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MEMORANDUM

To: City Council Members

From: Brian J. Aloia, Corporation Counsel

Re: Proposed Chapter 51 Amendment

Date: June 6, 2018

Please accept this correspondence in lieu of a more formal opinion finding that the proposed amendment to Chapter 51 of the City's Code is invalid and unenforceable. The facts are as follows.

The proposed amendment to the City's ordinance adds a paragraph (c) that reads as follows:

> Chapter 51 - Office of the Mayor
>
> Sec. 51-1 C. Outside Employment: While the Office of Mayor is a full-time position, the Mayor may be employed in other governmental or private sector employment, except not within the City of Hoboken government, so long as such employment does not compromise the Mayor's ability to fulfill the duties of the office and as long as all related income are publicly disclosed. To ensure that such outside employment does not create a conflict with the Mayor's full-time duties, public disclosure of such income shall include the name of the employer, the amount of all compensation, including commissions, and in the case of private sector employment, a quarterly listing of all clients and / or contracts. This reporting must be made to the City Clerk no later than ten business days following the close of each quarter.

Foremost, the ordinance is invalid as it attempts to pass an ethics requirement to address potential conflicts, which may be done only if the City establishes a local municipal ethics board. In the event a local board is created, if sought to be adopted by the local board, such an ordinance would also be subject to the approval of the Local Finance Board as required under the Local Government Ethics Law. The Local Government Ethics Law was enacted on February 20, 1991. L. 1991, c. 29, 27. The purpose of the Act is to provide a Statewide method for governing the ethical conduct of local government officers and employees and requiring financial disclosure for local government officers. N.J.S.A. 40A:9-22.2(e). To effect this purpose the Legislature has established a Statewide Code of Ethics applicable to local government officers and employees. N.J.S.A. 40A:9-22.5. The Code of Ethics is enforced by the Local Finance Board. N.J.S.A. 40A:9-22.4. However, a county or municipality may establish a county or municipal ethics board to enforce the code of ethics. N.J.S.A. 40A:9-22.13, N.J.S.A. 40A:9-22.19. The county or municipal ethics board establishes the local code of ethics. N.J.S.A. 40A:9-22.15, N.J.S.A. 40A:9-22.21. If the local code is not identical to the State code, it is subject to the approval of the Local Finance Board. N.J.S.A. 40A:9-22.15, N.J.S.A. 4OA:9-22.21. Accordingly, because the City has not established a municipal ethics board the City cannot alter the State ethics code by passing ethics rules and disclosure responsibilities that alter the State Code. Therefore, the proposed ordinance is an improper and unenforceable attempt to alter the Statewide code of ethics without the establishment of a local municipal ethics board or approval of from the Local Finance Board.

I also note that the Statewide Code of Ethics requires that in addition to adhering to the ethical guidelines set forth in the law a "local government officer" is required to file annually a financial disclosure statement, N.J.S.A. 40A:9-22.6, which contains information about the officer’s sources of income, certain business interests, and real estate holdings in New Jersey. Ibid. (Initially financial disclosure statements are required to be filed by August 19, 1991 and thereafter annually by April 30. Ibid.). Accordingly, a substantial amount of the information sought by, and the assumed reason behind, the proposed ordinance is already covered under the Statewide Code of Ethics as enforced by

the Local Finance Board. Furthermore, if the Council considers adopting a local ethics code, it is respectfully submitted that the same should apply to all members of Council not just the Mayor. Clearly, the potential conflicts sought to be addressed in the proposed ordinance are present for all members of the governing body. [1]

I note that the proposed amendment also creates conflict with many professional occupations requiring that information, including in some instances the identity of clients, be kept confidential. There are certain relationships that, by their very nature, require one or both party's consent before information can be disclosed to a third-party. Perhaps the most common of these relationships include that of: doctor to patient, therapist to patient, and attorney to client. Because these types of relationships often involve very personal and sensitive information (such as medical conditions or personal finances), confidentiality serves to facilitate open and forthright communication between both parties -- thereby serving the best interests of all involved. In many cases that confidential information includes the identity of a patient or client. Therefore, the proposed ordinance, which requires disclosure of "clients" would require both doctors and lawyers to disclose patients and clients. This proposed disclosure provision conflicts with the state law and the ethical obligations of certain professionals' obligations to keep the identity of their clients and other information confidential. Because the current Mayor is an attorney, I will analyze the proposed disclosure requirement as it pertains to attorneys.

It is well-settled under New Jersey law that communications between lawyers and clients "in the course of that relationship and in professional confidence" are privileged and therefore protected from disclosure. N.J.S.A. 2A:84A–20(1); N.J.R.E. 504(1). Specifically, the attorney-client privilege generally applies to communications (1) in which legal advice is sought, (2) from an attorney acting in his capacity as a legal advisor, (3) and the communication is made in confidence, (4) by the client. See Metasalts Corp. v. Weiss, 76 N.J.Super. 291, 297, 184 A.2d 435 (Ch.Div.1962). The attorney-client privilege "recognizes that sound legal advice or advocacy serves public

[1] I do not recommend the establishment of a Local Board as I believe the potential for the board to become political is too great. I find the Local Finance Board's enforcement is of the Statewide ethics code is reliable and sufficient. Further if the council were to establish a Local Board I recommend adoption of the Statewide ethics code not the creation of a local code.

ends and rests on the need to 'encourage full and frank communication between attorneys and their clients.' " United Jersey Bank v. Wolosoff, 196 N.J.Super. 553, 561, 483 A.2d 821 (App.Div.1984) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584, 591 (1981)). " 'Preserving the sanctity of confidentiality of a client's disclosures to his attorney [promotes] an open atmosphere of trust.' " United Jersey Bank, supra, 196 N.J.Super. at 561, 483 A.2d 821 (quoting *11 Reardon v. Marlayne, 83 N.J. 460, 470, 416 A.2d 852 (1980)). Accordingly, "the confidentiality of communications between client and attorney constitutes an indispensable ingredient of our legal system." In re Grand Jury Subpoenas Duces Tecum, 241 N.J.Super. 18, 27–28, 574 A.2d 449 (App.Div.1989).

To be sure, while the attorney-client privilege is "clearly extremely important," it is neither absolute nor sacrosanct. Biunno, *12 Current N.J. Rules of Evidence, comment 1 on N.J.R.E. 504(3). Because the privilege results in the suppression of evidence, it "is to be strictly limited to the purposes for which it exists, i.e., the need for consultation between attorney and client without fear of public disclosure." **245 State v. Humphreys, 89 N.J.Super. 322, 325, 215 A.2d 32 (App.Div.1965). However, "[w]here the privilege is applicable, 'it must be given as broad a scope as its rationale requires.' " United Jersey Bank, supra, 196 N.J.Super. at 561, 483 A.2d 821 (quoting Ervesun v. Bank of N.Y., 99 N.J.Super. 162, 168, 239 A.2d 10 (App.Div.), certif. denied, 51 N.J. 394, 241 A.2d 11 (1968)). And while the burden of proof is on the person or entity asserting the privilege to show its applicability in any given case, L.J. v. J.B., 150 N.J.Super. 373, 378, 375 A.2d 1202 (App.Div.), certif. denied sub nom. Jacobson v. Balle, 75 N.J. 24, 379 A.2d 255 (1977), there is a presumption that a communication made in the lawyer-client relationship has been made in professional confidence. N.J.R.E. 504(3); see also Hannan v. St. Joseph's Hosp. & Med. Ctr., 318 N.J.Super. 22, 28, 722 A.2d 971 (App.Div.1999); State v. Schubert, 235 N.J.Super. 212, 220–21, 561 A.2d 1186 (App.Div.1989), certif. denied, 121 N.J. 597, 583 A.2d 302, cert. denied, 496 U.S. 911, 110 S.Ct. 2600, 110 L.Ed.2d 280 (1990).

In this regard, confidential communications are those "communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the **246 attorney as so intended." State v.

Schubert, supra, 235 N.J.Super. at 221, 561 A.2d 1186. Furthermore, confidential communications may be disclosed to a non-client or non-party who shares the client's interest, without surrendering confidentiality. See *14 In re State Comm'n of Investigation Subpoena No. 5441, 226 N.J.Super. 461, 466–67, 544 A.2d 893 (App.Div.), certif. denied, 113 N.J. 382, 550 A.2d 484 (1988). The privilege, of course, can be waived only by the client and not the lawyer. Sicpa N. Am., Inc. v. Donaldson Enters., 179 N.J.Super. 56, 60–61, 430 A.2d 262 (Law Div.1981). Generally, once privileged material is disclosed, the privilege of non-disclosure is waived as to that matter. See In re Grand Jury Subpoena Issued, 389 N.J.Super. 281, 298, 913 A.2d 78 (App.Div.2006). Not all disclosures, however, amount to waivers. For example, an unauthorized disclosure by someone who is not the holder of the privilege does not generally constitute a waiver. In re Grand Jury Subpoenas Duces Tecum, supra, **247 241 N.J.Super. at 31, 574 A.2d 449; In re Nackson, 221 N.J.Super. 187, 191, 534 A.2d 65 (App.Div.1987), aff'd, 114 N.J. 527, 555 A.2d 1101 (1989).

In this case, the City is considering passing an ordinance that would require disclosure of a "quarterly listing of all clients and / or contracts" of the Mayor who maintains a relationship with a law firm. However, in this state and others the identity of a client is not automatically outside the protection of the privilege. In certain circumstances the privilege may protect a client's identity from compelled disclosure. In *In re Kozlov*, 79 *N.J.* 232, 398 *A.*2d 882 (1979), the Court permitted an attorney to refuse to disclose his client's identity when less intrusive sources of the same information were available. *See also* *In re Kaplan*, 8 *N.Y.*2d 214, 203 *N.Y.S.*2d 836, 168 *N.E.*2d 660 (1960) (client's identity may be privileged if directly related to advice proffered by attorney); 81 Am.Jur.2d *Witnesses* § 231 (1976) at 246 ("[A] client's name may be privileged if information already obtained by the tribunal, combined with the client's identity, might expose him to criminal prosecution for acts subsequent to, and because of which, he had sought the advice of his attorney."). Although an attorney's clients are not always confidential, when the identity of a client is requested to be disclosed the Court must weigh the benefits/detriment of disclosure and the impact upon litigation. In this case, the City is considering an ordinance requiring disclosure of all clients under the guise of ensuring there are no conflicts. However, in some instances this proposed requirement

would violate the State law and an attorney's ethical obligation to keep that information confidential. Therefore, for the reasons set forth herein it is my opinion that the proposed amendment to Chapter 51 is invalid and unenforceable and I do not recommend that the City Council approve the same.

Should you have any questions or need any further information please feel free to contact me.