ORIGINAL

IN THE SUPREME COURT OF OHIO

JAMES E. PIETRANGELO, II	:	Supreme Court No. 2015-0110
Plaintiff-Appellant	:	
v.	:	On Appeal from the Lorain County Court of Appeals, Ninth Appellate District
CITY OF AVON LAKE, OHIO	:	
Defendant-Appellee	:	Court of Appeals Case No. 14CA010644

MOTION AND MEMORANDUM TO DISQUALIFY OF PLAINTIFF-APPELLANT JAMES E. PIETRANGELO, II

James E. Pietrangelo, II
33317 Fairport Drive
Avon Lake, OH 44012
(802) 338-0501
Pro Se Plaintiff-Appellant

Margaret Koesel
Porter Wright
950 Main Avenue
Suite 500
Cleveland, OH 44113
(216) 443-9000
Counsel for Defendant-Appellee

RECEIVED
FEB 12 2015
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
FEB 12 2015
CLERK OF COURT
SUPREME COURT OF OHIO

Pursuant to the Court's inherent powers, Appellant hereby moves the Court to disqualify attorneys Margaret Koesel and Tracey Turnbull, if not their law firm Porter Wright Morris & Arthur LLP as well, from representing Appellee before this Court on Appellant's (notice of) appeal, for the following reasons.

INTRODUCTION

During the course of the case below, Appellant discovered a fact about Appellee's trial counsel, attorneys Margaret Koesel and Tracey Turnbull, that Appellant believed required their (if not their firm's as well) disqualification as a matter of Appellee's own conflict-of-interest law and of Ohio legal ethics. Appellant discovered that Koesel and Turnbull actually had been *appointed* Avon Lake Special Assistant Law Directors by Appellee for the case at the beginning of the case, but Koesel and Turnbull thereafter still continued to also work as Porter Wright attorneys, including in connection with the case. Consequently, Appellant promptly moved the trial court on April 9, 2014, to disqualify Koesel and Turnbull (if not their firm as well) for conflict of interest. Lorain Cty. C.P. No. 13CV181561, 4/9/14 Mot. to Disq. On May 13, 2014, the trial court, without addressing any of the specific legal or factual issues raised by Appellant in his motion, denied Appellant's motion by an order stating only: "Defendant City of Avon Lake's decision as to how it categorizes counsel, as assistant law directors or private counsel, does not create a conflict of interest requiring disqualification." *Id.*, 5/13/14 Order.

Following Appellant's August 25, 2014 appeal to the Ninth District in the case on other grounds, Appellant, after Koesel and Turnbull had appeared and filed a memorandum with the Ninth District on Appellee's behalf arguing for dismissal of Appellant's appeal, *de novo* moved the Ninth District to disqualify Koesel and Turnbull for the same conflict of interest. See Ninth Dist. No. 14CA010644, 9/8/14 Appellee's Req. to Stay; 9/18/14 Appellant's Mot. to Disq. The

Ninth District never ruled on Appellant's motion, ultimately dismissing Appellant's appeal for lack of a final, appealable order. See *id.*, 10/23/14 J.E.

On January 22, 2015, Appellant filed a notice of appeal and jurisdictional memorandum with this Court, seeking review of the Ninth District's dismissal of his appeal. See No. 2015-0110, 1/22/15 Not.; 1/22/15 Memo. On February 3, 2015, Koesel and Turnbull appeared and filed a memorandum with this Court on Appellee's behalf opposing jurisdiction. See *id.*, 2/3/15 Memo.

Appellant now *de novo* moves this Court to disqualify Koesel and Turnbull (if not their firm as well) from representing Appellee before this Court on Appellant's (notice of) appeal. To be clear, Appellant is not presently asking the Court to review the lower courts' denials of his previous motions to disqualify. Such denials are not appealable orders at this point in the case, *i.e.*, pre-final-judgment. Instead, Appellant is now independently[1] moving the Court to disqualify Koesel and Turnbull (if not their firm as well), on the basis that Koesel and Turnbull have now voluntarily appeared before *this Court* on Appellant's notice of appeal, and thus subjected themselves to *this Court's* own regulation of attorneys before it. *Cf. Bowers v. The Ophthalmology Group*, 733 F.3d 647, 651 (6th Cir. 2013) (appellate-court motion to disqualify allowed and

[1]In opposing Appellant's prior motion(s) to disqualify, Appellee cited a series of cases for the proposition that Appellant may not raise a *de novo* motion to disqualify on his interlocutory appeal of the trial court's denial of his motion for a TRO/preliminary injunction, but may only post-final-judgment appeal the trial court's denial of his trial-court motion to disqualify. However, none of Appellee's cases remotely stand for such a proposition. Appellee's first two cited-cases, *Lava Landscaping* and *Bernbaum*, each involved an appeal *solely* of a trial-court denial of a motion to disqualify. There was no separate proper interlocutory-appeal in support of which an appellate-court motion to disqualify could be made. Nor for that matter was there any appellate-court motion to disqualify made in the first place in those cases. In any event, neither case held that an appellate-court motion to disqualify is prohibited. Appellee's third case, *Murphy*, which only tangentially involved an appellate-court motion to disqualify, actually *supports* Appellant's position, since the appellate-court motion to disqualify in that case was *allowed and granted*. See *State v. Murphy*, 49 Ohio St.3d 293, 293 (1990) (court of appeals had granted appellant's appellate-court motion to disqualify prosecutor Gerald Moore).

granted independently of review of the denied trial-court motion to disqualify) ("Bowers argues that defendant's counsel must be disqualified on appeal because of a conflict of interest. *** We agree with Bowers that M & L must be disqualified."); *State v. Murphy*, 49 Ohio St.3d 293, 293, 294 fn 1 (1990) (court of appeals had granted appellant's appellate-court motion to disqualify prosecutor Gerald Moore) ("Consequently, appellant filed a motion with the court of appeals in order to disqualify the entire Marion County Prosecutor's office on the grounds of conflict of interest and DR 5-105. *** [O]n June 27, 1988, the court of appeals granted the motion[.] *** On June 30, 1988, appellee made an application for reconsideration of the court of appeals' disqualification order. *** In a judgment entry and opinion filed November 21, 1988, the court of appeals granted the application for reconsideration, vacated its prior disqualification order, and overruled appellant's motion except as to Gerald Moore. *** Given our disposition on the jurisdictional issue, it is unnecessary for us to consider the issue of whether *** the *granting* of a motion to disqualify counsel is a final appealable order[.]") (emphasis original).

A *de novo* motion to disqualify in the instant case is proper because Koesel's and Turnbull's memorandum on Appellee's behalf opposing jurisdiction may not be considered if/when Koesel and Turnbull have a prohibited conflict-of-interest in representing Appellee in the first place. See *Bowers*, 733 F.3d at 654 ("[A] court must rule on a motion for disqualification of counsel prior to ruling on [an appeal] because the success of a disqualification motion has the potential to change the proceedings entirely.") ("[W]hen counsel is disqualified, a court should not reach the other questions or motions presented to it through the disqualified counsel.").

LAW

A court has the "authority and duty to see to the ethical conduct of attorneys in proceedings before it[,] *** [and] [u]pon proper grounds it can disqualify an attorney." *Royal Indemn. Co. v.*

J.C. Penney Co., 27 Ohio St.3d 31, 34 (1986) (internal quotation marks and citation omitted; brackets and asterisks original). "Clearly a court cannot knowingly participate in what it perceives to be a breach of an ethical [duty] or disciplinary violation." *Mentor Lagoons, Inc. v. Teague*, 71 Ohio App.3d 719, 725 (11th Dist. Lake 1991). "Disqualification of a party's chosen lawyer, however, is a drastic measure [that] courts should hesitate to impose except when absolutely necessary." *Akron v. Carter*, 190 Ohio App.3d 420, 429 (9th Dist. Summit 2010) (internal quotation marks and citation omitted; brackets original). "[A] delicate balance must be struck between . . . the prerogative of a party to proceed with counsel of its choice and the need to uphold ethical conduct in courts of law." *Carnegie Cos., Inc. v. Summit Properties, Inc.*, 2009 Ohio 4655, ¶ 56 (9th Dist. Summit). "Disqualification is absolutely necessary only if real harm is likely to result from failing to [disqualify]." *Akron v. Carter*, 190 Ohio App.3d at 429. "It is appropriate for the net of disqualification to be cast at least as wide as that of attorney discipline for conduct that not only violates an ethical rule but also undermines the basic duty of undivided loyalty to one's clients." *Carnegie Cos., Inc.*, 2009 Ohio at ¶ 56. For example, "a violation of [Professional] Rule 1.7 [conflict of interest] requires disqualification of the offending lawyer." *Id.* at ¶ 57.

FACTS & ARGUMENT

As Appellant discovered during the trial-court proceedings, Koesel and Turnbull were actually *appointed* Special Assistant Law Directors *of* Appellee City of Avon Lake by Appellee's City Council on October 15, 2013. See Apr. 9, 2014 Mot. to Disq. at Ex. 2 (Avon Lake City Council Temp. Ord. # 127-2013 (Oct. 15, 2013)) at 1 ("AN ORDINANCE PROVIDING FOR THE DEFENSE OF THE CITY OF AVON LAKE IN AN ACTION FILED BY JAMES E. PIETRANGELO, II . . . . That Margaret Koesel and Tracey Turnbull of Porter, Wright, Morris & Arthur LLP are hereby appointed Special Assistant Law Directors for this matter.") (capitalization

original); Apr. 9, 2014 Mot. to Disq. at Ex. 3 (Avon Lake City Council Temp. Ord. # 162-2013 (Dec. 9, 2013)) at 1 ("AN ORDINANCE PROVIDING FOR THE CONTINUED DEFENSE OF THE CITY OF AVON LAKE IN AN ACTION FILED BY JAMES E. PIETRANGELO, II . . . . That Margaret Koesel and Tracey Turnbull of Porter, Wright, Morris and Arthur, LLP, Special Assistant Law Directors for this matter, are authorized to continue in the defense of the City of Avon Lake.") (capitalization original). Appellee's Charter apparently allows Appellee's City Council to appoint Assistant Law Directors. See Avon Lake Charter § 36 ("The Council may by ordinance provide for a Safety Department, a Service Department, a Finance Department, a Law Department, a Recreation Department, and such other departments, divisions, boards, commissions, *officers* and *employees* as it may deem necessary from time to time, and determine the organization and duties of each . . . .") (emphasis added). To be clear, Koesel and Turnbull were not merely "designated" or "categorized" by Appellee's City Council as Special Assistant Law Directors; they were actually "appointed" as such by Appellee's City Council. The Temporary Ordinances say "appointed Special Assistant Law Directors," and not "designated" or "categorized" Special Assistant Law Directors. Moreover, Appellee's City Council was not required to affirmatively designate Koesel and Turnbull as anything, so to say that Appellee's City Council merely "designated" but did not actually "appoint" them Special Assistant Law Directors would be specious.

Upon appointment as "officers or employees" of Appellee, see Avon Lake Charter § 36, *supra*, Koesel and Turnbull undeniably thus became subject to Appellee's conflict-of-interest ordinances pertaining to *every* "elected or appointed City official or employee, whether paid or unpaid." Avon Lake Code Ord. § 254.01, "Conflicts of Interest Prohibited" (Ex. 1 hereto) ("No elected or appointed City official or employee, whether paid or unpaid, shall engage in any

business or transaction or have a financial or other private interest, directly or indirectly, which is in conflict with the discharge of his or her officials duties."); § 254.06, "Gifts and Favors" (Ex. 1 hereto) ("No elected or appointed City official or employee, whether paid or unpaid, shall accept any valuable gift, whether in the form of service, loan, thing or promise, or any other form, from any person who, to his or her knowledge, is interested, directly or indirectly, in any manner whatsoever, in business dealings with the City."). However, subsequent to their appointment as Special Assistant Law Directors, Koesel and Turnbull violated and continue to violate one or both of the above cited ordinances, by continuing to be employed by and receive benefits from Porter Wright *while* working on this case as Special Assistant Law Directors.

Specifically, while Koesel and Turnbull have been and continue to be City officers/ employees, they have also been and continue to be Porter Wright "Counsel to the Firm" and "Partner," respectively, and have also received and continue to receive from Porter Wright salaries, benefits, dividends, and/or continued employment, including for or relative in part to their work for Appellee on this case. They admitted as much in their trial-court and appellate-court briefs. However, at the same time, Porter Wright, as a "person interested, directly or indirectly, in any manner whatsoever, in business dealings with the City,"[2] had and still has a business dealing[3] with Appellee: Appellee retained, and authorized at least $80,000.00 of its public funds for, Porter Wright's legal services on this case, and to date paid Porter Wright at least $75,378.05 for those

---

[2]See Avon Lake Code Ord. § 202.02/(s) ("As used in these Codified Ordinances, the following definitions shall apply unless the context clearly indicates or requires a different meaning. *** 'Person' includes an individual, corporation, business trust, estate, trust, *partnership*, and association.") (emphasis added).

[3] See http://dictionary.search.yahoo.com ("business" defined as, among other things, "the activity of . . . selling services"); http://merriam-webster.com/dictionary/business ("business" defined as, among other things, "the activity of . . . providing services in exchange for money").

services. See Apr. 9, 2014 Mot. to Disq. at Ex. 2 at 1 ("That the law firm of Porter, Wright, Morris and Arthur LLP is hereby authorized and directed to defend . . . the City of Avon Lake . . . in connection with an action filed by James E. Pietrangelo, II . . . That the necessary expenses for said representation be paid upon approval voucher submitted therefore [sic], in an amount not to exceed $40,000.00."); Apr. 9, 2014 Mot. to Disq. at Ex. 3 at 1 ("That the law firm of Porter, Wright, Morris and Arthur LLP is hereby authorized and directed to defend . . . the City of Avon Lake . . . in connection with an action filed by James E. Pietrangelo, II . . . That the necessary expenses for said representation be paid upon approval voucher submitted therefore [sic], in an amount not to exceed $40,000.00."); Apr. 9, 2014 Mot. to Disq. at Ex. 4 (billing and payment documents showing payment by Appellee to *Porter Wright* of $75,378.05).

Thus, while serving as Special Assistant Law Directors, Koesel and Turnbull received and continue to receive prohibited "valuable gifts"—salaries, benefits, dividends, *etc.*—from a City vendor; "gifts" in the sense that Porter Wright had/has no obligation to pay compensation or to provide benefits to Koesel and Turnbull as *Special Assistant Law Directors* and/or for their work *for Appellee on the instant case*. As Special Assistant Law Directors, Koesel and Turnbull could only work for Appellee on this case (if at all) either *unpaid,* or paid *by Appellee*—but not paid by a person having a business dealing with Appellee on the same matter—*i.e.*, Porter Wright. City officers'/employees' being paid for their City work by an outside person financially interested in that work or in the subject matter of that work obviously gives the appearance to the public of a conflict of interest or of impropriety. This is a standard conflict-of-interest concept as old as government. Such compensation is akin to graft.

Of course, if Appellee had not gone the extra and *unnecessary* step of *appointing* Koesel and Turnbull Special Assistant Law Directors in the first place, and instead had simply hired their

firm as outside counsel and then their firm had simply assigned them as private attorneys to defend Appellee, there would have been and would be no conflict. The Porter Wright compensation/benefits would not have been and would not be an issue. But once Koesel and Turnbull were *appointed* City officers/employees, they had to steer clear of anything resembling a bribe or inducement or conflict, which they did not do. It sounds hyper-technical, but then again, government ethics are hyper-technical to begin with to ensure public confidence in government. See 3 McQuillin, *Municipal Corporations*, Elections, Officers and Employees, § 12:173.22, p. 874 (West 2012) ("Public confidence requires that municipal officials avoid conflicting interests that convey the perception that a personal rather than the public interest might affect decision-making on matters of concern. Officials must be free of even the potential for entangling interests that will erode public trust in government actions. Thus, it is the potential for conflict, rather than proof of an actual conflict or of actual dishonesty, that commands a public official to disqualify himself from acting on a matter of public interest.") ("The general rule is that there should be strict enforcement of conflict of interest statutes so as to provide a strong disincentive for officers who might be tempted to take personal advantage of their public offices.").

Similarly, by continuing to be employed by Porter Wright while also being City officers/employees in relation to the same matter (this case), Koesel and Turnbull engaged and continue to engage in a business or transaction or had/have a financial or other private interest, directly or indirectly, which was/is in conflict with the discharge of their officials duties. "[A]n assistant city law director is subject to the same limitations as a city law director[.]" Ohio Adv. Op. 08-005 at 2 (Ohio Bd. of Comm'rs on Grievances & Disc. Aug. 15, 2008)[4] (noting O.A.G. Op. 79-100). Thus, an Avon Lake Assistant Law Director may not have a "business or transaction

[4]Modified on other grounds.

or . . . financial or other private interest" which the Avon Lake Law Director himself or herself may not have. Thus, in turn, for example, an Avon Lake Assistant Law Director may not engage in a fee rate *higher* than that to which the Avon Lake Law Director himself or herself is restricted as a public servant. Yet, even though Appellee illegally refused Appellant's public-records request for the rates for Koesel's and Turnbull's work on this case, those rates were/are almost certainly higher than that of Avon Lake's current Law Director, Abraham Lieberman, for work on this same case. Moreover, again, Koesel and Turnbull received/receive compensation from a City vendor whose financial interest it was/is to bill as many hours and at the highest rate possible to Appellee—and, not coincidentally, Porter Wright has billed and received more than $75,000 from Appellee on this case alone. Koesel and Turnbull themselves also may have received/receive dividends on those billings. However, the duty of an Assistant Law Director is to see that Appellee is provided legal services at the *least* cost to Appellee.

Thus, also, because of the above restriction on an Assistant Law Director to what the Law Director is permitted to do, an Avon Lake Assistant Law Director may not report immediately to anyone other than Avon Lake City Council or Avon Lake Law Director, since the Law Director himself or herself must be immediately responsible to City Council. See Avon Lake Charter § 37 (Ex. 2 hereto) ("[The Director of Law] *shall* be immediately responsible to Council for the discharge of his respective duties.") (emphasis added). Yet, Koesel and Turnbull were and still are immediately responsible to *Porter Wright* for their work for *Appellee*, as evidenced by the billing statements from *Porter Wright* to Appellee for Koesel's and Turnbull's work for Appellee. Koesel and Turnbull thus had/have the proverbial two masters.

Finally, thus also, because of the above restriction on an Assistant Law Director to what the Law Director is permitted to do, an Avon Lake Assistant Law Director may not work on any

non-City matters, because the Avon Lake Law Director himself or herself is limited to working on only City matters. Avon Lake Charter Section 37 has no "moonlighting provision," and in fact emphatically states at the end of the description of the Law Director position: "In general and without limitation as to particularity, the Director of Law shall discharge the duties and functions of the Director of Law of a municipality." (Emphasis added.) This is clear and means that while a person is Avon Lake Law Director, and thus while a person is Assistant Law Director, the person is limited to working only as a City attorney or only on City matters. The People of Avon Lake—in enacting this Charter provision—wanted to ensure that their legal officers are not distracted or compromised by work on non-City matters. Yet, as Porter Wright attorneys, Koesel and Turnbull presumably have worked and work on non-City legal matters.

Again, it must be emphasized that there wouldn't have been/be a problem if Koesel and Turnbull had not been *appointed* City officers/employees. For example, their apparent billing at a higher rate than the current Avon Lake Law Director Abraham Lieberman himself would otherwise have been acceptable because a vendor at arm's length can generally charge whatever competitive rate it can get from a municipality. However, when one accepts public office or employment, one generally gives up market rates in favor of the public good, and is expected to serve the public good above personal interests. *Cf.* Ohio Adv. Op. 91-011[5] at Syllabus (Ohio Bd. of Comm'rs on Grievances & Disc. Apr. 12, 1991) ("[ethics] prohibit a municipal judge from serving as a member or officer of the Board of Directors of a nonprofit corporation providing services to the municipal court by contract with the city"); Ohio Adv. Op. 2006-7 (Ohio Bd. of Comm'rs on Grievances & Disc. Aug. 4, 2006) (same effect); Ohio Adv. Op. 96-006 at 6 (Ohio

[5]The status of this opinion is listed on the Court's website as "Former CJC Opinion" and "Not Current"—but not "Withdrawn." This likely reflects the adoption of a new code of judicial ethics at the time.

Bd. of Comm'rs on Grievances & Disc. Aug. 9, 1996) (attorney simultaneously serving as city councilmember and privately representing criminal defendant in municipal court "creates an appearance of impropriety and may appear to place personal or professional interests in conflict with official duties"); Charles P. Kindregan, *Conflict of Interest and the Lawyer in Civil Practice*, Valpraiso Univ. L. Rev., 423, 434 (1976) ("Lawyers in public positions should be aware of another conflict of interest. The lawyer as a public official is frequently limited in what he can do, not only by the Code of Professional Responsibility, but also by public-interest conflict rules.").

Thus, Koesel's and Turnbull's representation of Appellee in this case, including now before this Court, was and is actually *illegal*, *i.e.*, a violation of Appellee's own conflict-of-interest laws. Since Koesel's and Turnbull's representation of Appellee was and is actually illegal (versus simply unethical), that representation *per se* violated/violates Professional Rules 1.7 and 8.4, and caused/causes real harm by violating the law, enabling self-dealing, and reducing public trust. See Prof. R. 1.7(c)(1) ("Even if each affected client consents, the lawyer shall not accept or continue the representation if . . . the representation is prohibited by law."); 8.4(b)/(d)/(e)/(h) ("It is professional misconduct for a lawyer to do any of the following: . . . commit an illegal act that reflects adversely on the lawyer's honesty or trustworthiness; . . . engage in conduct that is prejudicial to the administration of justice; . . . achieve results by means that violate the . . . law; . . . engage in any other conduct that adversely reflects on the lawyer's fitness to practice law."), Cmt. [2] ("Offenses involving . . . breach of trust . . . are in that category [of illegal conduct that reflects adversely on fitness to practice law]."), Cmt. [5] ("Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers."); *Stark Cty. Bar Assn. v. Zimmer*, 135 Ohio St.3d 462, 466 (2013) (illegal conduct violates an attorney's "legal obligations to respect

and honor the law"). Arguably, Koesel's and Turnbull's representation of Appellee also violated/violates Professional Rule 1.7 as applied. See Prof. R. 1.7(a)(2) (conflict of interest due to personal interests); Ohio Adv. Op. 96-006, *supra*.

Given the fact that Koesel's and Turnbull's representation of Appellee was/is illegal, then, and that Appellee can without hardship obtain other outside counsel to appear on its behalf before this Court, see *Mentor Lagoons, Inc.*, 71 Ohio App.3d at 725-726 ("The fact that counsel may have experience and is knowledgeable in an area of the law does not establish that other competent counsel cannot be employed.") ("increased expenses for the client do not constitute a substantial hardship."), Koesel and Turnbull must be disqualified. Porter Wright itself arguably must also be disqualified, by virtue of the fact that Porter Wright, by providing valuable gifts to Koesel and Turnbull, was complicit in Koesel's and Turnbull's illegal conduct. See *supra*.

Appellee, no doubt, in opposition to this Motion, will raise certain incorrect if not specious arguments against disqualification, and, therefore, Appellant must also take time now and address those arguments. Appellee previously argued in the case that Appellant lacks standing to complain of any conflict of interest of Koesel and Turnbull in representing Appellee, because Appellant "has no past or present attorney-client relationship with [Appellee's] counsel, and he is not otherwise a representative of [Appellee]," and, under *Morgan v. N. Coast Cable Co.*, 63 Ohio St.3d 156 (1992), a "stranger" may not complain about "any alleged conflict." However, Appellee is wrong; Appellant does have standing.

Morgan simply does not bear the weight Appellee places upon it. The *Morgan* rule which Appellee cites is not absolute, as *Morgan* itself makes clear:

> *Typically*, courts do not disqualify an attorney on the grounds of conflict of interest unless there is (or was) an attorney-client relationship between the party seeking disqualification and the attorney the party seeks to disqualify.

> ***
>
> We believe that an attorney's obligations and responsibilities to a party, including the attorney's financial, business or personal interests *can, in appropriate circumstances, be a basis for disqualification*. However, such is not the case here.
>
> ***
>
> The *facts of this case* do not warrant an *exception* to the *general rule*.

Id. at 159-161 (emphasis added). Thus, there are exceptions to the *Morgan* rule.

Indeed, in *Morgan* itself, this Court—citing *Royal Indemnity Co., supra*—was at pains to reiterate the overriding rule on disqualification on which Appellant now relies to disqualify attorneys Koesel and Turnbull before this Court: *every court* "has the inherent authority to supervise members of the bar appearing before it and this necessarily includes the power to disqualify counsel in specific cases." *Morgan*, 63 Ohio St.3d at 161, citing *Royal Indemnity Co.*, 27 Ohio St.3d at 33-34. See, also, *Clucas v. Vojtech*, 119 Ohio App.3d 475, 476-478 (9th Dist. Summit 1997) (the Ninth District, five years after *Morgan*, affirmed a trial court's disqualification of a defendant's counsel, even though the complaining plaintiff was a "stranger" to the conflict of interest, and the conflict of interest was a mere "potential" ethical conflict-of-interest) ("The Ohio Supreme Court has held that '[a] trial court has the 'inherent power to regulate the practice before it and protect the integrity of its proceedings * * * ' including the 'authority and duty to see to the ethical conduct of attorneys * * *.'' *Mentor Lagoons, Inc. v. Rubin (1987), 31 Ohio St.3d 256, 259, 31 OBR 459, 462, 510 N.E.2d 379, 382.* Thus, the trial court possesses the authority to disqualify an attorney from the representation of clients if the attorney cannot conduct such representation in compliance with the Code of Professional Responsibility. *Id.* In fact, the court has its own ethical duty to intercede when it perceives a violation of the Code of Professional Responsibility. *Jackson v. Bellomy (1995), 105 Ohio App.3d 341, 348, 663 N.E.2d 1328, 1332-1333; Mentor Lagoons,*

Inc. v. Teague (1991), 71 Ohio App.3d 719, 725, 595 N.E.2d 392, 395-396; Code of Judicial Conduct, Canons 1 and 3. In the case *sub judice,* the trial court properly exercised its power to disqualify an attorney in order to eliminate the potential for an ethical violation.").

Moreover, the reason why this Court in *Morgan* found no grounds for disqualification was because the alleged conflict-of-interest—a purely *ethical* one between private parties with whom the disqualification movant was not privy—caused harm which was only "potential," "minimal," or "redressed by waiver." *Morgan,* 63 Ohio St.3d at 160-161. Thus, merely being a "stranger" to the conflict was not the determinative issue. Actual harm—and not being a stranger—was the test. In the instant case, unlike in *Morgan,* there *is* actual harm from the conflict of interest. The basis for disqualification here is not merely a potential ethical conflict-of-interest, *i.e.*, a potential conflict-of-interest prohibited by the Professional Rules—which, by the way, under *Clucas, supra,* would still require disqualification—but an actual conflict-of-interest prohibited by positive law (the Avon Lake ordinances), *i.e.*, a crime. A crime is not potential, minimal, or even waiverable, see, *e.g.*, Prof. R. 1.7(c)(1); 8.4(b)/(h), and instead is a serious matter. Appellee's officers/employees, particularly their *legal* officers/employees, cannot be above the law simply by Appellee's tolerance and/or their tolerance of their own wrongdoing. Appellee's conflict-of-interest ordinances are for the benefit of the People of Avon Lake—and not for the benefit or sole benefit of the City of Avon Lake or of the officers/employees of Avon Lake. See *State ex rel. Maher v. Baker*, 88 Ohio St. 165, Syllabus ¶ 1, 172, 179 (1913) ("[R]emedial laws [are] not only designed, but absolutely essential, to protect the public interests and safeguard the public funds.").

But even if a stranger to a conflict of interest could not complain about the conflict of interest, Appellant is no stranger to the conflict of interest in the instant case; he is a resident and elector of Appellee, see Lorain Cty. C.P. No. 13CV181561, 9/25/13 Ver. Compl. at ¶ 2; Ex. 3

hereto (Pietrangelo Aff.) at ¶ 3, and therefore has a beneficial interest in seeing its officers/employees free of conflict of interest. *Cf. State ex rel. Kocak v. Solon*, 2007 Ohio 412, ¶ 8 (8th Dist.) ("Appellant is neither a taxpayer nor a resident of Solon and has failed to otherwise establish a beneficial interest with respect to the oaths of office and officials bonds for Solon officials.") (indicating that a resident has a "beneficial interest" in the enforcement of municipal law pertaining to the regulation of municipal officers/employees).

Appellee also previously argued in the case that disqualification is not warranted here because, "[to] the extent there was a potential conflict of interest, [Appellee] considered the conflict and waived it[.]" However, this argument is simply after-the-fact bootstrapping by Appellee. *Cf. Morgan*, 63 Ohio St.3d at 161 ("We are cognizant that under certain circumstances a client's waiver with respect to a conflict of interest should be given little or no weight by the [] court."). A conflict of interest categorically prohibited by Avon Lake ordinances is *not* waiverable even by Appellee itself, at least as long as the specific relevant ordinances remain in force. Moreover, even if such a conflict of interest were waiverable, there was no actual waiver by Appellee *at the time* of Koesel's and Turnbull's appointment as Special Assistant Law Directors and thereafter.[6] There is no evidence—and certainly Appellee, who bears the burden of proving

---

[6]On October 27, 2014, more than a *year* after first appointing Koesel and Turnbull Special Assistant Law Directors on October 15, 2013, and several days after the Ninth District dismissed Appellant's appeal in this case on October 23, 2014, Appellee's City Council, in direct response to Appellant's trial-court and court-of-appeals motions to disqualify, apparently passed Temporary Legislation # 10408, purportedly "WAIVING ANY CONFLICT OF INTEREST RESULTING FROM THE ENGAGEMENT OF THE LAW FIRM PORTER, WRIGHT, MORRIS AND ARTHUR LLP, AND THE APPOINTMENT OF MARGARET KOESEL AND TRACEY TURNBULL AS SPECIAL ASSISTANT LAW DIRECTORS IN THE CASE FILED BY JAMES E. PIETRANGELO, II[.]" (Capitalization original.) However, this belated legislation does not help Appellee at all. First, Appellee may not waive, even by such belated temporary-legislation, a conflict of interest prohibited by its permanent ordinances, at least not without repealing the permanent ordinances, which Appellee did not do. Second, on its face, such belated legislation is

waiver, see *infra*, has presented no evidence—that there was waiver at the time of Koesel's and Turnbull's appointment and thereafter. The Temporary Ordinances appointing Koesel and Turnbull do not even mention waiver. See *supra*. Nor crucially was there otherwise any written waiver by Appellee at the time of appointment and thereafter; the absence of any written informed-consent by Appellee to any conflict at the time *per se* precluded waiver. See Prof. R. 1.7(b)(2) ("A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply: *** (2) each affected client gives *informed consent, confirmed in writing* . . . .") (emphasis original).

Appellee also previously argued in the case that disqualification is not warranted here because Appellant's identified actual-harms from Koesel's and Turnbull's conflict of interest—"violating the law, enabling self-dealing, and reducing public trust"—are "conclusory" only. However, there clearly is nothing conclusory about such real harms, and—in the case of the latter two harms—are the very harms considered to *per se* result from a conflict of interest. See 3 McQuillin, *Municipal Corporations*, Elections, Officers and Employees, § 12:173.22, p. 874 ("Public confidence requires that municipal officials avoid conflicting interests that convey the perception that a personal rather than the public interest might affect decision-making on matters of concern. Officials must be free of even the potential for entangling interests that will erode public trust in government actions. Thus, it is the potential for conflict, rather than proof of an actual conflict or of actual dishonesty, that commands a public official to disqualify himself from

---

an admission by Appellee that a prohibited conflict-of-interest under Appellee's ordinances existed, and existed for more than a year while Koesel and Turnbull represented Appellee. Appellee's belated legislation cannot retroactively cure that conflict of interest. Once Koesel and Turnbull engaged in the prohibited conflict-of-interest beginning in October 2013, Koesel's and Turnbull's crime was complete, and they were permanently conflicted out from representing Appellee in this case.

acting on a matter of public interest."). Thus, Appellant, to move for disqualification, need only show Koesel's and Turnbull's conflict of interest—not actual dishonesty or ill-gotten booty by Koesel and Turnbull resulting from such conflict.[7]

Appellee also previously argued in the case that disqualification is not warranted here because Appellee, in enacting Temporary Ordinances # 127-2013 and # 162-2013 appointing Koesel and Turnbull Special Assistant Law Directors, "determined that representation by Ms. Koesel and Ms. Turnbull while they remain employees of Porter Wright does not constitute a conflict of interest." In other words, Appellee argued, Temporary Ordinances # 127-2013 and # 162-2013 implicitly in part *repealed* Appellee's conflict-of-interest ordinances, Codified Ordinances §§ 254.01, 254.02, and 254.06; or as later-enacted ordinances *control* over the Codified Ordinances as earlier-enacted ordinances; or as specific ordinances *control* over the Codified Ordinances as general ordinances. However, Appellee's arguments all squarely ignore or violate well-established canons of statutory construction.

"[I]t is an elementary principle of law that repeals by implication are not favored." *State ex rel. City of Columbus v. Ind. Comm. of Ohio*, 158 Ohio St.2d 240, 243 (1952). "Repeals by implication are not favored and will not be given effect unless the provisions of the purported repealing act are so totally inconsistent and irreconcilable with the existing enactment as to nullify

---

[7] Appellee previously tried to minimize the benefits which Koesel and Turnbull received/receive from Porter Wright for/while working on the instant case, by saying that "Porter Wright pays Ms. Koesel and Ms. Turnbull a fixed sum for their work on behalf of firm clients; they do not receive additional compensation for their legal work on this particular matter—either from the City or from Porter Wright." However, by Appellee's own admission here, Koesel and Turnbull received/receive *some* compensation from Porter Wright for/while working *on this particular matter*. "Fixed" compensation can also mean many different things, including partnership dividends. Tellingly, Appellee previously did not address whether Turnbull (as "Partner") and Koesel (as "Counsel to the Firm") received or receive any dividends from firm profits on aggregate firm-billings—including billings on the instant case.

it." *O'Neil v. Bd. of Cty. Comm'rs of Summit Cty.*, 3 Ohio St.2d 53, 57 (1965). "Only where the provisions of the two statutes are irreconcilable *by any means* of interpretation or are so repugnant to or contradictory with each other as to evidence an intent on the part of the [legislature] to change the statutory law will this court conclude that the earlier statute has been superseded by the later statute, and therefore of no force and effect." *State v. Ruppert*, 54 Ohio St.2d 263, 268 (1978) (emphasis added). "It is understandable that courts disfavor repeals by implication, since it may properly be assumed that the [legislature] had knowledge of the prior legislation when the subsequent legislation was enacted, and had the [legislature] intended to nullify such prior legislation it would have done so, by means of an express repeal thereof." *City of Cincinnati v. Thomas Soft Ice Cream, Inc.*, 52 Ohio St.2d 76, 79 (1977). "The rule is too well established to require discussion that the repeal of statutes by implication is not favored in law; and the presumption is always against the intention to repeal an existing statute where express terms indicating that intention are not employed." *State ex rel. Draper v. Wilde*, 145 Ohio St. 447, 451 (1945). "A long-standing rule of statutory interpretation provides that courts will not hold prior legislation to be impliedly repealed by the enactment of subsequent legislation unless the subsequent legislation clearly requires such a holding." *State v. Frey*, 2006 Ohio 2452, ¶ 12 (4th Dist. Ross). "The burden is upon him who claims such . . . repeal by implication to establish such fact by clear and satisfactory evidence." *In re Estate of Friedman*, 154 Ohio St. 1, 10 (1950).

"It is a well-recognized principle of law that repeal by implication is not favored." *Cincinnati & L.E.R. Co. v. A. Jackson & Sons, Inc.*, 23 Ohio L. Abs. 689, 692 (2d Dist. Madison 1937). "The rule as applicable to legislative enactments is likewise applicable to ordinances of municipalities." *Ibid.* "The text of different laws, if the language permits, shall be so construed as to give effect to all." *Ibid.* See, also, *Frey*, 2006 Ohio 2452, ¶ 19 ("Because we hold that R.O.

303.09 and 545.06(d) can be reconciled such that each ordinance may be enforced, and in light of the long-standing policy in this state disfavoring repeal by implication, we cannot hold that the enactment of R.O. 545.06(d) impliedly repealed R.O. 303.09."); 21 *Ohio Jur.3d*, Counties Townships, and Municipal Corporations, Express and Implied Repeal, § 738, p. 259 (West 2010) ("The general rules and principles relating to the implied repeal of statutes apply in the case of municipal ordinances. If a legislative act by a municipal legislative authority is so repugnant to, or so contradictory of, or so irreconcilably in conflict with a prior act that they cannot be harmonized to effect the purpose of their enactment, the latter should control, without any repealing clause, as a repeal by implication of the first to the extent of the irreconcilable inconsistency. *** However, the rule that repeal by implication is not favored, applicable to legislative enactments, is likewise applicable to municipal ordinances."). Appellee's own Charter incorporates this particular canon of interpretation. See Avon Lake Charter § 66 ("All general laws of the State of Ohio as now or hereafter enacted [including R.C. § 1.51] which are not in conflict with this Charter, as now enacted or hereafter amended, or with any ordinance enacted hereunder shall apply to the government of the Municipality[.]"); R.C. § 1.51 ("If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both.").

There is no irreconcilable conflict—and certainly Appellee, who bears the burden of proof, has not clearly and convincingly shown any irreconcilable conflict—between Temporary Ordinances # 127-2013 and # 162-2013, on the one hand, and Codified Ordinances Sections 254.01, 254.02, and 254.06, on the other hand. Both sets of ordinances can readily be given effect at the same time. For example, the Temporary Ordinances "(1) permit Porter Wright to defend the City in this case; (2) appoint Ms. Koesel and Ms. Turnbull as Special Assistant Law Directors 'for

this matter'; and (3) allow compensation to Porter Wright for up to $80,000 . . . ." Thus, Koesel and Turnbull could have served and could serve as Special Assistant Law Directors on the instant case without accepting salary, wages, benefits, dividends, or continued employment from Porter Wright, even as Porter Wright maintained its business dealing with Appellee and had other attorneys besides Special Assistant Law Directors Koesel and Turnbull work on the matter. Tellingly, the Temporary Ordinances do not expressly permit Koesel and Turnbull, while Special Assistant Law Directors, to work for or receive valuable gifts (*i.e.*, compensation) from Porter Wright, which is effectively what is prohibited by the Codified Ordinances in this instance. While such an omission may seem to some as "legislative oversight," "[n]evertheless, the narrow legal issue before this court is not whether [it] should rewrite the [Avon Lake] Ordinances, but whether the two nonconflicting ordinances may coexist *** [and] . . . they can." *Frey*, 2006 Ohio 2452, ¶ 18. See, also, *Draper*, 145 Ohio St. at 451 ("Moreover, an enlarged meaning beyond the import of the words actually used will not be given to an act in order to repeal another by implication."); 85 *Ohio Jur.3d*, Statutes, § 87, p. 100 (West 2010), citing *Chesrown v. Bevier*, 101 Ohio St. 282 (1920) ("Difficulty in reconciliation does not necessarily call for a repeal by implication.").

Moreover, there is no indication of legislative intent—and certainly Appellee, who, again, bears the burden of proof, has not clearly and convincingly shown any indication of legislative intent—for the Temporary Ordinances to repeal the Codified Ordinances at issue here. See 85 *Ohio Jur.3d*, Statutes, § 88, p. 101 ("The polestar of construction and interpretation of seemingly inconsistent and conflicting language is legislative intent."). The Temporary Ordinances do not even come close to expressing any intent of repeal. See *State v. Detillio*, 90 Ohio App.3d 241, 244 (9th Dist. Summit 1992) ("When the legislature intend to repeal a statute, we may, as a general rule, expect them to do it in express terms, or by the use of words which are equivalent to an

express repeal. No court will, if it can be consistently avoided, determine that a statute is repealed by implication. * * *") (citation omitted; asterisks original); 85 *Ohio Jur.3d*, Statutes, § 89, p. 102 ("In accordance with the judicial policy against implied repeals, the presumption is always against the intention to repeal where express terms are not used."), § 90, p. 103 ("As a general rule, the legislature, when it intends to repeal a statute, may be expected to do so in express terms or by the use of words which are equivalent to an express repeal.").

Neither "repeal" nor any similar language appears anywhere in the Temporary Ordinances, and the Temporary Ordinances do not even once explicitly or implicitly reference either the Codified Ordinances at issue or their subject, *i.e.*, conflict(s) of interest. See *Frey*, 2006 Ohio 2452, ¶ 15 ("The enactment of R.O. 545.06(d) did not express a desire for the enactment to prevail over R.O. 303.09. We must presume that the city council members are aware of previously enacted legislation. If the city council members wanted to repeal R.O. 303.09, eliminating all forms of vehicle trespass except for those 'knowingly' committed, they could have done so. However, the language of the ordinance reveals no such intent."). Furthermore, Appellee has provided no affidavits of Appellee's City Council members, nor any minutes of Appellee's City Council meetings, evidencing such intent to repeal. One would certainly think that if Appellee's City Council had repealed or wanted to repeal important conflict-of-interest ordinances which have been on its books since 1965, it would have done so expressly.

Nor, critically, has Appellee or any of its officials anywhere, except in its previous opposition to disqualification in this case, ever declared the Codified Ordinances at issue here repealed. Even in its opposition, Appellee wavered—no pun intended—on the issue, remarkably suggesting that the Codified Ordinances at issue were just magically suspended solely "with respect to the particular representation by Ms. Koesel and Ms. Turnbull in this matter." Lorain Cty.

C.P. No. 13CV181561, 4/24/14 Opp. at 5 fn 8. However, crucially, the Codified Ordinances at issue here have no parts to even be severable or repealed in part, and do not mention Koesel and Turnbull by name or by position to be repealed as to them only. Moreover, individual City officers/employees cannot be made above the law.

Furthermore, the Temporary Ordinances and Codified Ordinances at issue here are vastly different in character for the latter to ever be considered repealed by the former. The subject matter or elements of each are, to say the least, not wholesale identical. See *Johnson v. City of Elyria*, 6 NP 372 (C.P. Lorain 1899). The Temporary Ordinances, critically, are *temporary*[8] ordinances, and the Codified Ordinances are *permanent* ordinances, see Avon Lake Code Ord. Certification (Ex. 1 hereto) ("We, Gregory J. Zilka, Mayor, and Barbara Dopp, Clerk of Council, of Avon Lake, Ohio, pursuant to Ohio Revised Code 731.23 and 731.42, hereby certify that the general and *permanent* legislation of the City of Avon Lake, Ohio, as revised, arranged, compiled, numbered, codified and printed herewith in component codes, is correctly set forth and constitutes the Codified Ordinances of the City of Avon Lake, Ohio, 1985, complete to February 28, 2014.") (emphasis added). *Cf.* Municipal Ordinances primer[9] ("A code ordinance is any ordinance that is intended to be permanent. Code ordinances define the local government and how it will operate or

---

[8] In its prior opposition, Appellee called Temporary Ordinances # 127-2013 and # 162-2013—appointing Koesel and Turnbull Special Assistant Law Directors—"emergency Ordinances," and stated that "[e]mergency ordinances have the same force of law as Avon Lake's other codified ordinances." 4/24/14 Opp. at 5. However, Appellee simply misrepresents the truth. Appellee's own actual title for the appointment ordinances was "Temporary Ordinance # 127-2013" and "Temporary Ordinance # 162-2013." 4/9/14 Mot. to Disq. at Exs. 1-2. Moreover, under Appellee's own Charter, even being an emergency ordinance does not make a temporary ordinance a codified or permanent ordinance. The proof of that fact is that the October/December 2013 Temporary Ordinances at issue here did not appear in Appellee's compilation of Codified Ordinances even after that compilation was updated in February 2014. See *infra.*

[9] Available at http://commerce.alaska.gov/dnn/dcra/LocalGovernmentOnline/Ordinances/MunicipalOrdinances.aspx.

regulate behavior or activity of people in the community. They are called code ordinances because they are required to be 'codified' (assigned a permanent number and entered into an indexed book called a 'code of ordinances'). *** A non-code ordinance is an ordinance that authorizes a specific action or that is intended to be temporary. It is not incorporated into the code (book) of ordinances."). Appellee's City Council would hardly repeal a permanent ordinance by a temporary—even emergency—ordinance.

Finally, the undeniable proof that the Temporary Ordinances did not repeal the specific Codified Ordinances at issue here is the fact, again, that Appellee updated its official publication of all of its Codified Ordinances, see Avon Lake Code Ord. Certification, *supra*, on February 28, 2014—a date which was months *after* the Temporary Ordinances had supposedly repealed the specific Codified Ordinances at issue here—and in that update Appellee listed and still lists the specific Codified Ordinances as wholly in force, see American Legal Publishing Co., Avon Lake, Ohio Code of Ordinances,[10] §§ 254.01, 254.02, and 254.06. See 85 *Ohio Jur.3d*, Statutes, § 88, pp. 101-102 ("Provisions will not be adjudged repealed by implication where they are specifically kept in force . . . ."). Appellee may not officially declare Codified Ordinances Sections 254.01, 254.02, and 254.06 wholly in force to the world, and then declare them singularly repealed in court.

The analysis also comes out the same even if you view the Temporary Ordinances as later or more specific provisions than the Codified Ordinances, under caselaw like *Peppers v. Beier*, 75 Ohio App.3d 420 (3rd Dist. Seneca 1991).[11] The rule still is that both (sets of) ordinances must be

---

[10]Available online at:
http://www.amlegal.com/nxt/gateway.dll/Ohio/avonlake/codifiedordinancesofthecityofavonlakeohi?f=templates$fn=default.htm$3.0$vid=amlegal:avonlake_oh

[11] In *Peppers*, the later ordinance clearly "purported to revise the whole subject-matter of a former act," 75 Ohio App.3d at 425, *i.e.*, voters passed an initiative petition repealing a municipality's ordinance providing for construction of a water reservoir, and the municipality then

given effect unless they are totally irreconcilable. See *Dade v. City of Bay Village*, 2006 Ohio 6416, ¶ 63 (8th Dist.) ("Moreover, to the extent that section 1125.02 could be seen as *irreconcilably* conflicting with section 1141.01(C), we are obligated as a matter of statutory construction to give effect to section 1141.01(C) because it was adopted later.") (emphasis added); R.C. § 1.51 ("[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both."); Avon Lake Charter § 66 (incorporating R.C. § 1.51); *LiCause v. City of Canton*, 42 Ohio St.3d 109, 112 (1989) ("If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.") (quoting and applying R.C. § 1.51). Again, the Temporary Ordinances and the Codified Ordinances in the instant case can be reconciled by interpreting the Temporary Ordinances to mean that Koesel and Turnbull, while Special Assistant Law Directors, had to cease working for and receiving benefits from Porter Wright, even as Porter Wright provided legal services to Appellee through other attorneys.

Thus, clearly, Appellee's conflict-of-interest laws were/are still in force and still applied/apply to Koesel and Turnbull as Special Assistant Law Directors. Neither Koesel and Turnbull nor Appellee could then ignore those laws. See *State ex rel. Bond v. Montgomery*, 63 Ohio App.3d 728, 736 (1st Dist. 1989) ("If a city does choose to draft its own rules concerning

---

passed a new ordinance reviving the planned construction of the reservoir, *id.* at 423. Though the later ordinance did not contain any repeal language, the court of appeals found that the earlier ordinance—the voters' cancellation of the reservoir project—was obviously repealed by the later ordinance reviving the project—because a reservoir can't both be cancelled and revived. In contrast, one can, as in the instant case, simultaneously both be a special assistant law director for a municipality *and* **not** work for or receive a valuable gift from a person, *i.e.*, a law firm, having a business dealing on the same matter with that municipality.

[local self-government] . . . the city council must abide by those rules."); *Lima v. State*, 122 Ohio St.3d 155, 168 (2009) (Lanzinger, J., dissenting) ("It is well settled that the terms and conditions of employment for municipal officers are purely a local matter."); *State ex rel. Frankenstein v. Hillenbrand*, 100 Ohio St. 339, 343 (1919) (qualifications, duties, and manner of selection of municipal officers come within the purview of local self-government); *State ex rel. Hackley v. Edmonds*, 150 Ohio St. 203, 216 (1948) (selection, compensation, and purely local duties of municipal officers do not conflict with any general problem or concern of state at large); *State ex rel. Canada v. Phillips*, 168 Ohio St. 191, Syllabus ¶ 1 (1958) (same effect).

Appellee also previously argued in the case that disqualification is not warranted here at least under Codified Ordinance Section 254.06 because Koesel and Turnbull, while Special Assistant Law Directors, simply did not and do not receive "gifts" or "favors" from Porter Wright, because gifts or favors are "[b]y definition . . . something provided for free," and Koesel and Turnbull merely received and receive "compensation for their work on behalf of the firm." However, Appellee is wrong on all counts. By definition, Porter Wright's "compensation" to Koesel and Turnbull for their work for Appellee on this case was and is a "valuable gift," because it was and is gratuitously given to them by Porter Wright—in the sense that Porter Wright had and has no obligation to pay compensation to Koesel and Turnbull as *Special Assistant Law Directors* and/or for their work *for Appellee* on the instant case.

Indeed, the language of Section 254.06 itself confirms that the nature of something as a "gift" is determined not by whether there is an approximately equal exchange of value between the City officer or employee and the City vendor, but whether *as City officer or employee* the officer or employee is entitled to the thing of value from the vendor within the scope of their work as City officer or employee in the first place. Section 254.06 expressly prohibits acceptance by a

City officer or employee of "any valuable gift, *whether in the form of service, loan, thing or promise, or any other form*, from any person who, to his or her knowledge, is interested, directly or indirectly, in any manner whatsoever, in business dealings with the City." (Emphases added.) Thus, "valuable gift" does not simply mean the cliché clandestine free diamond-watch or wad of cash in an envelope to a City officer or employee. It also means, for example, a gratuitous loan to a City officer or employee, *i.e.*, a loan—even if to be paid back—which the lender has no obligation to make to the City officer or employee *qua* City officer or employee in the first place, but does so anyway. Such a loan is technically not free because the officer or employee pays it back and/or with interest, but such a loan still qualifies as gratuitous in the first place.

Thus, the crucial distinction is not whether the thing itself is "free" to the recipient in another capacity, but whether it is gratuitous to him or her as an officer or employee. See McQuillin, *supra* ("The general rule is that there should be strict enforcement of conflict of interest statutes so as to provide a strong disincentive for officers who might be tempted to take personal advantage of their public offices."); *State ex rel. Maher v. Baker*, 88 Ohio St. 165, Syllabus ¶ 1, 172, 179 (1913) ("Remedial statutes should be liberally construed so as to furnish all the remedy and accomplish all the purposes intended by the statute. *** If it be a remedial statute, it is to be liberally construed in favor of the persons to be benefited. *** [R]emedial laws [are] not only designed, but absolutely essential, to protect the public interests and safeguard the public funds."). Porter Wright's compensation/benefits to Special Assistant Law Directors Koesel and Turnbull for their work for Appellee on the instant case was and is gratuitous.

Indeed, Appellee's interpretation of "gift" would swallow Section 254.06 whole. Under such an interpretation, a vendor could give a thing of value to any City officer or employee and justify it as "compensation" for the most illusory of service or act to the vendor. Even an outright

bribe could be so justified, for example, as a consultancy fee. Only if the gratuity of the thing of value is viewed from the point of obligation or lack of obligation to the officer or employee *in his or her official capacity*, is there an enforceable, bright-line rule. Porter Wright had/has no obligation to pay Appellee's Special Assistant Law Directors, including for their work for Appellee on a case, and so any payment to them as such is gratuitous.

Appellee also previously argued in the case that disqualification is not warranted here because there is no "authority stating that outside counsel cannot charge a rate in excess of the Law Director's." However, Koesel and Turnbull are *not* outside counsel, but are City officers/employees—Special Assistant Law Directors—and subject to the same public rate as the Law Director. Appellee also previously argued that Appellee's "2013 emergency ordinances, stating that Porter Wright's fees 'shall be paid upon approval voucher submitted,' would supersede any restrictions in earlier ordinances." But, again, under the canons of statutory construction discussed above, that simply is not true. "Paid upon approval voucher submitted" does not mean that an excessive rate could be charged by Koesel and Turnbull, only that Porter Wright would upon approved voucher be paid its market rate for provision of legal services by its attorneys other than Koesel and Turnbull, and/ or that Koesel and Turnbull as Special Assistant Law Directors would be paid a public rate upon approved voucher.

Appellee also previously argued in the case that disqualification is not warranted here because Appellant "provides no evidence for his assertion that [Koesel and Turnbull] are not immediately responsible to the City or its law director." However, Appellee's argument is simply disingenuous. *Porter Wright* submitted billing to Appellee; *Koesel and Turnbull* did *not* personally submit billing to Appellee—clearly indicating to whom Koesel and Turnbull immediately report: Porter Wright. Moreover, anyone familiar with how a law firm works knows that the firm has

ultimate say over how a suit is litigated by its attorneys. If Porter Wright made the decision today to terminate its representation of Appellee in this case for whatever reason, Koesel and Turnbull would—if they wanted to remain at Porter Wright—have to comply with that decision. Appellee previously likewise argued in the case that "Plaintiff [] provides no authority that a law director cannot be 'immediately responsible' to more than one entity; Section 37 of the Avon Lake City Charter contains no such exclusivity provision, and this Court should not infer one." But Appellee's argument is absurd. Obviously, by definition, a city law director can only be immediately responsible to one entity—even if there are multiple individuals in that entity to whom he or she reports—and cannot have two masters.

Appellee also previously argued in the case that disqualification is not warranted here because "Section 254.02 expressly states that it does not 'prohibit appearances in the City Municipal Court on matters in which the City or any agency thereof is not a party[,]'" and "Ohio Adv. Op. 96-006 expressly *permits* a lawyer to represent clients in civil matters while serving as a city councilperson so long as certain restrictions are heeded," and therefore the Avon Lake Law Director or an Assistant Law Director may work on non-City matters.[12] However, the sections

---

[12] On October 27, 2014, more than a *year* after first appointing Koesel and Turnbull Special Assistant Law Directors on October 15, 2013, and several days after the Ninth District dismissed Appellant's appeal in this case on October 23, 2014, Appellee's City Council, in direct response to Appellant's trial-court and court-of-appeals motions to disqualify, apparently passed a second Temporary Legislation, # 10409, purportedly "interpreting the section of the Charter dealing with the position of Law Director to specifically indicate that the Law Director and Assistant Law Director need not be full-time positions." However, again, this belated legislation does not help Appellee. First, the belated legislation does not seem to squarely address the issue of working on non-City matters. A part-time position can still entail work only on City matters. Second, Appellee cannot by temporary legislation "interpret" Appellee's Charter to mean that which it plainly does not mean. See *Northeast Ohio Regional Sewer Dist. v. Bath Twp.*, 2013 Ohio 4186, ¶ 42 (8th Dist.) ("If the statute conveys a clear, unequivocal, and definite meaning, interpretation comes to an end, and the statute must be applied according to its terms."). As discussed above, the Charter clearly limits the Law Director (and thus any Assistant Law Director) to working only

which Appellee cites are clearly inapposite to the issue at hand. Section 254.02[13] and Advisory Opinion 96-006 permit representations by *non*-law-department municipal personnel in municipal-court cases where the "City . . . is not a party." In the instant case, the City of Avon Lake *is* a party, and the challenged counsel *are* City of Avon Lake Law Department personnel, *i.e.*, Special Assistant Law Directors. Under Avon Lake's Charter, they—unlike City Councilmembers—are expressly limited to working only on City matters.

Appellee also previously argued in the case that disqualification is not warranted here because "the applicable ordinance is Avon Lake Code of Ordinances Section 606.17, which governs situations where public officials '[h]ave an interest in the profits or benefits of a public contract.'" Appellee also previously further argued that "[t]he City's appointment of Ms. Koesel and Ms. Turnbull as assistant law directors fully complies with R.C. 733.61 and 2921.421, which [Appellant] initially conceded in the trial court" but on which he later "changed his position apparently after he realized it was fatal to his motion." However, again, Appellee is wrong on all counts. Section 606.17 merely states that it is not a violation of *Section 606.17* for the City Law Director to appoint assistants and employees in accordance with R.C. Sections 733.621 and 2921.421. See Avon Lake Code Ord. § 606.17(f) ("It is not a violation of *this section* for a . . . chief legal officer of a municipality or an official designated as prosecutor in a municipality to

---

on City matters. Moreover, the belated legislation does not retroactively cure Koesel's and Turnbull's past conflict-of-interest of working on non-City matters while Special Assistant Law Directors.

[13]It should be noted that Appellant's argument that Koesel and Turnbull may only work on City matters while Special Assistant Law Directors goes in the main to his argument that they violated/violate Section 254.01. Section 254.02 is only an alternative basis for disqualification.

appoint assistants and employees in accordance with Ohio R.C. 733.621 and 2921.421") (emphasis added). Section 606.17 says nothing about such an appointment also not violating Sections 254.01, 254.02, and 254.06, or about an assistant—once having been appointed—being allowed to have conflicts of interest or being allowed to violate Sections 254.01, 254.02, and 254.06. Indeed, it must be remembered here that it was and is not Koesel's and Turnbull's *appointment* by itself that was and is the illegality; it was and is their later engaging in prohibited conduct while Special Assistant Law Directors that was/is the illegality.

Again, this is why there is no irreconcilable conflict between Sections 254.01, 254.02, and 254.06—which are part of Appellee's Administrative Code, and a violation of any of which sections is a misdemeanor of the third degree—on the one hand, and Section 606.17—which is part of Appellee's General Offenses Code, and a violation of which section is a misdemeanor of the second degree—on the other hand. Section 606.17 does not implicitly permit the prohibited conduct under all of Appellee's other ordinances including Sections 254.01, 254.02, and 254.06—it merely excludes it from the one higher-degree offense. See *State ex rel. Lee v. Karnes*, 103 Ohio St.3d 559, ¶ 20 (2004) ("The preeminent canon of statutory construction requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' Because the [legislature] did not include a[n] [exception] . . . , we will not infer one.") (internal quotation marks and citations omitted; first brackets original); *State v. Kreischer*, 109 Ohio St.3d 391, Syllabus (2006) ("Statutory interpretation involves an examination of the words used by the legislature in a statute, and when the [legislature] has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, therefore, the court applies the law as written."); *Jacobs v. Jacobs*, 102 Ohio App.3d 568, 572 (9th Dist. Wayne 1995) ("Statutory words and phrases must be given their usual, normal or customary meaning unless they

have acquired a technical or particular meaning by legislative definition or otherwise. *** Effect must be given to words utilized; a court cannot ignore words used nor add words not included to reach a desired result.") (citations omitted).

Indeed, the fact that Appellee's City Council omitted the exception from the one level of offense while including it in the other level is conclusive that the exception was deliberately—even if somewhat seemingly incongruously—excluded from the one level. See *Meek v. Nova Steel Processing, Inc.*, 124 Ohio App.3d 367, 371 (2d Dist. Miami 1997) ("It is a familiar canon of statutory construction that *** [w]here a legislative body 'includes particular language in one section . . . but omits it in another section . . . , it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion.'") (internal quotation marks and citation omitted; brackets original); *State v. Kent*, 163 Ohio Misc.2d 18, ¶ 7 (Wadsworth Muni. Ct. 2010) ("For whatever reason, the legislators clearly omitted an employee from subsection C of this section. And while I cannot understand the reasoning of the legislators in excluding employees from a violation of subsection C, a clear reading of the statute demonstrates that the legislators clearly intended and knowingly omitted employees from that subsection. Therefore, until a court of appeals, the Ohio Supreme Court, or the legislators direct me otherwise, I am bound to hold that an employee is specifically excluded from a violation of R.C. 2925.56(C).").

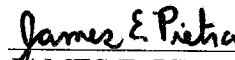
Finally, Section 606.17 is simply not applicable here in its exception to begin with. Section 606.17(f) provides an exception from Section 606.17's operation only "for a . . . *chief legal officer of a municipality* or an official designated as prosecutor in a municipality *to appoint* assistants and employees *in accordance with Ohio R.C. 733.621 and 2921.421*") (emphasis added) (note the conjunctive at the end). Appellee's Law Director, Abraham Lieberman, who is the chief legal

officer of Avon Lake, see Avon Lake Charter § 37 ("The Director of Law shall be the chief legal officer of the Municipality."), did *not* appoint Koesel and Turnbull as Special Assistant Law Directors—Appellee's City Council did. See Temporary Ordinances # 127-2013 and # 162-2013. Moreover, Koesel and Turnbull are *not* from Director Lieberman's own law firm, but from Porter Wright, of which Director Lieberman apparently is not a member. See R.C. § 733.621 ("[A] chief legal officer of a municipal corporation may appoint, as an assistant legal officer, prosecutor, clerk, stenographer, or other employee, a person who is an associate or partner of, or who is employed by, the chief legal officer, assistant legal officer, or prosecutor in the private practice of law in a partnership, professional association, or other law business arrangement."). Indeed, Director Lieberman apparently relinquished being in any law firm when he became Avon Lake Law Director—not least because the position *legally* required his full devotion, as discussed above. Furthermore, it must be remembered, again, that even if Section 606.17(f)'s exception did or does immunize Koesel's and Turnbull's conduct from *Section 606.17's operation*, such immunity would still not apply under Sections 254.01, 254.02, and 254.06, because Appellee's City Council did not include the exception in those ordinances.

In summary, Koesel and Turnbull clearly have a conflict of interest in representing Appellee before this Court. They cannot, as Appellee's own officers/employees, receive compensation/benefits from Porter Wright, especially when it is in Porter Wright's financial interest for Koesel and Turnbull to bill as much money to Appellee as possible. That is a clear conflict-of-interest. Appellee's conflict-of-interest laws liberally encompass such a conflict of interest and should be strictly enforced against Koesel and Turnbull. Appellee simply cannot complain about enforcement of its own law.

WHEREFORE, Appellant asks this Court to disqualify Koesel and Turnbull (if not their firm as well) from representing Appellee before this Court.

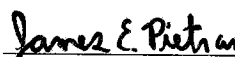
Respectfully submitted,



JAMES E. PIETRANGELO, II
33317 Fairport Drive
Avon Lake, OH 44012
(802) 338-0501

CERTIFICATE OF SERVICE

On February 9, 2015, a copy of the foregoing Motion and Memorandum was served by Appellant upon Appellee by first-class U.S. Mail to (the office of) M. Koesel, PWMA, 950 Main Ave., Suite 500, Cleveland, OH 44113, counsel for Appellee.



JAMES E. PIETRANGELO, II

Exhibit 1

Print

Avon Lake, Ohio Code of Ordinances

CODIFIED ORDINANCES OF THE CITY OF AVON LAKE, OHIO

Local legislation current through December 8, 2014
State legislation current through December 19, 2013

Published by:
American Legal Publishing Corporation
432 Walnut Street, 12th Floor
Cincinnati, Ohio 45202
Tel: (800) 445-5588
Fax: (513) 763-3562
email: customerservice@amlegal.com
Internet: http://www.amlegal.com

CERTIFICATION

We, Gregory J. Zilka, Mayor, and Barbara Dopp, Clerk of Council, of Avon Lake, Ohio, pursuant to Ohio Revised Code 731.23 and 731.42, hereby certify that the general and permanent legislation of the City of Avon Lake, Ohio, as revised, arranged, compiled, numbered, codified and printed herewith in component codes, is correctly set forth and constitutes the Codified Ordinances of the City of Avon Lake, Ohio, 1985, complete to February 28, 2014.

/s/ Gregory J. Zilka

Mayor

/s/ Barbara Dopp

Clerk of Council

PREAMBLE

We, the people of the Municipality of Avon Lake, in the County of Lorain and the State of Ohio, in order to secure for ourselves the benefits of local self-government under the Constitution of the State of Ohio, do ordain and establish this Charter for the government of the Municipality of Avon Lake.

254.01 CONFLICTS OF INTEREST PROHIBITED.

No elected or appointed City official or employee, whether paid or unpaid, shall engage in any business or transaction or have a financial or other private interest, directly or indirectly, which is in conflict with the discharge of his or her official duties.

(Ord. 129-65. Passed 12-27-65.)

254.06 GIFTS AND FAVORS.

No elected or appointed City official or employee, whether paid or unpaid, shall accept any valuable gift, whether in the form of service, loan, thing or promise, or any other form, from any person who, to his or her knowledge, is interested, directly or indirectly, in any manner whatsoever, in business dealings with the City.

(Ord. 129-65. Passed 12-27-65.)

Exhibit 2

Print

Avon Lake, Ohio Code of Ordinances

SECTION 37. DIRECTOR OF LAW.

The Director of Law shall be the chief law officer of the Municipality. He shall be appointed by the Mayor, with the concurrence of a majority of the members of Council, and shall be immediately responsible to Council for the discharge of his respective duties. The Director of Law shall be duly admitted to the practice of law in the State of Ohio, shall have been engaged in the active practice of law continuously for a period of five (5) years next preceding his appointment and shall have been a resident and qualified elector of the Municipality for at least two (2) full years before he is elected to office. The Director of Law shall prepare all contracts, bonds and other instruments in writing in which the Municipality is concerned and shall serve as legal counsel and attorney for the various officers and heads of the Municipality in the performance of their official duties. When required to do so by resolution of Council, the Director of Law shall prosecute or defend, as the case may be, for and in behalf of the Municipality, all complaints, suits and controversies in which the corporation is a party, and such other suits, matters and controversies as he shall by resolution or ordinance be directed to prosecute; but shall not be required to prosecute any action for the violation of a municipal ordinance without first advising such action. In general and without limitation as to particularity, the Director of Law shall discharge the duties and functions of the Director of Law of a municipality.

The Director of Law shall serve for a term not longer than the term of the Mayor who appoints him/her. Council shall fix the rate and basis of compensation of the Director of Law.

(Amended 11-6-73; 11-3-98; 5-6-03; 3-2-04)

(Editor's Note: *The Ohio Supreme Court decided in* Lima v. State, *122 Ohio St. 3d 155 (June 2009), that R.C. § 9.481 prevents municipalities from requiring its employees to reside in the municipality, other than as provided in R.C. § 9.481(B)(2)(b).)*

Exhibit 3

AFFIDAVIT OF JAMES E. PIETRANGELO, II
IN SUPPORT OF MOTION TO DISQUALIFY

STATE OF OHIO)
) ss:
COUNTY OF LORAIN)

James E. Pietrangelo, II, having been duly sworn according to law, deposes and states as follows:

1. I am the Appellant in Supreme Court No. 2015-0110.

2. I have personal knowledge of the facts herein, and am competent to testify as to all matters stated in this Affidavit.

3. I reside in (the City of) Avon Lake, Ohio.

4. I am a registered voter/elector in (the City of) Avon Lake, Ohio.

Respectfully submitted,

James E. Pietrangelo, II
JAMES E. PIETRANGELO, II

SWORN TO AND SUBSCRIBED in my presence in Lorain County, this 9th day of February 2015.

Deborah McCartney
NOTARY PUBLIC

NOTARIAL SEAL
STATE OF OHIO

DEBORAH McCARTNEY
Notary Public State of Ohio
My Commission Expires
November 5, 2017