retain outside legal services when such services are necessary...all attorneys retained or employed by the city, regardless of the nature or kind of service performed or the title or designation under which they render legal service for the city, are hereby placed under the direct supervision and control of the city attorney." Further, legal services are exempt from the procurement code (Sec. 2-678(6)). Thus, pursuant to the City Code, the City Commission has no authority to hire, fire or otherwise control special counsel.

Given the recent election of Commissioner Mena, this opinion explores whether Commissioner Mena's new position with the City presents any issues under the Miami-Dade Conflict of Interest and Code of Ethics Ordinance (M-D Ethics Ordinance), the City of Coral Gables Ethics Code or the Florida Code of Ethics for Officers and Employees (Ch. 112, F.S.).

This opinion finds that none of the Codes prohibit the City Attorney's Office's continued use of attorneys at Akerman as special counsel, with care taken regarding voting conflict rules (should a pertinent situation arise in the future).

The relationship is analyzed under Sec. 2-11.1(d)1 of the M-D Ethics Ordinance which states in pertinent part:

No [Commissioner, autonomous personnel, quasi-judicial personnel advisory personnel, departmental personnel, employee] shall enter into a contract or transact any business through a firm, corporation, partnership or business entity in which he...has a controlling financial interest, direct or indirect, with [the City]...

A "controlling financial interest" is defined as, ownership of "ten (10) percent or more of the outstanding capital stock in any corporation or as a direct or indirect interest of ten (10) percent or more in a firm, partnership or other business entity."

Akerman employs approximately 650 attorneys and has 24 offices throughout the country. Although Commissioner Mena holds the title of "partner," he is not an equity partner and does not have a "controlling financial interest" in the firm. Therefore, Sec. 2-11.1(d) does not prohibit Akerman from continuing to contract with the City Attorney's Office.

The relationship is further analyzed under Sec. 112.313(3), F.S. which states, in pertinent part:

No employee of an agency acting in his or her official capacity as a purchasing agent, or public officer acting in his or her official capacity, shall either directly or indirectly purchase...services for his or her own agency from a business entity of which the officer...is an officer, partner, director or proprietor...Nor shall a public officer...acting in a private capacity...sell...services to...any political subdivision or any agency thereof, if he or she is serving as an officer...of that political subdivision.

With regard to the first part of the section involving an official acting in his or her official capacity, in CEO 94-12 the Florida Ethics Commission opined that this section was not violated where an attorney in the same law firm in which the college president's wife was a shareholder served as counsel to the college's board of trustees, because the "College President would not be acting as a 'purchasing agent' to purchase legal services for the College District Board of Trustees." In explaining their conclusion they stated that the Board attorney is retained directly by the Board and performs services directly for the Board. As previously stated, pursuant to the City Code, the hiring and direction of special counsel is exclusively under the authority of the City Attorney. Also, pursuant to Sec. 2-201(10) of the City Code, the City Attorney may "retain, supervise and remove outside counsel in accordance with the procurement provision of the City Code relating to the authority to contract for legal services." The City Attorney hires special

counsel based on this authority and without seeking Commission approval. The model in the City is that the City Attorney oversees special counsel on every matter as they serve in assisting his office and at his pleasure. Thus, Commissioner Mena has no legal authority over the hiring of special counsel, and therefore would not ever act in his official capacity as a purchasing agent for these purposes creating no conflict of interest under Sec. 112.313(3), F.S.

With regard to an official acting in his or her private capacity, in CEO 07-1 the Florida Ethics Commission addressed whether this section would be violated where a member of a city housing authority was a partner in a law firm providing services to the authority. In that case, the relationship with the law firm was started prior to the member joining the firm (through a merger) therefore the Ethics Commission concluded that a conflict of interest did not exist as he did not act in a private capacity to sell services to the authority. The opinion did conclude that “should the member’s law firm be selected anew to provide legal services to the Authority, a conflict of interest would be created under the statute.” As previously stated, Commissioner Mena has never been personally involved in the legal services provided to the City Attorney’s

Office by Akerman and Akerman’s relationship with the City Attorney’s Office significantly predates Commissioner Mena’s election to the City Commission. The current and ongoing relationship with Akerman is pursuant to an established retainer agreement which is not being renewed or expanded at this time. Further, it is important to reiterate that the retainer agreements with special counsel are entered into by the City Attorney’s Office directly and under his independent authority provided in the City Code. Therefore, a conflict is not created under Sec. 112.313(3), F.S.

As previously stated, Akerman has served as special counsel to the City Attorney’s Office and largely due to that fact, Akerman does not appear before the City Commission on behalf of its clients. In the spirit of completeness, however, the relationship is further analyzed under the second paragraph of Sec. 2-11.1(d) of the M-D Ethics Ordinance relating to voting conflicts and which state in pertinent part:

No [Commissioner] shall vote on or participate in any way in any matter presented to the [City Commission] if said person has any of the following relationships with any of the persons or entities which would be or might be directly or indirectly affected by any action of the [City Commission]: (i) officer, director, partner, of counsel, consultant, employee, fiduciary or beneficiary; or (ii) stockholder, bondholder, debtor, or creditor, if in any transaction or matter would affected [the Commissioner] in a manner distinct from the manner in which it would affect the public generally.

Commissioner Mena holds the title of “partner” with Akerman therefore he has one of the enumerated relationships in (d)(i), however, a voting conflict under the M-D Ethics Ordinance is only presented “if the transaction or matter would affect the Commissioner in a manner distinct from the manner in which it would affect the public generally.” Thus, Commissioner Mena

would only have a voting conflict if the matter in particular would affect him in a distinct fashion.

The corresponding state law provision (Sec. 112.3143) relating to voting conflict states, in pertinent part, as follows:

No...municipal...officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency defined in s. 112. 312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer.

A “special private gain or loss” means an economic benefit or harm that would inure to the officer, his or her relative, business associate, or principal, in which case, at least the following factors must be considered when determining whether a special private gain or loss exists:

1. The size of the class affected by the vote.
2. The nature of the interests involved.
3. The degree to which the interests of all members of the class are affected by the vote.
4. The degree to which the officer, his or her relative, business associate, or principal receive a greater benefit or harm when compared to other members of the class.

Opinions issued by the Florida Ethics Commission vary in their conclusions regarding whether a voting conflict exists as the analysis is largely based on the particular facts presented. It stands to reason that there may be situations where Sec. 112.3143 would prohibit Commissioner Mena from voting on a matter presented to the City Commission by attorneys at Akerman and others where Commissioner Mena would not have a voting conflict. If the situation were to arise, a separate ethics opinion may be given which account for the specific facts at hand. Importantly, Commissioner Mena has indicated that he will recuse himself from any matter where Akerman is presenting before the City Commission. This does not present a frequently recurring conflict as Akerman has not historically presented before the City Commission and does not intend to doing so now.

Setting any potential voting conflict aside, this opinion concludes with its intended purpose - to determine whether Commissioner Mena’s position with the City prohibits the City Attorney’s Office from continuing its relationship with Akerman to have their attorneys assist the City Attorney’s Office as special counsel. As detailed above, the fact that the relationship with Akerman significantly predates Commissioner Mena’s election to office, that he was not involved in establishing that relationship, given Commissioner Mena’s role as a non-equity partner in the firm and given the City Attorney’s authority over special counsel, the City

Attorney's Office may continue to employ Akerman as special counsel as it has historically done.

This opinion is issued pursuant to Sections 2-201(e)(1) and (8) of the City Code and Section 2-237 of the City's Ethics Code, as corrected in CAO 2016-045.

June 2017