

BARRETT JOHNSTON MARTIN & GARRISON LLC

February 22, 2018

VIA HAND DELIVERY

District Attorney General Glenn R. Funk
Washington Square, Suite 500
222 2nd Avenue North
Nashville, TN 37201

Dear General Funk,

As you know, this firm represents Mayor Megan Barry in her individual capacity as it relates to the investigation of her by the Tennessee Bureau of Investigation (TBI) that was initiated at your request.

When you and I first met at your office on this matter on February 2, 2018, you raised the possibility of a conflict of interest that you and your office might have. In particular, we discussed the fact that budget season was fast approaching and the distinct possibility that this created a conflict. I appreciate you raising this concern, and I have reflected more on this potential conflict since that meeting.

To that end, this firm engaged the services of Mr. Lucian Pera in the Memphis office of the law firm of Adams & Reese to provide us with an ethics opinion on whether you and your office have a potential conflict of interest. Mr Pera, who is currently the President of the Tennessee Bar Association, is a nationally recognized expert on ethics and professional responsibility. As such, I believed seeking his opinion was important before addressing this issue with you further.

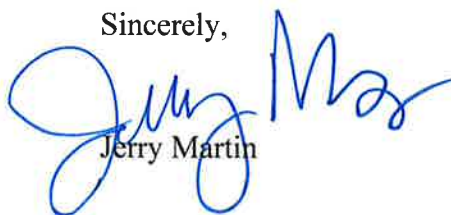
I have enclosed his report for your review. I have also enclosed a copy of Mr. Pera's curriculum vitae.

Finally, I have enclosed an article from the Knoxville News Sentinel dated August 11, 2008. This article references a decision by then District Attorney General Randy Nichols to recuse his office in an investigation of the Knox County Mayor.

In light of these materials, I would respectfully ask you to revisit the issue of whether you and your office may have a conflict of interest. Understand that I raise this issue not only to ensure that my client gets a fair process but also to ensure that the public has confidence in the ultimate outcome. I trust you will give this issue the proper consideration it deserves.

If you would like to discuss this further, then please let me know.

Sincerely,



Jerry Martin

February 22, 2018

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**Re: Opinion Concerning Possible Conflict of Interest of District Attorney
Glenn Funk and His Office Concerning Investigation of Mayor Megan
Barry**

Dear Mr. Martin:

You have asked me to provide you with my analysis of whether District Attorney General for the 20th Judicial District Glenn Funk has a conflict of interest that requires his recusal or disqualification from participating in or supervising an ongoing criminal investigation of Metropolitan Government of Nashville and Davidson County Mayor Megan Barry. You have also asked that I consider whether, if General Funk does have such a disqualifying conflict of interest, other attorneys and personnel in his office must also recuse or be disqualified from participation in this investigation. This letter summarizes my analysis and opinion.

SUMMARY

In summary, as set out in more detail below, in my opinion, District Attorney General Glenn Funk is required by the Tennessee lawyer ethics rules and case law to recuse or be disqualified from his supervision and participation in the criminal investigation of Mayor Megan Barry. Further, in my opinion, Tennessee lawyer ethics rules and case law also require that General Funk's entire office also recuse or be disqualified from participating in this investigation.

FACTS

As I understand the facts, Mayor Barry is currently under investigation for possible criminal misconduct, including possible official misconduct as Mayor. General Funk is supervising and participating in this criminal investigation.

The office of the District Attorney General for the 20th Judicial District, which General Funk supervises as the elected district attorney general, receives very substantial annual funding for its ongoing operations from the Metropolitan Government of Nashville and Davidson County (“Metro”).

Pursuant to express provisions of the Metro Charter, Mayor Barry has an important and well-defined role in the allocation, appropriation, and approval of all of Metro’s funding for the District. *See, e.g.*, Metro Charter ___ 6. To summarize this budget process, General Funk, like Metro department heads, must submit to the Mayor’s director of finance a proposed budget seeking any Metro funds to be appropriated to the district attorney’s office and he presents this budget request to the Mayor in a meeting open to the public. The Metro director of finance and the Mayor then review this and other budget requests, and the Mayor then is required to propose to the Metro Council, as part of a larger budget, a budget for the district attorney’s office. News reports suggest that General Funk has sought or will seek Metro funding additional to that provided his office by Metro last year, possibly for additional personnel tied to the use of police body cameras, pay increases, and additional prosecutors.

Under these same Metro Charter provisions, General Funk also has clear obligations concerning any Metro funding provided to his office, including an obligation to present any budget requests to the Mayor.

ANALYSIS

Like other Tennessee lawyers, the conduct of district attorneys is governed by Tennessee’s legal ethics rules, the Tennessee Rules of Professional Conduct.¹ Those rules govern the circumstances in which district attorneys are disqualified by a conflict of interest.² Rule 1.7(a)(2)³ prohibits a lawyer from taking on any representation where

¹ Tenn. Sup. Ct. R. 8, Tennessee Rules of Professional Conduct.

² Rule 1.11(d)(1) makes clear that district attorneys are governed by the conflict of interest rule discussed here, Rule 1.7. *See* Tenn. Sup. Ct. R. 8, RPC 1.11(d)(1) and Comment [1].

³ This Rule:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Tenn. Sup. Ct. R. 8, RPC 1.7(a)(2).

“there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”

While a district attorney general may or may not have an attorney-client relationship that arises from his position, Tennessee courts have been very clear about the special role of a prosecutor and the ethical requirement that they avoid conflicts of interest.

In one leading case, the Tennessee Supreme Court noted that, “[i]n determining whether to disqualify a prosecutor in a criminal case, the trial court must determine whether there is an actual conflict of interest, *which includes any circumstances in which an attorney cannot exercise his or her independent professional judgment free of ‘compromising interests and loyalties’*” (emphasis added).⁴ The Tennessee Rules of Professional Conduct themselves, in commenting on a prosecutor’s special role, cites this case and confirms that independence of judgment and impartiality are fundamental requirements of the ethics rules for prosecutors:

A prosecutor has the responsibility of a minister of justice whose duty is to seek justice rather than merely to advocate for the State's victory at any given cost. *See State v. Superior Oil, Inc.*, 875 S.W.2d 658, 661 (Tenn. 1994). For example, prosecutors are expected “to be impartial in the sense that charging decisions should be based upon the evidence, without discrimination or bias for or against any groups or individuals. Yet, at the same time, they are expected to prosecute criminal offenses with zeal and vigor within the bounds of the law and professional conduct.” *State v. Culbreath*, 30 S.W.3d 309, 314 (Tenn. 2000).⁵

On this basis, Tennessee legal ethics rules prohibit a district attorney general or any other Tennessee prosecutor from taking on any matter where there is a significant risk that their independent professional judgment or impartiality will be materially limited by their responsibilities to another client, a former client or a third person or by a personal interest.

In my opinion, General Funk’s official responsibility and interest in obtaining Metro funding for his office creates a conflict of interest for him in supervising or

⁴ *State v. Culbreath*, 30 S.W.3d 309, 312-13 (Tenn. 2000).

⁵ Tenn. Sup. Ct. R. 8, RPC 3.8 (“Special Responsibilities of a Prosecutor”), Comment [1].

participating in an investigation of possible criminal misconduct by Mayor Barry.⁶ This conclusion is based on my view that there is a significant risk that General Funk's independent professional judgment or impartiality will be materially limited by his obligations and interests concerning obtaining funding from Metro for his office's operations.

The typical concern underlying this "material limitation" conflict of interest rule focuses on concern about the risk that a lawyer in this situation may, for example, "pull his punches," acting more to favor the interest that creates the conflict – here, for example, by acting more in Mayor Barry's interest than independence and impartiality would require. For a prosecutor, there is the additional concern that, because a prosecutor must be an impartial "minister of justice," this other interest creating the conflict might lead the lawyer to act more adversely than independence and impartiality might require.

Let me be very clear. Nothing in my opinion reflects any judgment that General Funk will actually do anything less than ethical or honorable in conducting the investigation of Mayor Barry. I have no opinion concerning whether General Funk's judgment concerning the investigation of Mayor Barry is now or will be, in fact, impaired by his obligations and interests concerning Metro funding for his office. I also have no opinion concerning whether General Funk will be, as he is required to be, impartial in supervising or participating in the investigation of Mayor Barry. That is not the issue under the ethics rules.

The ethics rules clearly and expressly *do not* require a finding that General Funk *will not* use independent professional judgment or that he *will not* be impartial. Instead, the ethics rules – specifically, Rule 1.7(a)(2) – focus on whether "*there is a significant risk*" that his independent professional judgment or impartiality "*will be materially limited*" by his obligations and interests concerning Metro funding. This is intended to be an objective and forward-looking analysis of risk.

In my opinion, that analysis leads to the conclusion that General Funk does have a conflict of interest and that, as a result, the ethics rules require that he recuse himself from any role in this investigation.⁷

⁶ In addition, in my opinion, General Funk's official responsibility and interest in funding for his office should also be considered a personal interest under the ethics rules that likewise imposes a material limitation under Rule 1.7(a)(2).

⁷ In addition, based on the facts here, in my opinion, it is very clear that, General Funk's continued supervision of and participation in the investigation of Mayor Barry creates an appearance of impropriety. *See Culbreath*, 30 S.W.3d at 312-13. Whether the ethics rules and Tennessee case law

You have also asked me to consider whether, if General Funk must recuse or be disqualified on these fact, his entire office must also recuse or be disqualified. In my opinion, it should.

As one leading case has noted, “[i]f disqualification is required ... the trial court must also determine whether the conflict of interest or appearance of impropriety requires disqualification of the entire District Attorney General's office.”⁸ Here, in my opinion, both the language of the ethics rules and the appearance of impropriety created by General Funk’s office being involved in this investigation mandate that his entire office recuse or be disqualified.

First, the ethics rule prohibiting “material limitation” conflicts discussed above applies with equal force to all lawyers and other personnel in General Funk’s office. While the interest of any individual prosecutor in General Funk’s office in Metro funding may seem less direct than General Funk’s (they do not, for example, have the same duties as General Funk under the Metro Charter), their interest is clear. Within the last year, for example, General Funk has sought Metro funding for salary increases for certain people working in his office, in budget requests made directly to the Mayor. Moreover, even personnel in General Funk’s office who may not see any personal financial benefit from continued or increased Metro funding share an interest in Metro funding for the office as a whole and also share an interest in Metro’s granting of any request by General Funk, who directly or indirectly supervises them. On this basis, in my opinion, the ethics rules require recusal or disqualification of General Funk’s entire office because there is a significant risk that the independent professional judgment or impartiality of each member of his office will be materially limited by interests concerning Metro funding for his office’s operations.

Second, in my opinion, under Tennessee case law, an appearance of impropriety arising from an office’s participation in this investigation of Mayor Barry requires the office’s disqualification.⁹ In my opinion, the participation of lawyers and other personnel in General Funk’s office in this investigation creates an appearance of impropriety for

requires General Funk’s recusal or not (and I believe they do), in my opinion, a prudent prosecutor faced this situation would discharge his duties as a “minister of justice” most effectively by recusing himself.

⁸ *Culbreath*, 30 S.W.3d at 313 (citing *State v. Tate*, 925 S.W.2d 548, 550 (Tenn. Crim. App. 1995)).

⁹ *Culbreath*, 30 S.W.3d at 312-15.

much the same reasons discussed in the preceding paragraph, as well as for the reasons I believe support my conclusion that General Funk should recuse or be disqualified.¹⁰

Please let me know if you need any further information or explanation concerning my analysis or opinions concerning this matter.

Very truly yours,



Lucian T. Pera

¹⁰ In a similar situation, the district attorney general for the district including Knox County recused from an investigation of the Knox County mayor. *See* "State attorney general to investigate Mayor's Office," *Knoxville News Sentinel* (Aug. 11, 2008). While this instance is not, of course, binding precedent, in my view, it is an example of a responsible prosecutor responding to concerns very similar to the concerns present here.

State attorney general to investigate Mayor's Office

 archive.knoxnews.com/news/local/state-attorney-general-to-investigate-mayors-office-ep-411205504-359815121.html/

Posted: Aug. 11, 2008

SHARE

By Rebecca Ferrar

- [Robot probe will search for signs of intelligent political life in Knox County](#)
- [The letters between Knox County District Attorney General Randy Nichols and State Attorney General Robert E. Cooper Jr.](#)

Tennessee Attorney General Robert E. Cooper Jr. has been appointed under state law to investigate all matters relating to probes under way by a Memphis prosecutor involving the office of Knox County Mayor Mike Ragsdale, according to a letter today to Knox County commissioners from Knox County District Attorney General Randy Nichols.

The appointment was made by Nichols.

"This is to advise you that Attorney General Robert E. Cooper Jr. has been appointed under state law to take responsibility to investigate all matters and conduct any proceedings relative to the handling and possible misuse of Knox County funds, possible conflicts of interest and possible official misconduct within the administrative branch of Knox County government in violation of the laws of Tennessee and/or the Knox County Charter," the letter states.

The attorney general and his staff will "focus primarily on the use of grant funds and on audits of the mayor's hospitality funds, county purchasing card charges and expense reimbursements and travel expenses. This will include fulfilling the legal obligations to advise citizens seeking to bring an ouster suit."

The appointment, Nichols said in his letter, is "not meant to convey any conclusion as to whether or not laws have been violated or that a legal action will or will not be taken. Those are matters to be determined by the attorney general."

Bill Bright, the Memphis prosecutor previously appointed to handle allegations regarding purchasing card use by former Community Services Director Cynthia Finch, will continue under the direction of Cooper, Nichols wrote. Cooper appointed Bright "to be involved in the entire investigation."

"Communications about these matters in the future should be made directly to the attorney general's office," the letter concludes.

Ragsdale's chief administrative officer, Dwight Van de Vate, released a brief statement.

"We welcome the involvement of the state Attorney General's Office and the continued efforts of General Bright," the statement said. "The work of General Cooper and his staff will ensure a fact-finding process that is careful, deliberate and objective. We will continue to support their work and look forward to seeing these questions definitively answered once and for all."

In an Aug. 6 letter from Cooper to Nichols, regarding "Knox County investigations," Cooper notes that his office has "been conferring for the past several weeks regarding the ongoing controversy in Knox County related to various financial management issues. In light of those discussions, we have agreed that this office is best suited to investigate and, if appropriate, undertake legal action in these matters."

Cooper was asked to take over the investigation by Nichols, according to attorney general spokeswoman Sharon Curtis Flair.

Cooper noted that he understands Nichols' office "works on a daily basis with Knox County officials affected by this investigation and receives much of its funding from Knox County, and therefore you have removed yourself from the investigation to avoid any appearance of conflict."

Cooper continued that, "We agree with you that an office like mine, independent of Knox County government and with expertise in the law applicable to these matters, should take over these investigations to ensure public confidence in the disposition of these matters."

Cooper goes on to say that the investigation will "involve all potential violations and remedies relating to the alleged improper handling of Knox County finances and possible conflicts of interest." Cooper continues to note that several of these issues "have been the subject of audits reviewing transactions related to travel, purchasing cards and hospitality funds, as well as a forthcoming audit on grants."

County auditor Richard Walls has so far released audits on the use of auto allowances by the mayor's office, the use of purchasing cards by the mayor's office and the use of a hospitality fund by the mayor's office. In the hospitality fund, the auditor noted the violation of the Knox County Charter and state law.

"While the subjects covered by these audits will be the primary focus of the investigation, we would also be authorized to review any related matters which might arise in the course of the investigation," Cooper wrote. In addition, he said, under state law, his office would examine the request for ouster filed by 10 citizens and County Commissioners Victorial DeFreese and Paul Pinkston.

Cooper goes on to note the earlier appointment of Bill Bright, an assistant district attorney in Shelby County and head of that office's white collar crime division "to investigate financial management issues related to former Knox County Senior Community Services Director Cynthia Finch." Bright has substantial experience in "these type cases" and Cooper expanded his appointment so he could work with Cooper's office.

The investigation will be conducted by the Law Enforcement and Special Prosecutions Division in Cooper's office. He noted that Nichols has provided Cooper's office with copies of the audits and "other information related to the investigation."

Cooper asked that Nichols provide copies of his letter to Ragsdale, county commissioners, the citizens submitting the ouster request, the press and noted it will be posted on the attorney general's Web site.

In an Aug. 8 letter to Cooper, Nichols thanks the state attorney general for agreeing to investigate matters in the mayor's office and said, "As you know, these questions have adversely impacted public confidence in the operation of Knox County government, and I appreciate your understanding that a prompt review of those practices by an office independent from Knox County government, regardless of its outcome, should begin to restore some of that confidence."

Nichols wrote that he understood Cooper's office would "devote the resources of your office necessary to bring this matter to a conclusion as soon as reasonably possible."

Nichols continued that he has instructed his staff to file all documents needed to "formalize my delegation of authority to you and your office to handle this matter."

More details as they develop online and in Tuesday's News Sentinel.