

STATE OF NEW YORK: COUNTY OF SUFFOLK  
SUFFOLK COUNTY BOARD OF ETHICS

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In the Matter of the Inquiry of

██████████

**ADVISORY OPINION**  
No. AO-2014-3

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NOTICE: THIS ADVISORY OPINION IS SUBJECT TO REVISION OR WITHDRAWAL. Applications requesting its modification, clarification, or withdrawal must be made in accordance with Suffolk County Board of Ethics rules unless an application for the revision or withdrawal of an advisory opinion is timely received, it shall become final. Nothing shall prohibit the Suffolk County Board of Ethics, on its own motion, from reconsidering, revising or withdrawing an advisory opinion at any time.

**ADVISORY OPINION REQUEST**

1. Would a former Assistant County Attorney be in conflict under Suffolk County Code Chapter 77, §77-6 (post-employment restrictions) because he appeared before a neutral magistrate appointed by the County Executive under County Code 420 (vehicle seizure hearings), less than two years following the termination of his employment?

**GOVERNING AUTHORITY**

2. The Laws of Suffolk County; Suffolk County Administrative Code XXX, Advisory Opinions; and Suffolk County Code Chapter 77, Section 77-6(B), Section 77-6(C), Section 77-6(I).

**PROCEDURAL HISTORY**

- 3. This Advisory Opinion was requested 3/28/2014.
- 4. Standing was voted and approved on 4/9/2014.
- 5. Fact finding was concluded on 4/14/2014.
- 6. The Board voted on this Advisory Opinion request on 4/23/2014.

**INFORMATION PRESENTED TO THE BOARD**

7. The Requestor, a former Suffolk County Assistant Attorney, was employed by the County Law Department until ██████████. (*Requestor's Exhibit#1*). During his employment in the position,

he represented the County in DWI and vehicle seizure hearings before a neutral magistrate appointed by the County Executive under Suffolk County Code 420. He did not receive any departmental directives prior to his separation from the County regarding post-employment court appearances (*Requestor's Exhibits #1/2*).

8. On [REDACTED] a private client sought to retain the Requestor to appear on behalf of the private client before the neutral magistrate appointed by the County Executive at a vehicle seizure hearing. He declined in order to obtain an Advisory Opinion from the Board as to post-employment restrictions (*Requestor's Exhibits #1/2*).

9. To date, the Requestor has not appeared before any magistrate regarding any vehicle seizure since separation from the County (*Requestor's Exhibits #1/2*).

10. The Requestor asserts that his private practice will not include any vehicle seizures that occurred on or before his date of separation from the County, [REDACTED]. He further affirms that his private practice, similar to many members of the Bar who are not former Assistant County Attorney's, is based solely on the vehicle seizure laws, not the disclosure of use of confidential information gained from County service (*Requestor's Exhibits #1/2*).

## **OPINION AND ANALYSIS**

9. In considering this inquiry, the Board employed the following three-step analysis to determine whether a prohibited conflict of interest would exist:

- a) Does the requestor have standing to obtain an Advisory Opinion from the Suffolk County Board of Ethics;
- b) Is the requestor seeking advice on proposed future conduct;
- c) Whether an appearance by a former Assistant County Attorney, less than 2 years post-employment, before the neutral magistrate, is a violation of the ethics laws?

## STANDING

10. The Board determined that standing exists for this Advisory Opinion request due to the requestor's position as a former public servant<sup>1</sup> (*Suffolk County Administrative Code §A30-1, §A30-3, Suffolk County Code Chapter 77, §77-1, NYC COIB Advisory Opinion 2009-4*).

## PROPOSED FUTURE CONDUCT

11. The Law States in Pertinent Part<sup>2</sup>:

§ A30-3(B). ADVISORY OPINIONS:

*Advisory opinions shall be issued only with respect to proposed future conduct or action by a public servant. A public servant whose conduct or action is the subject of an advisory opinion shall not be subject to penalties or sanctions by virtue of acting or failing to act due to reasonable reliance on the opinion, unless material facts were omitted or misstated in the request for an opinion. The Board may amend a previously issued advisory opinion after giving reasonable notice to the public servant that it is reconsidering its opinion.*

12. The Requestor seeks guidance regarding the subject future conduct. The Board has determined that since the subject hearings have not yet occurred and the Requestor has not yet appeared before the neutral magistrate, the request is within the Board's jurisdiction.

## POTENTIAL CONFLICTS OF INTEREST

13. The analyzed laws states in pertinent part:

I. Suffolk County Code:

§ 77-6. **POST-EMPLOYMENT RESTRICTIONS**

B. No former public servant shall appear, within a *two-year period* after his or her separation from County service, *before the County agency served by such public servant*. This prohibition shall not apply to a former public servant who appears before a County agency on behalf of another government entity as an elected representative or employee;

C. No person who has served as a public servant shall appear before the County, or receive compensation for any services rendered, in relation to any particular matter in which such person had participated personally and substantially as a public servant

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I. Nothing contained in this section shall prohibit a former public servant from being associated with or having a position in a firm which appears before a County agency or from acting in a ministerial matter regarding business dealings with the County.

II. Suffolk County Code

**420. DRUG PREMISES AND PROPERTY**

§ 420-6. Warrantless seizures.

A. Any property which constitutes the proceeds of an offense, the substituted proceeds of an offense or an instrumentality of an offense shall be seized by any peace officer acting pursuant to his or her special duties or police officer upon probable cause to believe that an offense, as defined in this article, has been committed, and may be forfeited as hereinafter provided.

B. Notice of seizure.

(1) The seizing agency shall send notification of the seizure to all titled owners, registrants on file with the New York State Department of Motor Vehicles by certified mail, return receipt requested, within five business days of the seizure. Such notification shall inform the recipient that there will be a hearing promptly scheduled before a neutral magistrate to determine whether probable cause existed for the defendant's warrantless arrest, whether the County is likely to succeed on the merits of the forfeiture action, whether retention is necessary to preserve the vehicle from destruction or sale during the pendency of the forfeiture proceeding, and whether any other measures would better protect the County's interest during the proceedings, including, but not limited to:

(a) Issuance of a restraining order prohibiting the sale, transfer, or loss of the vehicle with imposition(s) of appropriate penalties for violation of said restraining order;

(b) Taking of a bond; and/or

(c) Use of an interlock device.

(2) When a hearing is held, the neutral magistrate shall review the documents supporting the arrest and any other relevant documents and take any testimony to determine whether the seizing agency has sustained its burden of proof as set forth in Subsection B(1) of this section. If the seizing agency has met its burden of proof, the neutral magistrate shall authorize the continued retention of the property by the seizing agency pending a judicial determination of any civil forfeiture action. Nothing herein shall be construed to preclude a party with a legal interest in the seized property from commencing an action or proceeding in a court of competent jurisdiction for its return.

***(3) The Suffolk County Executive shall designate neutral magistrates to conduct hearings in accordance with this Subsection B.***

14. The Board holds under § 77-6(B) that any appearance by any former employee of Suffolk

County within the prohibited two year time period before the department or agency they served would violate § 77-6(B). Pursuant to Chapter 77 section 77-1 “Definitions,” the statute defines an appearance as “. . . any communication, for compensation, other than those involving ministerial matters;” ministerial matters is defined as, “. . . an administrative act, including the issuance of a license, permit or other permission of the County, which is carried out in a prescribed manner and which does not involve substantial personal discretion” (*see NYC COIB Advisory Opinion 94-15*).

**15.** The Board holds that as applied to § 77-6(I), a former employee of any Department in the County is not in violation of the post-employment restrictions by having a position within the two year prohibited time period with a firm which appears before the County agency or individually appearing before a different department or agency that they served.

As applied to the facts presented to the Suffolk County Board of Ethics, the Board finds that an appearance before a neutral magistrate appointed by the County Executive is not an appearance before the prior agency served by the Requestor, namely the Suffolk County Law Department. It has been repeatedly held by New York Courts that County’s appointment procedures of Judicial Hearing Officers to conduct post-seizure hearings do not violate the State Constitution or Article 43 of the CPLR. *Malafi v. Pierson 2012 NY Slip Op 31856(U), July 12, 2102*). As applied, Article 43 states:

**Rule 4312.** Number of referees; qualifications.

“(3). *No person shall serve as referee who holds the position of court clerk, or clerk, secretary or stenographer to a judge; or who is the partner or clerk of an attorney for any party to the action or occupies the same office with such attorney, except as provided in paragraph five of this rule.*”

Article 43 of the CPLR precludes a referee from being associated with an attorney for any party in an action before the referee, or occupying the same office of such an attorney. Hence, the Board finds that the since neutral magistrates appointed pursuant to Article 43 of the CPLR for DWI seizure hearings may not hold office in the same department as an attorney for the County, by definition an appearance before the neutral magistrate is **not an** appearance before the Law Department.

## CONCLUSION

16. As set forth above, the Board finds that pursuant to Suffolk County Code § 77-6(B), any appearance other than ministerial by a former employee before the agency they served for a two year time period would be in violation of § 77-6(B). The Board finds a former assistant county attorney representing a client before the neutral magistrate in DWI seizure hearings **is not** appearance before the County Law Department. (*see Suffolk County Board of Ethics Advisory Opinion 2013-6 holding a New York State District Court's referral designating the former County employee's company as rehabilitation service provider is an appearance before the New York State District Court, not the former employer of the Suffolk County; and Suffolk County Board of Ethics Advisory Opinion 2013-16 holding a former County employee representing or consulting on behalf of an Appellant before the New York State Office of Administrative Hearings is an appearance before New York State, not before the former Suffolk County Department*).

17. The Board concurs with the Requestor's assertion with respect to Suffolk County Code §77-6(C) that he would be prohibited from receiving compensation for any services rendered, in relation to any particular matter in which he had participated personally and substantially as a public servant. The Board also affirms that under Suffolk County Code §77-6(E) a former public servant cannot disclose or using for private advantage any confidential information gained from County service which is not otherwise available to the public. As such, the Requestor is directed to comply with such prohibitions in Suffolk County Code §77-6(C) and Suffolk County Code §77-6(E).

18. Pursuant to Suffolk County Board of Ethics Resolution 004/2013 passed on January 30, 2013, the requester shall have 15 business days from the time this Advisory Opinion has been rendered (excluding Saturday, Sunday, or a legal holiday) to file a request for reconsideration supported by new material facts submitted to the Board.

**19.** The forgoing is the opinion of the Board.

Dated: Yaphank, New York  
4/23/2014

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Linda A. Spahr, Esq. – Vice Chair

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<sup>1</sup> N.Y. Gen Mun. Law § 810 (6). Additional definitions; Suffolk County §77-1 definitions

<sup>2</sup> N.Y. Gen Mun. Law § 800: Article 18 of the New York General Municipal Law establishes standards of ethical conduct that are mandatory for officers and employees within the State of New York.