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November 5, 2019

**VIA HAND DELIVERY AND EMAIL (mcheh@DCcouncil.us)**

Councilmember Mary Cheh  
Council of the District of Columbia  
1350 Pennsylvania Avenue, N.W., Suite 108  
Washington, D.C. 20004

Dear Councilmember Cheh:

As attorneys for Councilmember Jack Evans, we are submitting and asking the Council to review this response to its outside counsel's report. We also request that you make our submission equally available to the Council and the public, as has been done with its own counsel's submission. We also appreciate the opportunity for Mr. Evans and his counsel to address these issues with the Council when it takes up the report as soon as can be arranged.

**I. EXECUTIVE SUMMARY**

This Executive Summary presents some initial responses to the report submitted yesterday by O'Melveny & Myers ("OMM"), lawyers for the D.C. Council. The final version of that Report was given to us just an hour or so ago, even though it had been given to all Councilmembers yesterday and leaked to the media about the same time. The articles written from the unauthorized leak and now the formal conference you and others have had necessitate as rapid a response as we can make. Therefore, some of the page citation in the long form

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response are not to the correct page in the final report (as they are based on a preliminary draft we received last Friday).

In addition, each of the issues in the Report is addressed in detail after this summary. We also are enclosing an October 25, 2019 letter we wrote to OMM that we had hoped they would address (but they did not) and the formal opinions of an ethics expert we retained to provide experienced perspective to the Council and public.

**1. As an Ethics Expert Confirms, the Report's Conclusions of Rule Violations Are Simply Wrong, Misapply the Law, Make Up New Requirements and Reflect a Total Misunderstanding of the Permissibility of Legislators with Outside Employment**

The Executive Summary of the Report identifies eleven alleged violations of the Code and also faults him for various entries on his financial disclosure forms. The alleged violations are organized here into relevant subject areas with the OMM numbers from the Executive Summary. To begin with, it should be noted that the Report attributes what it concludes as violations to Mr. Evan's "misunderstanding" of the rules versus a deliberate attempt to violate them:

**A. Mr. Evans' Financial Disclosures**

*Financial disclosure forms were inadequate*

- He failed to disclose his NSE clients
- He failed to disclose his income from Manatt
- He improperly omitted NSE as a source of income on one disclosure form

**Response**

The plain language of the instructions does *not* require the listing of individual clients (only an "employer") and the alleged violation is based on an after-the-fact creation of new requirements by OMM. The other alleged "omissions" were simply clerical errors where other submissions in the same form demonstrated there was *no* intent to conceal his outside employment or income. These clerical omissions were corrected when discovered.

**B. Mr. Evans' support for Pepco-Excelon while employed at Manatt**

*OMM 1 Evans spoke at a public council meeting in favor of Pepco-Excelon merger; voted for the budget amendment that diverted funds away from research challenging private utility ownership; Evans used his position and title to influence agency approval of the merger.*

**Response**

The Report ties Evans' actions in favor of the Pepco-Excelon merger to a law firm's (where he ended up working) relationship with Pepco. They do so by starting the clock *before* Mr. Evans worked there, despite the fact that it is not clear when Mr. Evans became aware of the relationship, even though Mr. Evans never worked on the matter at the firm, even though Mr. Evans' support for the merger pre-dated any conversations with the firm, and despite the fact that when he learned of the relationship with the firm he disclosed it to the Board of Government Ethics and Accountability.

**C. Mr. Evans' provision of routine constituent services**

*OMM 2 Evans' Deputy Chief of Staff connected Don MacCord of Digi Media with WMATA's assistant GM to facilitate overnight sign installation after there was the possibility of MacCord's company becoming a client.*

**Response**

All of the alleged violations arising from the issues with Digi Media fall away because Mr. Evans decided *not* to accept Digi as a client and did so quickly, on his own, without anyone raising a question or concern, and when there were no inquiries or investigation or media questions. It shows how he tried to adhere to ethics rules, not violate them.

Moreover, the alleged violation amounts to an email from MacCord to Evans' staff requesting assistance in connecting with WMATA officials who could grant after-hours access to government facilities to perform overnight work, a routine request and matter. Since Evans was out of town, his staff passed on the request and copied him on the emails. This is one of many examples of Evans or his staff playing "traffic cop" to connect his constituents to the right government agency or information, and nothing more.

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*OMM 4 Evans' Legislative Assistant emailed the D.C. Office of the Chief Technology Officer to arrange a meeting for EastBanc Tech.*

*OMM 5 & 7 Evans Arranged a meeting between two clients at NSE (EastBanc and Willco) and Councilman McDuffie.*

*OMM 8 Evans and his staff provided assistance to Willco in trying to influence the District Department of Transportation to stop work on a curb installation.*

*OMM 10 & 11 Evans and his staff answered constituent services requests from Willco to obtain information from the Mayor's office and to inquire about a delayed plumbing permit*

### **Response**

This group of alleged violation is a "catch-all" that casts constituent services as improper. But as Mr. Evans repeatedly explained, and as ethics experts have opined, outside employment that is allowed under the Code does not extinguish a legislator's responsibilities to his constituents. Issues as mundane as road pavers, delinquent permits, and forwarded emails do not constitute conflicts of interest. They are among the many routine services that councilmembers provide all constituents, regardless of any other relationships that may exist.

One of the OMM Report's fundamental flaws is its conclusion that a public official may no longer help a constituent with a problem, as he or she did before and as he or she does for thousands of others, if that person becomes a client. That contradicts ethics doctrine. The work done was just that sort of routine constituent service.

And as fundamental is the fact that the Report shows that Mr. Evan's helping with these constituent services were consistent with his office practices to non-clients, consistent with his assistance to these individuals before they were clients, and consistent with the positions he has taken for nearly three decades in office.

### **D. Mr. Evans' consistent, disclosed and well known policy positions that remained unchanged before and after establishing his consulting relationships**

*OMM (3) Evans voted in favor of the 2016 Omnibus Amendment Act that would involve his NSE client Squash on Fire.*

**Response**

The 2016 legislation were merely a technical amendment that was necessary to properly implement existing legislation that Mr. Evans did before in 2010, and that predated NSE's existence entirely. The amendment was requested by the D.C. CFO in order to effectuate the previously-approved expenditure of maintenance funds for the West End Library and Fire Station. There is no basis to connect this technical correction to NSE's later relationships.

*OMM (6) Evans supported the 2017 tax incentive legislation that incentivized development of film production activities in the District which a principal of one of his clients (Willco) testified in support of.*

**Response**

As Mr. Evans repeatedly explained in his interviews with OMM, he has always considered himself the "film guy" on the Council. In 2013, before NSE even existed, Mr. Evans publicly supported nearly identical legislation to the bill implicated in this alleged violation. The Report takes his consistent policy position on this subject as a conflict of interest while disregarding his prior public support and then erroneously concludes that the Willco official appearing at a hearing required Mr. Evans to abandon his long-standing role on D.C. development.

*OMM (9) Evans introduced and subsequently voted for the 2018 Parking Tax legislation that kept rates at 18%, as they had been previously, which could benefit a subsidiary to his client The Forge Company.*

**Response**

The Report implies this vote was connected to NSE's relationship with Forge. However, that innuendo disregards Evans' long-standing public position that D.C.'s high tax rate was detrimental to the business community at large, that he had voted against similar measures before any client signed on with him, and that this opposition benefited lots of businesses and was never directed to assist a single client.

**2. Nevertheless, the Report Confirms That Mr. Evans' Errors Were Not Intentional, Resulted Only from a "Misunderstanding" Of The Rules, and There Was No Evidence That Any Official Act Was Ever Tied to his Consulting Relationships**

The Report itself concedes that where its application of the Code differed from that of Mr. Evans, that difference came as a result of "misunderstanding" and "failure to correctly implement" a compliance model that was never clearly established in the first place. There was no evidence or conclusion of tying financial gain to official acts or Mr. Evans *changing* a position to benefit a client. In fact, the Report unfairly ignores completely the examples of when Mr. Evans opposed the interests of clients.

**3. The Report Reached its Flawed Conclusions as a Result of an Unrealistic Deadline, Selective and Incomplete Use of Interview Testimony, and Improper Inferences from Various Witnesses who were Unavailable for Interviews**

The Report flagrantly misrepresents Mr. Evans' testimony pertaining to issues at the very heart of its allegations. Some selected quotes in the Report are exactly the opposite of what he told OMM. For example, the Report grabs onto one snippet of testimony out of four days while disregarding several minutes' worth of detailed explanation.

The Report implies that Mr. Evans was cavalier about his obligation to monitor for conflicts of interest. But to explain his decision-making process, Evans gave detailed explanations about each issue in the report, as well as several other ethical dilemmas he has faced in his decades-long career. The Report conveys none of this detail, and instead holds up a single unartful phrase – "I know it when I see it" – as though that was all Evans had to say on the matter.

The Report leaps to the conclusion that Evans' constituent services were tied to his consulting business, when the evidence shows that he provided the same services to everyone. The Report finds violations in issues as mundane as forwarded emails, loose pavers, and a slow-to-issue plumbing permit.

The Report ties Evans' actions in favor of the Pepco-Excelon merger to his employer's client relationship with Pepco, even though the firm represented Pepco before Mr. Evans was employed there, and he raised the issue with BEGA when he learned about the relationship.

#### **4. The Report Completely Fails to Address the Contradictions in the Code, Financial Disclosure Form Instructions, Lack of Ethics Training and Lapses by D.C. Ethics Offices**

OMM counsel stated that applying the Code is “a somewhat technical exercise, because it has technical language in it” and that “there may be a difference between a technical violation and a more substantive violation.” OMM counsel conceded that in some cases, interpreting disclosure requirements is a “quasi-philosophical question about the form,” which is so complicated and poorly drafted that he “went back and looked at this since [he] was sort of confused by it” and had trouble reading it correctly. Before coming up with its own interpretations of rules and instructions as it seems to have done, OMM should have been given the time to consult with ethics experts.

They did not do that, but we did. Attached to this document is an opinion letter from Michael Frisch, noted ethics expert, Ethics Counsel and Adjunct Professor at Georgetown University Law Center, which provides crucial context that the Report leaves out. We offered to make Professor Frisch available to OMM but they did not accept the invitation.

Moreover, the Report itself shows that BEGA and the Council failed at multiple critical junctures to provide the clarity, training, and guidance needed to avoid problems inherent in permissible outside employment.

The Report’s Executive Summary by setting out six suggestions for improvement of the Council’s ethics regime finally addresses what we requested in our meetings – the fundamental systemic issues that this matter involving Mr. Evans has uncovered. They did not, however, address the contradictions in Code of Conduct provisions and financial disclosure form instructions, changed rules that were not flagged to Councilmembers, and the inherent tensions that exist when a government body permits outside employment for its officials. Instead, while acknowledging the need for change, they apply the changes they request to Mr. Evans retroactively.

## **II. OVERVIEW AND INTRODUCTION**

On July 9, 2019 the Council voted to conduct its own investigation into allegations concerning Mr. Evans. While the Council, and more importantly, the citizens of Washington, D.C., have every right to understand Mr. Evans’ conduct, the timing of the effort was and is problematic. To begin with, there were and are other investigations, especially one by the U.S. Attorney, that made it predictable that a Council inquiry would not be able to get at all the

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important facts because various witnesses had to keep the other inquiries as priorities. In addition, the Council then placed an unrealistic deadline on OMM to go over multiple issues that require more analysis and context than the time allowed. And then, this investigation was commissioned after the Council concluded that Mr. Evans had committed ethical violations, reprimanded him for one, had a hearing over others, and after many of the Council had already made statements indicating they had already concluded Mr. Evans had violated the rules.

**“Confirmation bias”** is *“the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.”* Raymond S. Nickerson, Ph.D., Tufts University, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 R. Gen. Psych. 175 (1998).

The Report submitted to the D.C. City Counsel by its outside law firm demonstrates the application of this phrase.<sup>1</sup> As we lay out in the remainder of this letter, and as is confirmed by an experienced, reputable ethics expert, the Report does so with (a) a combination of selective presentation of facts, (b) rewriting of the Code of Conduct with definitions and clarifications it does not contain and ones inconsistent with precedents, and (c) a constant after-the-fact, 20/20 hindsight approach to issues that have never been addressed by the Council, but which the events surrounding Mr. Evans indicate should be discussed for future rules. For example, on October 25, 2019, we submitted a letter to OMM asking it to consider a number of issues before writing its report. Among these were the inherent tensions of outside employment with full-time legislators, the lack of important definitions in the Code of Conduct (such as what is and who measures an “appearance” of a conflict), and clear contradictions in the financial disclosure

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<sup>1</sup> This letter makes reference to numerous passages in “the Report,” which is actually the draft report provided to us on October 31, 2019. While there may be some differences, e.g.—changes in pagination, we expect the substance of the final Report to remain essentially the same.



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forms (reporting stock only when a company transacts business *with* D.C. versus when a company transacts business *in* D.C.) and the lack of real notice and ethics training to all Councilmembers and their staffs. Probably, because of the press of time, the Report addresses none of these, but they are critical to a fair and impartial review of Mr. Evans' conduct.

With all of that, Mr. Evans has stated repeatedly that he regrets a number of the things that he did and did not do. He could have submitted each of his client relationships to the General Counsel for further review (even if the record shows that Office may not have had the resources or background to process that information), he could have made more disclosures of his own consulting clients (even if the rules were unclear as to when or how that should occur), and he could have spent more funds and time having outside accountants and attorneys review his business and disclosure reports. However, *none* of his lapses were intentional; *none* reflected any corrupt agreement with friends and clients; and *none* ever compromised Mr. Evans' positions, votes, support or work on long-standing issues for which he has been consistent for almost 30 years. Indeed, even the OMM Report concludes only that Mr. Evans' lapses resulted not from an attempt to intentionally circumvent the rules but from: "misunderstandings of the ethical rules."<sup>2</sup>

A careful and fair reading of the OMM Report will note that even with the constraints in which it was done, the outside counsel concluded there were *no* rule violations in so many of the issues that have been raised in the media, a few of which include:

1. The investigation did not find evidence sufficient to establish that these relationships (between Mr. Evans and *inter alia* William Jarvis) were likely to present a direct and

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<sup>2</sup> Report at 91.

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predictable effect on Evans' personal financial interests within the meaning of the Code of Conduct or Council rules during the relevant time period.

2. The investigation found no evidence that Bill Jarvis received any compensation for his assistance with NSE or that he had any other financial interest in the company.
3. The investigation found no indication that the limited amount of time that Evans' staff spent on purely NSE-related tasks (some of which were performed outside of regular business hours) ever interfered with their ability or availability to fulfill their official duties at all.
4. The investigation did not uncover any evidence of ethical violations as a result of Evans' employment at Squire Patton Boggs or BakerHostetler.

And for those violations OMM did find, as an ethics expert concludes<sup>3</sup>, these conclusions rest on really faulty propositions that either are undercut by reading an entire transcript of an interview or reference to ethics law and commentary. Here are just a few:

1. OMM believes that once a person or company became a client of Mr. Evans' (or presumably a law firm for which he worked), he and his staff could no longer provide that person with normal constituent services as they did before and for the other 630,000+ residents of D.C. *That surely is not the correct interpretation of the rules.*
2. OMM believes that once a person or company became a client of Mr. Evans (or presumably a law firm for which he worked), he had to recuse himself from participating in any official acts that could benefit that client or the firm for which he worked even if his actions were exactly the same as he had done for decades before the person or entity became a client. *That surely is not the correct application of the rules.*
3. OMM makes no distinction between Mr. Evans taking an action or supporting an issue generally – for example promoting development of New York Avenue – versus participating in a bill or action that would award a particular person associated with Evans a contract on New York Avenue. *That surely is not the correct view of ethics prohibitions.*

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<sup>3</sup> See November 4, 2019 Ethics Letter of Michael Frisch.

4. OMM has equated a law firm or other employer of Mr. Evans having a financial interest in one of its clients – for example when Manatt represented Pepco without Mr. Evans’ participation or knowledge – with that being the same as Mr. Evans himself having that financial gain when Mr. Evans was always on a fixed salary, never had his pay dependent on whether he brought in clients or not and never had a success fee or bonus. *That surely is not the correct definition of what creates a conflict of interest.*

### **III. ERRORS IN PROCESS IN THE COUNCIL’S INVESTIGATION AFFECTED THE CONCLUSIONS OF THE OMM REPORT**

#### **A. The Report rushed to do in two months what should have taken a much longer period.**

The Report provides a broad and far-reaching treatment of Mr. Evans’ business, political, and personal relationships spanning many years. It was conducted all while Mr. Evans and several crucial witnesses were simultaneously responding to inquiries in other parallel investigations. Mr. Evans himself sat for four interviews over more than twelve hours and addressed hundreds of pages of documents. However, interview topics were revisited over and over again, as OMM compiled information from various additional sources. Within a week of the final round of interviews, OMM provided a draft of its nearly 100-page report, giving Mr. Evans’ counsel two days to review the Report before it was submitted to the Council. (And then someone in the City decided to leak the final Report to the media nearly a day before Mr. Evans was allowed to get a copy). As previously noted, on October 25, 2019, we provided OMM with a twenty-page submission and a request to address some systemic issues when viewing Mr. Evans’ conduct. The final report does so as an afterthought and makes suggestions for future

improvements but nevertheless criticize Mr. Evans for not failing to know before what they only suggest be changed now. We also requested that OMM meet with outside ethics experts which seemed like a critical step at the time and, given OMM's decision to rewrite the Code of Conduct to criticize Mr. Evans, was even more important. Again, the deadline under which it was working seems to have prevented that from happening.

All in all, the time limits have caused some of the mistakes and questions we raise in this letter.

**B. The Report was drafted without the input from outside ethics experts.**

Application of a code of conduct, written as D.C.'s has been, requires some thought and analysis. OMM itself notes on various occasions how there were contradictions and ambiguities and "technical" issues in the Code and the disclosure forms. For example, OMM counsel stated that applying the Code is "a somewhat technical exercise, because it has technical language in it" and that "there may be a difference between a technical violation and a more substantive violation."<sup>4</sup> He conceded that in some cases, interpreting disclosure requirements is a "quasi-philosophical question about the form,"<sup>5</sup> which is so complicated and poorly drafted that he "went back and looked at this since [he] was sort of confused by it"<sup>6</sup> and had trouble reading it correctly.<sup>7</sup> Before coming up with its own interpretations or re-writing of rules and instructions as it seems to have done, OMM should have been given the time to consult with ethics experts.

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<sup>4</sup> Transcript, September 3 Interview with Jack Evans, at 121.

<sup>5</sup> Transcript, September 16 Interview with Jack Evans, at 181.

<sup>6</sup> Transcript, September 23, 2019 Interview with Jack Evans, at 187.

<sup>7</sup> Transcript, September 23, 2019 Interview with Jack Evans, at 190-91.

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For what OMM conceded was the need for case-by-case analysis,<sup>8</sup> we offered to make a well-reputed ethics expert available to OMM. Among other things, Michael Frisch is current Ethics Counsel at Georgetown University Law Center. He also served as a senior assistant bar counsel to the D.C. Bar and has written and testified extensively about ethics issues. But that meeting did not occur.

Instead, OMM seems to have drafted its report by applying its own view of rules and instructions which they sometimes agreed were subject to different interpretations. For example,

1. OMM concluded that an official filing a disclosure form must include the identity of clients unless the filer has a “privileged” relationship with the client. That is simply a made-up, after-the-fact new requirement that does not exist in the Code or the instructions. On the face of the form’s instruction, the requirement is for the identity of the “employer,” the plain meaning of which is the firm or business that employs the official. If more should be reported, this can be clarified for the future, but it is not right to graft a new requirement on Mr. Evans now.
2. OMM concluded that an official should recuse him/herself for an issue that benefits a client, even as to a general position (versus one specific to a person or business) taken by an official, and even if the position conforms to specific and demonstrable prior actions. This turns the ethics rules on their head by allowing a client to manipulate an official’s recusal when there is no conflict (the official’s position was not affected by any client relationship). For example, OMM was told that Mr. Evans had positions *against* the interests of certain clients. Had he been required to recuse himself simply because he had such a client, the client would have removed an opponent – sometimes the only opponent – of the actions it wanted. The Council cannot want that result.

Having not consulted an independent expert, OMM compounded the error by going to BEGA just two weeks ago to have it opine, after-the-fact,<sup>9</sup> on what Mr. Evans did and did not

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<sup>8</sup> E.g., Report at 8, (“Determining whether a matter before the Council is a ‘particular matter’ typically requires a case-by-case analysis.”)

<sup>9</sup> See Report at 18 (“In response to our investigative inquiry, BEGA opined on Evans’ explanations for various omissions in his annual filings. BEGA explained that Evans could not properly assert client confidentiality as a basis to withhold disclosure of his NSE clients.”) (citing “Oct. 17, 2019 BEGA Interview”).

know when BEGA “had a dog in the race.” The record shows BEGA’s lapses and deficiencies in providing advice and training and clear rules. Going back to an umpire who missed the call during the game to say the player was out was not a proper way to seek ethics advice.<sup>10</sup> And, oddly, OMM often states that Mr. Evans and other Councilmembers should be consulting with ethics experts often in the process of doing their job, and yet did not follow their own advice in preparing its Report.

**C. The Report often makes an unfair and unwarranted assumption about the testimony of critical witnesses who were forced to decline to testify because of other ongoing investigations.**

The OMM Report claims that the team “took precautions to help ensure it did not impede or frustrate any parallel governmental investigations.”<sup>11</sup> Apparently those “precautions” amounted to forcing essential fact witnesses to choose between cooperating with the inquiry or waiving their own legal rights in those parallel investigations or invoking their rights. Then, having done so, OMM speculated on the motives and actions of those it could not interview. For example, OMM refers to emails or interviews of third parties other than Don MacCord of Digi Media to speculate what MacCord intended to achieve in his offering Mr. Evans to be a client or even helping with the Hillary Clinton for President campaign, even though Mr. Evans was not on those emails and MacCord was not available to explain them.

No better example of the flaw in the process exists than OMM’s addressing Mr. Evans’ retainer and on-call agreements with NSE clients. Without any factual basis, and staking out a

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<sup>10</sup> For example, without criticism, OMM notes (Report at 27) that when Mr. Evans sought advice from the Council’s General Counsel, the response was, in effect, to follow the rules – nothing more. Rather than point out that the entire advice process was not working well, OMM basically put all the blame on Mr. Evans.

<sup>11</sup> Report at 1.

new theory of a potential problem, OMM raises the specter of whether or not retainers can be “gifts” under the rules.<sup>12</sup> Putting aside how that would impact even lawyers at OMM itself, the

Report notes:

Unfortunately, the Investigation was unable to get the perspective of most of the NSE clients on the value they received under these consulting agreements and, thus, O’Melveny cannot present the Council with a more granular description of what NSE clients received for the money they paid. With the exception of Russel Lindner, the Chairman of Forge, who cooperated with this Investigation, most of the other witnesses associated with NSE’s other clients refused to speak with O’Melveny. Paul, the former CEO of EagleBank, raised technical objections to the Council’s subpoena authority and also represented through counsel that he has health issues that would preclude him from being interviewed.<sup>13</sup> Pincus, the former Vice Chairman of EagleBank Pincus; Anthony Lanier, the President of Eastbanc, Inc., Eastbanc Technologies, and Squash on Fire; Steven Fischer, the owner of Fischer Holdings; Richard Cohen, the Chairman of Willco; and Jason Goldblatt, the former President of Willco, all represented through counsel that if compelled to testify they would assert their right to remain silent under the Fifth Amendment to the Constitution. Don MacCord, the chairman of Digi Outdoor Media, Inc., who is serving a federal prison sentence in Arkansas for fraud related to Digi, also declined to cooperate with the Investigation without immunity from criminal prosecution, which the Council cannot provide. Document productions from NSE clients revealed little or no evidence that they received actual traditional consulting services.”<sup>14</sup>

However, the one client who did cooperate and provided all the explanation needed was Rusty Lindner. He surely explained the value given by Mr. Evans for the fees earned under the NSE consulting agreement.<sup>15</sup> Rather than using that as the best example, the OMM Report muses as to what the others would say with a negative inference that the retainer did not provide value.

In addition, the Report completely disregards Mr. Evans’ specific testimony about this issue. As he explained, NSE consulting applied a model he had learned from Tommy Boggs, the

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<sup>12</sup> Report at 32.

<sup>13</sup> Apparently in Mr. Bunnell’s estimation, personal jurisdiction is a mere technicality.

<sup>14</sup> Report at 29. It should be noted that MacCord’s conviction for securities fraud was unrelated to Mr. Evans.

<sup>15</sup> Report at 29.

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senior partner of the Patton Boggs firm, who had commonly taken clients on retainer for the sake of availability. He said:

I was on a retainer basis. That's how we set it up. So I was available to do what they needed me to do when they contacted me, if they ever did. So it was a retainer agreement, very similar to the ones that existed at Patton Boggs with many, many people, including Tom [Boggs].

You know, Tom [Boggs] probably had 100 retainer agreements with people who never called, never contacted him ever. So that's kind of the setup that was in place with my clients.<sup>16</sup>

This precisely matches the testimony of Rusty Lindner, who stated "he understood that by retaining NSE he was purchasing 'greater license for [him] to take Jack's time' and to 'use him as a sounding board,' something Evans had done informally as a friend over the years. According to Lindner, the engagement gave Lindner the 'opportunity . . . to have someone . . . who could help [him] sort out where the city was, on a fairly casual basis, an irregular basis."<sup>17</sup>

Having failed to see the consistency between Mr. Evans' and Mr. Lindner's explanations, OMM then oddly takes it a step further. The Report inserts a back-of-the-napkin calculation to determine Mr. Evans' hourly rate for his basic retainer versus the rate at which additional hours would be charged.<sup>18</sup> This comment, clearly made with a negative implication, is completely inapposite to the recognized concept of a retainer agreement, where the retainer itself is a legal

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<sup>16</sup> Transcript, September 3 Interview with Jack Evans, at 41.

<sup>17</sup> Report at 29.

<sup>18</sup> Report at 28 ("These agreements further provided that if the client requested additional services in a given month in excess of the five-hour time commitment, Evans would, at his discretion, provide those additional services at a rate of \$250 per hour. So for a client with \$50,000 annual retainer, even if Evans worked his full base time commitment of five hours every month for a year, his hourly compensation for those services would be \$833 per hour (multiplied by 60 hours over the course of a year), far more than the \$250 per hour that Evans would charge for work in excess of the base commitment.").



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service with independent value.<sup>19</sup> This arrangement was not new to NSE, and is quite common among law firms and consulting shops in D.C., but it is treated as a hint that something wrong occurred.

#### **IV. SELECTIVE PRESENTATION OF FACTS SLANT THE REPORT**

##### **A. The Report selectively misquotes Councilman Evans' testimony on multiple subjects.**

The Report hangs great importance on Mr. Evans' statement that his process for determining whether a particular matter presented a conflict came down to "I'll know it when I see it."<sup>20</sup> The Report quotes Evans making that statement in his third of four in-person interviews. But it completely disregards his lengthy explanation—spanning five uninterrupted pages of testimony transcript—in which Mr. Evans expounds on his understanding of the Code of Conduct conflicts rules and gives examples in great detail.<sup>21</sup> During *that* section of testimony, even OMM counsel agreed that the issues and process thinking Mr. Evans explained "are important considerations" as to how the Code applies in real life.<sup>22</sup> No mention of this detailed thinking made it into the Report, which, instead, casts Mr. Evans' process as cavalier and careless. Yet at the time of the explanation that is not included, OMM counsel conceded that "we may disagree about whether your view of how to approach conflicts is exactly the same as the view and the approach that the code of conduct takes" but that "[i]t's more of a point that

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<sup>19</sup> November 4 Ethics Letter of Michael Frisch ("the suggestion that availability retainers to clients might constitute a "gift" is a frivolous suggestion. A fee for any legal service - including availability - is never deemed a gift by the lawyer, client or Internal Revenue Service. Such a fee is entirely consistent with an attorney's ethical obligation. See DC RPC 1.5(a).").

<sup>20</sup> Report at 15.

<sup>21</sup> Transcript, September 23 Interview with Jack Evans, at 7-11.

<sup>22</sup> *Id* at 12.

maybe lawyers should debate at the end of this.”<sup>23</sup> Without Mr. Evans’ full explanation, this debate will be one-sided.

The Report also states that “Evans incorrectly understood the recusal requirement to apply exclusively to voting.”<sup>24</sup> This is a flat-out mischaracterization of Mr. Evans’ testimony. He stated in clear and simple terms that he understood his recusal requirement to reach conduct beyond voting:

“Q: The question was: Did you understand that what you were barred from was voting and nothing more than voting, I think.

MR. EVANS: No. More than voting.

Q: Then explain it.

MR. EVANS: You’re barred from participating as the Code says—

Q: Okay.

MR. EVANS: -- in a matter, in any matter from, in which you’re a client or yourself can financially benefit.”<sup>25</sup>

The conclusion that Mr. Evans misunderstood the rules because he thought that they applied only to voting simply misstates what he said.

**B. The Report suggests that Mr. Evans’ staff had no process for aiding him in avoiding conflicts, but the record shows they did so on multiple occasions.**

Another example of “confirmation bias” and how the OMM Report unfairly holds Mr. Evans accountable for systemic problems is its criticism that he did not have a formalized point-person to systematically screen for conflicts. After its criticism of Mr. Evans, the Report later

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<sup>23</sup> *Id* at 11-12.

<sup>24</sup> Report at 13.

<sup>25</sup> Transcript, September 16 Interview with Jack Evans, at 50-51.

then concedes, “Councilmembers are not required to implement formal, intra-office processes for ethics reviews, nor are staff members independently obligated to assume an ethics compliance role for their respective Councilmember.”<sup>26</sup> Nor is there any evidence that any such program has ever been promoted in any of the Council’s scant ethics training materials. Nonetheless, the Report asserts that “the absence of a structured approach to ethics compliance in Evans’ Council office is relevant as it exacerbated Evans’ subjective misunderstandings” of the Report’s specific readings of the requirements of the Code.

In reality, the record shows that Mr. Evans’ staff often assisted him in avoiding conflicts, and notwithstanding the Report’s inaccurate assertion to the contrary, they acted to prevent such conflicts on more than one occasion. What this shows is *not* an effort to circumvent any rules, but an intent to comply. For example, the Report subsequently notes that his Legislative Counsel highlighted potential conflicts issues for other members of Evans’ staff,<sup>27</sup> and that Mr. Evans’ chief of staff Schanette Grant conferred with his assistant at Manatt for the same purpose.<sup>28</sup>

When a report makes a criticism that supports its interpretation that a rule violation occurred, and the record undercuts the criticism, the conclusion too is undercut. What should come from this part of the OMM Report are new rules and procedures for the future (e.g., having a designated ethics staff member, requiring more submissions to BEGA), that apply to all Councilmembers and not an after-the-fact singling out of Mr. Evans who, as it turned out, did have staff involved.

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<sup>26</sup> Report at 14.

<sup>27</sup> Report at 20.

<sup>28</sup> *Id.*

**C. The OMM Report Misstates Mr. Evan's Actions with Respect to the Digi Stock Purchase.**

The Report inaccurately states the facts and mischaracterizes the nature of the possible Digi Media stock transaction. Simply stated, when Mr. Evans discussed the possibility of a consultant relationship with MacCord in the summer of 2016, MacCord raised the issue of offering Mr. Evans Digi stock. Mr. Evans told MacCord that he could not receive a gift of stock, but he would consider purchasing stock as an investment. Although MacCord did not quote a specific price at that time, he stated it would be inexpensive, since Digi was a startup. When the stock was delivered in October 2016, Mr. Evans had already decided (and communicated to MacCord) that he would not have a business relationship with Digi, and he immediately returned the stock. Only by ignoring the proper timeline could the Report lodge this criticism.

**V. THE SPECIFIC CONCLUSIONS OF RULE VIOLATIONS ARE SIMPLY WRONG UNDER A CORRECT, FAIR AND OBJECTIVE APPLICATION OF EXISTING RULES AND THE ENTIRE RECORD.**

**A. The Report turns Mr. Evans' relationship with Digi Media—which actually shows his clear intent to avoid conflicts—into the bulk of his alleged violations.**

Mr. Evans provided numerous examples of his well-reasoned choices to recuse, abstain, and take other similar actions to avoid conflicts as he engaged in permissible outside employment, almost *none* of which were mentioned in the Report. For example, The Scottish Rite had retained Manatt to represent it in its efforts to redevelop a tract of land adjacent to its temple on 16th Street, Northwest. Mr. Evans had no personal involvement in the Scottish Rite's account at Manatt, and furthermore, as a legislator he was opposed to the Scottish Rite's position before the Council. Nonetheless, he took himself out of any consideration of the matter because

he wished to avoid any conflict. Additionally, Manatt represented Joe Mammo, a D.C. developer who wished to tear down and redevelop several area gas stations. As a Councilman, Mr. Evans has long been concerned about the shrinking set of options for District drivers to get fuel and repairs. In direct opposition to the desires of his employer's client, Mr. Evans kept true to his long-held position on the issue. When Mr. Evans was employed at Patton Boggs, there were reports that the firm was representing Marriott Corporation for the building of a hotel at the Convention Center. That was not the case but, nevertheless, M. Evans recused himself from the issue. *None* of these episodes which demonstrate an intent to comply with ethics rules are discussed in OMM's analysis.

But then, the OMM Report does something extraordinary. It took the example of Mr. Evans *not* working for a client with D.C. issues and doing so on his own with no outside questions being asked, and turned it into the major conclusion of rules violations in the Report. This is the issue of Digi Media and Don MacCord.

It is true that Mr. Evans approached MacCord as a possible NSE client in July 2016 to provide strategic business advice to MacCord and the Digi companies—but not in connection with a District government issue. It is true that MacCord and Mr. Evans had known each other for several years, and that during 2015 and early 2016, MacCord contacted Mr. Evans' office staff to ask for information about pending DCRA regulations regarding digital signage in the District. It is true that during this time, MacCord had various issues regarding D.C. regulations for digital signage. But it is also true that because of the potential for such disputes to involve the D.C. Council down the road, Mr. Evans decided that he could not and would not have a

business relationship with MacCord or Digi, and he returned the retainer and cancelled the arrangement before it really got started.

The slant of the OMM Report is exemplified by its decision to treat the short time when Mr. Evans was away in August, 2016, during which time the retainer checks to consummate the client relationship with MacCord arrived at Evans' home, as if a real client relationship existed, and that this assumed client relationship caused any actions by Mr. Evans or his staff. Both are not the case. Mr. Evans returned home and, having decided not to undertake the consulting relationship with MacCord, he returned the checks and advised MacCord in writing of his decision. Separate from the client relationship discussions, Mr. Evans also decided not to purchase the stock that was delivered to his home, and he immediately returned it as well.

The *most important* part of the Digi issue is that Mr. Evans made the right decision not to take on Digi as a client and that he did so when there were *no* questions being asked, *no* investigation, *no* outside scrutiny, and *no* reason – other than doing the right ethical thing – to not carry through. Rather than pointing out this obvious and critical fact, the OMM Report does the opposite and elevates some view that Digi was a technical client for NSE during the 20-day period after signing the agreement and deciding not to carry through, into ten separate conclusions of violations.<sup>29</sup> Amazing.

The OMM Report spends nearly 20% of the report we received —nearly as many pages as days that even some technical relationship between Mr. Evans and Digi existed —analyzing

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<sup>29</sup> Report at 53-54.

whether Mr. Evans recognized the potential for a conflict quickly enough. Some of the ‘ethical lapses’ for which the Report excoriates Mr. Evans’ conduct:

- Mr. Evans’ son took an interview for a graphic design internship at Digi, which he chose not to accept.
- Mr. Evans told Digi in writing he could not take them on as a client while there was a potential for a conflict, as the Code requires.
- Mr. Evans considered buying stock in Digi at fair market value. He chose not to consummate the transaction because he perceived the risk of a conflict, as the Code requires.

In short, the Report faults Mr. Evans for doing the right thing and carefully scrutinizing what he determined to be an emergent risk of a conflict. To punish Mr. Evans for thinking the relationship with Digi over and correcting course—which occurred *before* there was one word of protest or scrutiny from the media, his colleagues, or anyone else—would be to punish him for doing exactly what any citizen would expect of a responsible public official.

**B. The Report casts Mr. Evans’ consistent positions and commitment to constituent services as indicia of violations with respect to client EastBanc and Wilco.**

***EastBanc***

The Report finds violations of the Code’s conflict-of-interest provisions pertaining to NSE’s relationship with EastBanc and Anthony Lanier. In each case, the alleged violation was triggered because Mr. Evans behaved *exactly the same* before and after taking on Mr. Lanier as a client and, therefore, an incorrect view by OMM of what the rules require of an official with outside employment.

First, the Report finds a violation arising from Mr. Evans' vote in support of the 2016 Omnibus Amendment Act. Several years *before* NSE even existed, Mr. Evans not only voted for, but introduced the West End Parcels Development Omnibus Act of 2010, which granted the right to develop certain real estate parcels previously owned by the District Government in the West End neighborhood. In 2016, the District of Columbia Office of the Chief Financial Officer determined that the statute needed a technical revision. Having sponsored the original bill, Mr. Evans voted in favor of the needed technical revision, as anyone would expect.

But the Report concludes that this second vote was sanctionable because of NSE's recently-established relationship with Lanier, notwithstanding the fact that Mr. Evans would of course support a technical correction, requested by the District government, which allowed his prior legislation to work properly.

Second, the Report finds a violation arising because a member of Mr. Evans' staff connected a constituent with a government agency, just as they had done on countless occasions for countless constituents. As he emphasized in multiple interviews, constituent services make up a large majority of his duties as a councilman, and he has played "traffic cop" for individuals and businesses in his district ever since he was first elected in 1991, wholly apart from his work under any consulting agreement.

But the Report concludes that this one-time meeting, in which there is no evidence that Mr. Evans advocated for or against Mr. Lanier's position, or even attended (or knew about), constitutes a violation because of NSE's relationship with EastBanc.



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The OMM Report concludes that “Evans’ characterization of his actions as constituent services, again underscores his inappropriately narrow interpretation of the scope of the conflicts of interest rules as only covering official votes on matters before the D.C. Council.” As ethics expert Frisch confirms, it does not. Instead, Mr. Evans’ had a reasonable position that the conflict of interest rules do not end a legislator’s relationship with his constituents or prevent him from rendering the same services he would provide to anyone in the District. Mr. Frisch’s analysis would have been helpful here:

“In *In re Sofair*, 728 A.2d 625 (D.C. 1999), the [D.C. Court of Appeals] admonished a former legal advisor to the Department of State for switching sides by representing Libya as private counsel. The court found his personal and substantial participation as a government attorney in responding to third party subpoenas in a specific matter – litigation brought in connection with the Lockerbie bombing – violated DC [Rule of Professional Conduct] 1.11 (revolving door).

Here, in contrast, there is no showing of such participation on behalf of a private client that in any way resembles special pleading on that client’s behalf. His position on matters of general application to the citizens of the District of Columbia do not constitute a matter on behalf of a specific client as ethics rules prohibit.”<sup>30</sup>

Third, the Report finds another meeting-based violation when Mr. Evans connected Philippe Lanier with Councilmember McDuffie to discuss a project in McDuffie’s Ward. Both of these supposed violations are based on a flawed premise that a legislator and his or her constituent must choose between a business relationship and a representative one, regardless of whether there is any actual connection between the two in the performance of the legislator’s duties. Here again, the OMM Report concludes an ethics violation solely from the uncontroversial and consistent performance of Mr. Evans’ duties as a Councilmember.

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<sup>30</sup> November 4, 2019 Ethics Letter of Michael Frisch.

*Willco*

The Report also finds similar violations in NSE's relationship with Richie Cohen and his company, Willco. As with the "technical violations" that pertain to the NSE-Lanier relationship, Mr. Evans' supposed malfeasance here comes in the form of maintaining consistent policy positions and routine constituent services and then an OMM new and unsupported position that once an official has a private business with clients, he or she may not do the same things he or she did before that client relationship arose. This is not the law.

First, Mr. Evans is faulted for re-introducing the same legislation in 2017 that he had first introduced in 2014. For years before and then in 2014, Mr. Evans supported development in New York Avenue and increasing revenues from film production in D.C. Friends, potential clients, strangers and adversaries knew of his consistent position. No doubt some, knowing this, would make their own plans (whether to participate or not) should such development occur. This is *not* Mr. Evans taking a position for a client; it is a *client* taking a position after it became aware of what Mr. Evans believed. And most important, Mr. Evans' long-standing position occurred before he formed NSE or had any clients.

Then in 2017, the issue of New York Avenue development and the film industry came up again. Mr. Evans maintained his support, and it turns out Mr. Cohen showed up for a hearing on the general issue. According to OMM, that appearance at a public hearing, right then and there, should have required Mr. Evans to remove himself from the issue he had worked on for decades. In fact, the OMM Report says that this episode is "particularly noteworthy given the similarities in Evans' conduct with this legislation and its predecessor, the NY Avenue Legislation." We

enthusiastically concur. It is noteworthy in that it shows that Mr. Evans' actions were based on his sincere and long-held position in favor of the policy, and had nothing to do with his consulting relationship with Willco. To require Evans to recuse here would be a prime example of the problem of over-recusal, which Mr. Frisch discusses in his letter to the Council: "Over-recusal can produce the same result [of undue influence over official acts] through slightly different means when an official is forced to drop her opposition because of some unrelated and ultimately irrelevant association that requires her to recuse. Indeed, the danger of over-recusal in judicial matters is acknowledged in the ABA Model Rules of Judicial Ethics Canons that address the issue by severely limiting the outside activities of a judicial officer. See, e.g. Canon 2 Rules 2.1 2.4 and 2.7 ("a judge shall hear and decide matters assigned to the judge, except where disqualification is required ... "). The dangers of over-recusal are far more evident in the activities of a political actor as opposed to a judge."<sup>31</sup>

Second, the Report indicates that Mr. Evans worked to make his long-favored project successful by connecting Willco, an eager developer whose interest in the project went back to Mr. Evans' initial 2013 (pre-NSE) legislation, and Councilman McDuffie, whose support as chair of the Economic Development Committee was necessary. Mr. Evans not only supported, but conceived of the project long before NSE existed. Willco supported and hoped to participate in the project long before NSE existed. Connecting constituents to their government is at the core of Mr. Evans' duties as a Councilmember, and that is what happened here. The more important point is that Mr. Evans and the Council never had before it a measure to specifically

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<sup>31</sup> November 4, 2019 Ethics Letter of Michael Frisch.

assist Willco in this effort – no bill, no contract, no zoning issue, etc. Mr. Evans supported the general proposition. Mr. Cohen, like any other developer, could try to become involved. There was nothing that Mr. Evans could do to give Cohen any advantage, and Mr. Cohen never asked him to do so. Mr. Cohen's interest was obviously contingent on a whole lot of events than had nothing to do with Evans or the Council: some law passing, some development authorized, some agency taking over, some process delineated, some application made, some application approved, funding secured, permits achieved, etc. There was nothing that required Mr. Evans' recusal from a general proposition he had supported for years.

Finally, the Report makes a violation out of several instances of what even OMM concedes are constituent services. This shows the extent to which the Report strains to find violations, again by adopting an unprecedented ethics rule – an official has to stop providing the basic services of his or her office to a constituent if that constituent is either an actual (or as OMM concludes with respect to others, a prospective) client of that official. From that faulty premise, Mr. Evans is found to have violated the rules for fielding calls about street repairs and pavers, forwarding an email from one of the Mayor's staffers about a lease, and shaking loose a delinquent city plumbing permit. These are down-the-middle constituent services; the kind of things schoolchildren are taught about in classes about local government. Because they were requested by individuals then connected to NSE, the Report concludes that they represent a sanctionable conflict of interest. But forwarding an email or allowing staff to refer a constituent to other government officials for routine requests are not "personal and substantial" involvement. And more importantly, these supposed violations are found in the performance of utterly

mundane government functions. Simply stated, public officials are not barred from providing people or companies with basic constituent services, consistent with their past practices, when the person or entity is a friend or client.

The Report's theory of the case here simply contradicts good government and ethics practice. One does not become a client in order to *diminish* what they are already entitled to as a citizen. To the contrary, the Code empowers each legislator to engage in good-faith, case-by-case analysis and strike the appropriate balance. As BEGA's own August 29, 2013 Advisory Opinion on the subject notes, "Describing the various types of services that elected officials can provide to their constituents is one thing. Defining the ethical limits of providing those services is quite another, much more difficult matter, if only because each instance of constituent services is based on its own facts. [ . . . ] Clearly, though, there must be limits, and, to the extent possible, those limits should not be so strict as to prevent officials from doing the work they were elected to do."<sup>32</sup> Even Mr. Evans' fiercest critics should reject the Report's claim that the Code "practically forecloses" a legislator's ability to provide routine services to a constituent with whom he or she also has a business relationship.

**C. The Report finds violations over the Digi Media and other relationships based on a standardless application of the Code's faulty "appearance-of-a-conflict" rule.**

As we explained in our October 25, 2019 letter to OMM, the Code's rule against actions that could potentially create an "appearance of a conflict" are misguided on ethics law and policy grounds, and nearly impossible to apply fairly in practice. There have been numerous critical

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<sup>32</sup> Advisory Opinion, *Constituent Services by Elected District of Columbia Government Officials*, D.C. Board of Ethics and Government Accountability, August 29, 2013.

analyses of these rules, including that of Mr. Frisch, who wrote a letter on the subject during the WMATA investigation. As Mr. Frisch did not get the chance to meet with OMM, he has written a new letter which is attached to this submission.<sup>33</sup>

In that analysis, Mr. Frisch pointed out that the appearance standard “is subject to wide misunderstanding and arbitrary, hindsight and inconsistent application.” This Report is a perfect example. The Report does not allege one single substantive breach of the public trust in any of the issues that it claims have led to an appearance of a conflict. Instead, it purports to apply a ‘reasonable person’ standard to wholly appropriate behavior, based on the idea that public trust is diminished when a person without the full facts, whose impressions may be shaped by zealous critics and rivals, sees something and leaps to conclusions. That standard is too vague and amorphous, and leads to a process that is ripe to be overtaken by politics. Among the supposed events that lead to an “appearance” of a conflict:

1. MacCord used offers of tickets and other gifts to try to influence Evans and his Council staff to provide “constituent services” to aid Digi. But Mr. Evans is not alleged to have accepted any such offer, and he never did. Again, if one wants to focus on “appearance,” the fact that Mr. Evans did not go forward with Digi as a client is a better optic.
2. Mr. Evans inquired about an internship for his son with MacCord. It is not at all clear this was intended by him to be a paying arrangement. Even so, Evans’ son turned it down and did not work a single day for MacCord. When Evans considered the totality of the Digi issues, neither he nor his family went forward.
3. NSE engaged Digi knowing its interests against DCRA regulation when OMM contends Digi “was a client.” But NSE never even deposited Digi’s checks, and Mr. Evans disengaged the relationship within a short time of the written agreement being sent. Again, all of this was Mr. Evans’ decision without any outside questions being raised.

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<sup>33</sup> November 4, 2019 Ethics Letter of Michael Frisch.

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4. A particularly unfair allegation of an “appearance” issue is that Mr. Evans delayed but supposedly did not terminate NSE’s relationship with Digi. The fervor to find a violation is evidenced by OMM grabbing on to one sentence in Mr. Evans’ termination letter that suggested that there might be some future possibility of employment. As the ethics expert states, that such a courteous sentence with no real prospect was included in the letter does not make the letter any less a termination.<sup>34</sup> This is so picayune to undermine the entire “appearance” conclusion.
5. If the one phrase in the termination letter was not proof enough of confirmation bias, the next criticism is. The OMM Report actually makes Mr. Evans’ political activity for another candidate an issue. MacCord did raise thousands of dollars to the Hillary Clinton for President Campaign and other Evans-backed political campaigns. But the Report cannot point to (and does not even suggest) a benefit that accrued or was intended for Mr. Evans other than his wanting good candidates in office. How is supporting good candidates something that could create an “appearance” of a conflict?
6. By failing to point out that Mr. Evans was clear that he would have paid fair market value for any stock purchase, the OMM Report finds an appearance violation because Evans sought and accepted an equity stake in Digi immediately after acknowledging the potential for a conflict of interest in representing Digi and terminating the relationship before it ever really got started. As a matter of the real facts, Mr. Evans was not going to get the stock as a gift, and he never consummated the transaction and returned the stock certificate because he perceived the same issue of a conflict. Nonetheless, had he decided to go through with a market-rate stock purchase available to others, that too would have been perfectly legal.<sup>35</sup>
7. In the flawed view that a client or in this case a would be client may not receive constituent services as other do, the OMM Report finds an appearance violation because Evans used his Council email account to pass DCRA information to MacCord. But forwarding an email from a government unit to a constituent is a basic public service for an elected official, and does not even suggest that Mr. Evans attempted to unduly influence any government action. The information was not private or confidential and this is a practice that Mr. Evans and his staff did for all who asked.
8. As to a meeting with Digi investors, the violation accusation is based on the incorrect view that Digi was a client of NSE. Nevertheless, the criticism of the next event is wrong even if that was the case. The Report erroneously concludes that Evans and his staff met with Digi’s investors to discuss legislative solutions to benefit Digi. In reality, the issue was an honest

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<sup>34</sup> November 4, 2019 Ethics Letter from Michael Frisch (“Mr. Evans fully complied with his obligations under D.C. RPC 1.16(d) in connection with the termination of the engagement. The report’s suggestion that he had present duties to DiGi as a ‘prospective future client’ is a frivolous conclusion.”).

<sup>35</sup> See, Council of the District of Columbia Code of Official Conduct, Period 22, at III(b) (stating that an improper ‘gift’ can be ameliorated by “reimburse[ing] the donor the market value of the gift.”)

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dispute between competitors being hamstrung by what was seen as a real bureaucratic disagreement. In any event, nothing came of the investors' concern since the DCRA regulations prevailed.

9. The Report questions Mr. Evans' inquiry to the OGC on whether Digi was correct on new sign regulations being enacted by DCRA or the Council was information gathering. OMM heard Mr. Evans explain the literally hundreds if not thousands of times he or his office have done this same thing for anyone who asked – playing traffic cop for inquiries, sending people to the right agency, getting information that they could get if they knew how, etc. But again, forwarding emails is not substantial involvement, and there is no allegation that Mr. Evans tried to push for any inappropriate favors.
10. As to the allegation concerning emergency legislation, although Mr. Evans' office did not participate in drafting the proposal, he circulated a notice of intent to introduce it, in order to afford the Council the opportunity to correct the regulatory uncertainty created by DCRA's emergency regulation. To have an issue heard on the merits is not an effort to tip the scales. There was not sufficient support by councilmembers to even consider a vote on the matter, due in part to OGC and OAG concerns, and Mr. Evans withdrew the notice of intent.

Most important, *all* of the appearance violations stem from OMM deciding that Digi was a client or would-be client of NSE. The record is clear that Mr. Evans did not let that occur. The actions Mr. Evans or his staff took were in keeping with his positions on pro-business, anti-regulation, etc. They did not reflect a change brought on by a brief consideration of Digi as a client.

One more thing about “appearance.” If no one knew or raised any concerns about Mr. Evans' short contemplation of having Digi as a client and Evans, on his own, decided not to do so, isn't that the *best* example of an appearance to do the right thing?

**D. The Report finds technical violations with no suggestion of substantive wrongdoing.**

In many cases, the OMM Report applies a ruthlessly mechanical and formalistic reading of the Code's conflict rule. OMM does this even while acknowledging that its application is fraught and often requires complicated analysis by ethical experts. It does this even while



acknowledging that Mr. Evans' positions were never for sale, and never changed based on his client list. Instead, the Report finds fault in numerous episodes in which Mr. Evans specifically *did not* alter his course because of his relationships with his clients, but instead carried forth the same policies that got him elected and re-elected to his seat in the first place:

1. Evans introduced and subsequently voted for the 2018 budget that kept parking taxes at 18%. He voted against all such increases and if that "assisted" a subsidiary of one of his clients (The Forge Company), it also benefited dozens of other businesses.
2. Evans voted in favor of the 2016 Omnibus Amendment Act, which had a direct and predictable financial impact on EastBanc's interest in the West End development project while EastBanc was an NSE client. The 2016 event was merely a technical correction for something that had been done six years before. It is a great example of bias to call him out for this action.
3. Evans' Legislative Assistant Windy Rahim emailed OCTO to arrange a meeting on behalf of NSE client EastBanc Tech. This was a staffer connecting a constituent to a government agency for services, and nothing more.
4. Evans facilitated a meeting with Councilmember McDuffie and Anthony Lanier regarding a potential development project in Ward 5 while Lanier's companies were NSE clients. This is again connecting people to the right government agency based on their needs. It is the definition of constituent services.
5. Evans co-sponsored the 2017 film studio tax incentives legislation, in support of which Cohen (then an NSE client) again testified before the Council, just as he had in 2015 before

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NSE existed. When Cohen testified in 2017, Willco was an NSE client. But as was explained in detail above, nothing Mr. Evans did in 2017 was different from years of prior positions, was not done for any client, was a general position and not company-specific, and, as Mr. Frisch explains,<sup>36</sup> a Willco person showing up to a public hearing did not require a recusal.

6. Evans arranged a meeting between Councilman McDuffie and Jason Goldblatt to discuss the sound studio project while Willco was an NSE client. This is the same as above, and similarly a nonissue as it was when he merely introduced Mr. McDuffie and Mr. Lanier.

The ethical rules are codified specifically to *prevent* legislators from putting their votes up for sale. The Report's formalistic application of rules which OMM acknowledges should be applied on a case-by-case basis, can only lead to perverse incentives for future legislators.<sup>37</sup>

OMM's view that, in a system where Councilmembers have outside employment, a Councilmember and his or her staff are then disqualified from helping people who are also clients or might have become clients is untenable. OMM's view that Mr. Evans or any other Councilmember must remove himself or herself from an issue that he or she is identified with and has long supported when a client or a would-be client becomes interested in the issue is equally untenable.<sup>38</sup> It would be Mr. Evans *changing* long-standing positions after someone

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<sup>36</sup> November 4, 2019 Ethics Letter of Michael Frisch.

<sup>37</sup> November 4, 2019 Ethics Letter of Michael Frisch ("the Report entirely fails to place the investigation in the proper context of a system that permits a legislator to engage in outside employment. [. . .] Ethics rules are rules of reason").

<sup>38</sup> *Id.* ("when the standard of what constitutes an actual conflict is defined in an overly broad manner, constituents can be denied representation beyond what is necessary or appropriate to police abuses.").

became a client, not his *keeping* those positions (even those that were against the interests of client) that would create the “appearance” of something being wrong.

**E. The Report finds violations based on speculation of facts not in evidence.**

The Report leaps to conclusions that are unsupported by the record and the facts as presented. As noted above, this has caused OMM to assume the worst at every turn, but many of the Report’s conclusions do not hold up under scrutiny:

1. The OMM Report concludes that Mr. Evans and his staff answered constituent services requests from Willco more often than before Willco became an NSE client. That attributes this to the client relationship versus Willco having more issues that arose. This is a classic fallacy described in the Latin phrase *post hoc ergo propter hoc*. If something happened after, it has to be caused by what happened before. There is no basis for this conclusion in the record and, in fact, Mr. Evans and his staff explained and are known for their great commitment to constituent services. The only proper inference would have been that and not the confirmation bias that the client relationship caused the help.
2. Mr. Evans spoke at a public Council meeting in favor of the Pepco-Excelon merger and took other actions to support the concept of the merger. Remembering that the Council did not have the authority to approve or vote down the merger, Mr. Evans’ positions were not only consistent with his record, they were widely supported by his colleagues and constituents. OMM’s conclusion of some violation results from the fact that at some point in Mr. Evans’ consistent support for this issue, Manatt, where he would later become affiliated, was working for Pepco. Mr. Evans’ positions pre-date his employment and so the OMM Report finds its violation by now stating that Mr. Evans had a conflict because he was *considering* working for Manatt earlier than the employment actually occurred. Again, this is a fiction that does not stand up to ethics rules and law. In addition, to find a violation here assumes that Mr. Evans was aware of Pepco’s relationship with his employer when he acted in favor of the merger. But Mr. Evans’ testimony, as well as contemporaneous documentary evidence, makes unclear when Evans became aware of this relationship, and the Report ignores the fact that Mr. Evans immediately sought ethics advice when he found out after he became employed.
3. Evans used his position and title to influence the agency’s approval of the merger. This refers to an October 16, 2015 letter on which Mr. Evans became the seventh signatory a few days after he signed an employment agreement at Manatt. But he had already agreed to the letter before he was employed! The Report already concluded that Mr. Evans’ activities at Patton Boggs—where Excelon had previously been a client—were not indicative of any

violation. Like all law firms, Manatt can erect ethical walls around associates for imputation purposes; it's perfectly routine. And when it happens, conflicts are not imputed to the associate, contrary to the Report's capacious misreading of the rule.

As to all of the Report's conclusions of rule violations based on his considering to work and then working at Manatt, this is one area where ethics advice would have been particularly helpful to OMM. Mr. Frisch explains that "The report suggests that Mr. Evans - a salaried employee with no financial stake in the Pepco matter - somehow derived a prohibited financial benefit from the representation. Simply stated, he did not. If the fees paid by a client were deemed a financial benefit to the screened attorney and thus a rule violation, the entire structure of DC RPC 1.10 would collapse and be rendered nugatory. That is not - and could not be - a legitimate interpretation of a rule that is crucial to the ethical operation of a law firm."<sup>39</sup>

**F. The Report finds violations based on disputed and post-hoc applications of ethical rules.**

At this point, it gets repetitive to point out that the OMM Report takes its own, unsupported and no precedent-cited reading of the code as the basis for finding violations. A more extended inquiry with input from Mr. Frisch and other ethics experts would have clarified that a good deal of the OMM assumptions are simply not correct and would inhibit good government. Without basis and against Mr. Evans' explanations and the very ambiguities it conceded exist, OMM then makes unnecessary pejorative statements:

1. OMM states that Mr. Evans tried "to hide" his client relations. There is nothing to support that conclusion. His failure to list them was consistent with the plain meaning of the instructions and the past practice of law firms where he worked. He surely agreed that law

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<sup>39</sup> November 4, 2019 Ethics Letter from Michael Frisch.

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firms and lawyers try not to reveal clients but that is not the same as the negative implication that he tried “to hide” them.

2. OMM then created a new ethics requirement to find a violation by stating that only entities with “privileged” relations might be able to shield their clients from disclosure.<sup>40</sup> As noted above, this is not the law, the rules, the Code, or the instructions. What OMM uses for their support? The after-the-fact visit with BEGA. Notice that is not an opinion or advisory that BEGA issued before this inquiry where people could have then changed their reporting practices.
3. Mr. Evans provided constituent services to his consulting clients. The Report offers the conclusory statement that the Code “practically forecloses Evans’ ability to provide constituent services to entities in which he has a financial interest.”<sup>41</sup> However, this rule proves far too much. Anticorruption rules should not result in the perverse outcome that a legislator must cease to provide ordinary services. The point of the rule is to prevent special pleading, not run-of-the-mill Council work.<sup>42</sup>

Moreover, many of the Report’s conclusions invent and then impose standards of conduct, after-the-fact, without sufficient notice of such in advance. For example, the Report faults Mr. Evans for failing to establish a formal conflicts protocol in his office, while conceding that no rule ever required one. The Report faults Mr. Evans for failing to report his ownership of stock in Eagle Bank, but when he purchased the stock in 2005, the financial disclosure form *only* required a member to report when they owned stock in a “business entity transacting any business *with* the District Government.”<sup>43</sup> As far as Mr. Evans knew and what the record seems to agree is that Eagle Bank had no such contracts with the District Government, and when the form was later changed, no training was offered to put members on notice against importing their prior years’ reports. Instead, the Report glosses over this change in the form, and treats his

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<sup>40</sup> Report at 18.

<sup>41</sup> Report at 84.

<sup>42</sup> November 4, 2019 Ethics Letter of Michael Frisch.

<sup>43</sup> 2005 Financial Disclosure Statement, Question 1.

reporting obligations as though they were standard the whole time. The OMM Report then somehow changes “transacts business *with*” D.C. to “transacts business *in*” D.C. because it notes that Eagle has no many branches in the city. The plain rule is the plain rule and when it changed, this change was not flagged. It surely explains the omission more than something not in the record.

Finally, the Report ensnares Mr. Evans in a small handful of violations which, while concededly errors on Mr. Evans’ part, are minor oversights that were corrected immediately upon discovery. Elevating these, sometimes typographical, errors to rule violations demonstrate the confirmation bias of this exercise. For instance, the Report complains that Mr. Evans failed to disclose NSE Consulting on a single bi-annual disclosure in 2017. What the Report omits is the detail that in this period, the Council was deploying a new electronic filing system for the first time. In Mr. Evans’ first attempt to file electronically, *he had indeed listed NSE Consulting*. But the system failed. When his staff were later instructed to submit a hard-copy because of the technical failure, they inadvertently copied an earlier submission that omitted NSE. The error was corrected shortly thereafter, and there is no allegation that the omission was intentional, or led to any substantive issues or confusion. It is another picayune conclusion of a violation that exposes the Report’s slant. And in some “gotcha” moment, OMM never even asked about this issue in any of the *four* in-person interviews with Mr. Evans. If they had, the mistake would have been explained easily. Instead, it was sprung for the first time in the Report.

In addition, the Report faults Mr. Evans for mistakenly failing to disclose the amount of money – some \$14,000 – he earned from Manatt in the fourth quarter of 2015. His entries on the

form confirm he had outside employment; it correctly names “Manatt”; and then there was an accidental listing of the word “None” for the amount even though a box showing that there was some income was checked. This could not be an attempt to “hide” his employment as his employer was named. It was a clerical error which was elevated to a violation in a slanted report. And again, it is “gotcha” not to ask about this in 12 hours of interviews and then include it in the Report.

**G. The Report inconsistently applies its own standard of what constitutes a “Particular Matter.”**

Throughout the Report, violation after violation is predicated on OMM’s interpretation of the rules that Mr. Evans’ participated in a “particular matter” on behalf of his NSE clients. The definition of this term is essential to the core allegations in the Report; if Mr. Evans’ involvement in a matter is not particular to his clients, then there can be no conflict of interest. The Report defines “particular matter” as follows:

A ‘particular matter is limited to deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons.’ Legislation of general applicability that is presented to the Council (e.g., legislation that deals with all qualifying stores rather than a single store or subset of stores) does not give rise to a conflict of interest. Legislation that is focused on a ‘particular industry or profession,’ however, can create a conflict of interest. Determining whether a matter before the Council is a ‘particular matter’ typically requires a case-by-case analysis.

Thus, the conflict rules focus on participation in a matter that runs to the benefit of some specific subset of individuals, rather than on policies and acts focused on the good of one’s constituents or society generally. As the Report’s own description concedes, general (rather than particular) matters need not even impact *every single person*; legislation that deals with “all

qualifying stores” is given as an example of something that is *not* a particular matter. Instead, the rule as defined in the Report deals with special pleading on behalf of some narrow subset.

But the Report applies this standard inconsistently, often accusing Mr. Evans of conflicts because of his participation in matters that benefit his constituents, his clients, and their competitors all the same. It concluded that matters impacting employers are not particular,<sup>44</sup> but matters impacting higher education are;<sup>45</sup> that matters impacting large geographical areas are not particular,<sup>46</sup> but matters impacting smaller geographical areas are.<sup>47</sup> A more reasonable reading of the “particular matter” requirement for conflict of interest analysis would focus on whether the official’s participation amounted to special pleading for his client. If not, a fair application of the rule would not punish fair consideration of a matter of public concern.<sup>48</sup> As ethics expert Professor Frisch concluded: “the report purports to interpret key ethics concept relevant here – the “substantial relationship” test and the definition of a “matter” – without reference to the key District of Columbia Court of Appeals opinion interpreting those phrases. [. . .] Here [. . .] there is no showing of such participation on behalf of a private client that in any way resembles a special pleading on that client's behalf. His positions on matters of general application to the

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<sup>44</sup> Report at 62 (regarding the Universal Paid Leave Act).

<sup>45</sup> Report at 63 (regarding the Higher Education Act).

<sup>46</sup> Report at 65 (regarding Empowerment Zone legislation).

<sup>47</sup> Report at 70 (regarding the 2016 Omnibus Amendment Act).

<sup>48</sup> November 4, 2019 Ethics Letter of Michael Frisch. *See also, Id* (“Over-recusal can produce the same result through slightly different means when an official is forced to drop her opposition because of some unrelated and ultimately irrelevant association that requires her to recuse. Indeed, the danger of over-recusal in judicial matters is acknowledged in the ABA Model Rules of Judicial Ethics Canons that address the issue by severely limiting the outside activities of a judicial officer. See, e.g. Canon 2 Rules 2.1 2.4 and 2.7 (“a judge shall hear and decide matters assigned to the judge, except where disqualification is required...”). The dangers of over-recusal are far more evident in the activities of a political actor as opposed to a judge.”).



citizens of the District of Columbia do not constitute a matter on behalf of a specific client as ethics rules prohibit.”<sup>49</sup>

## VI. CONCLUSION

The allegations of wrongdoing against Jack Evans have been reported and repeated and echoed and then the subject of various inquiries and investigations. It is a serious matter, affecting the public service, career, reputation and future of a long-standing, dedicated official. Mr. Evans has always conceded that things he did and did not do are things he wished he had done better. He has always stated that some things appear to be worse than they are. However, the Council deciding to do another inquiry when others were pending that restricted gathering all the facts, its imposing an impossible deadline, and it allowing a process without the considered input of outside, independent ethics experts, raises the concerns we have expressed.

Already the OMM Report has been leaked to the media in an attempt to poison the well and try Mr. Evans in the court of public opinion before a considered review of all that has been addressed can occur. We can only hope that the numerous flaws we have demonstrated in the Report will be considered by the Council and the public as much as it will the mere repetition of old allegations and the sensational headlines the recent leak has engendered. As the Council considers how to handle Mr. Evans' future as a member, it would only be prudent and fair to scrutinize the Report consistent with the facts and analysis we have provided.

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<sup>49</sup> *Id.*

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Sincerely,



Abbe David Lowell



Mark Tuohy

Enclosures (3)

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October 25, 2019

**VIA HAND DELIVER AND EMAIL (sbunnell@omm.com)**

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**Re: D.C. City Council Inquiry**

Dear Mr. Bunnell:

We write to offer additional thoughts on issues we discussed during our various meetings and calls with you and your colleagues concerning our client Councilman Jack Evans, before you write a report to the Council. As you know, Mr. Evans has cooperated fully with your work, for example providing documents and over sixteen hours of interviews over four different days. We hope this cooperation will be noted in your report to the Council.

Before you make any final conclusions, we wanted to address the following:

**I. *The Structure of the Council and Outside Employment Should Be Changed***

At the root of the issues that have arisen with Mr. Evans, and more broadly, is the fact that the D.C. Council – whether because it is not yet considered a “full-time” position or otherwise – specifically allows and provides for outside income through other employment. When that is the case, the potential for questions of conflict arise continuously. This is an issue that has received some attention lately. Various commentators point out that this arrangement is fraught with the possibility of conflicts because of the very nature of two employment relationships. Consider Peter Butzin, chair of Common Cause Florida, a government transparency advocacy group, regarding a lobbyist-turned-legislator introducing a bill specifically impacting his employer (as opposed to the allegations raised with Mr. Evans): “Is it a conflict? Yes. Should we be surprised? No. This happens all the time. We have a working legislature.”<sup>1</sup>

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<sup>1</sup> Jessica Bakeman, *In Part-Time Legislature, Regular Overlap Between Day Jobs and Ed. Policy*, Politico (Oct. 12, 2015) (available at <https://www.politico.com/states/florida/story/2015/10/in-part-time-legislature-regular-overlap-between-day-jobs-and-ed-policy-026574>); see also *Conflicted Interests: State Lawmakers Often Blur the Lines*, Center for Public Integrity (December 7, 2017) (available at <https://publicintegrity.org/...ate-politics/conflicted-interests-state-lawmakers-often-blur-the-line-between-the-publics-business-and-their-own/>)

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A 2017 collaboration between the Center for Public Integrity and the Associated Press raised numerous concerns about state legislators with outside employment, noting that “news organizations found numerous examples in which lawmakers’ votes had the effect of promoting their private interests. Even then, the votes did not necessarily represent a conflict of interest as defined by the state.”<sup>2</sup> That study noted that “many lawmakers defend even the votes that benefit their businesses and industries, saying they bring important expertise to the debate.” That seems to be the judgment of the D.C. Council in adopting rules permitting outside employment, but now those rules are being used to target Mr. Evans with out-of-context accusations, as has occurred in many other state legislatures around the country.

Underscoring the wide divergence of opinion on this issue, some states not only do not require recusal from matters impacting a legislator’s outside employment, but affirmatively require it. Utah and Oregon require lawmakers to vote *even if they have a conflict*. Pennsylvania requires permission to recuse, leading one State Senator to vote on the nomination of his own mother to a public board.<sup>3</sup> In short, the “right way” to deal with conflicts of interest arising from outside employment is far from clear, regardless of the feigned indignity of many of Mr. Evans’ critics.

The problem is exacerbated in certain professions, such as lobbyists, attorneys, and consultants. However, even with other employment, the issues would arise:

- If an official is a real estate agent, do clients come to the agency because they hope to ingratiate themselves for their business on issues that might arise on zoning, permits and the like? If the Council takes up a real estate issue, it will most certainly “affect” the clients of the agency, even if the Council does not take up an issue specifically for a specific client.
- If an official works as a bank official, do people put their accounts there for the same reason? If the Council addresses the issue of zoning for all banks, it surely affects the one the official is working for.
- If an official teaches in a private school, will parents enroll their children there for the same reason? If the Council changes its rule for tax-exemption, it will impact the school for which the official is working as well.

And of course, the issues are pronounced with attorneys, accountants, lobbyists and consultants. In a small business community like Washington, D.C., it will be rare that there will not be some overlap with clients, their issues and matters that come up in the Council or those in

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<sup>2</sup> Conflicted Interests: State Lawmakers Often Blur the Lines, Center for Public Integrity (December 7, 2017) (available at <https://publicintegrity.org/...ate-politics/conflicted-interests-state-lawmakers-often-blur-the-line-between-the-publics-business-and-their-own/>)

<sup>3</sup> *Id.*

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agencies in D.C. And what makes that even more complicated is that Mr. Evans and other Councilmembers have the duty to take care of constituent and resident issues, which often involve D.C. agencies and regulations. If a person with a D.C. issue (even if not something specifically before the Council) is also a client of a firm in which a Councilmember works, then the Councilmember has to either risk being accused of a conflict to do what he/she would do for any other D.C. person or entity, or forego helping someone he/she was elected to help. This is especially the case when, as Mr. Evans explained, so much of a Councilmember's job is dealing with these constituent-type issues and not legislation in the traditional sense:

Constituent services take up about 80 percent of our time in the office, all of us. 'Constituent services' is when a constituent – it doesn't necessarily have to be a Ward 2 resident, but a resident of the city contacts my office, myself, my office and my staff members, for help in any fashion. [ . . . ] And it's the Tip O'Neill [line], obviously. For those who don't know him, he is very famous for saying 'All politics is local. The most important street is the one in front of my house,' you know, that type of thing where you take care of things that people are concerned about rather than the broader issues which in reality they are less concerned about. So constituent services is all-encompassing as far as I'm concerned.<sup>4</sup>

The line between helping someone as a constituent service and helping that same person in some other context can hardly be a clear one in this outside-employment setting and led Mr. Evans to describe the tension as trying to "know it when he sees it." What he explained by that general phrase is that, as long as he was doing what he would do for anyone, did not change long-standing positions, and did not get a reward for doing his job, he could and did continue to do the work he was elected to do. For example, answering a question about his willingness to arrange for a one-time meeting between someone he knew who became a client and people in the D.C. government, Mr. Evans explained that a good portion of his office's work is to direct people to the right agency or official in the D.C. government:

This would fall into the category of again, the constituent [services]. And if you remember last time, there were constituent services like fixing potholes, and there were constituent services like me being the 'traffic cop,' when he needs to have a meeting with somebody, and I arranged those things to happen. This appears to fall into that category that if a constituency, someone calls me. It doesn't even have to be a constituent. You know, my office does—responds to anybody who calls us for anything, literally. And so they called, they need help with something, we would take care of that.<sup>5</sup>

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<sup>4</sup> Transcript, September 9 Interview with Jack Evans, at 8-10.

<sup>5</sup> Transcript, September 23 Interview with Jack Evans, at 83-84.

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To the extent this has caused some concerns today, the problem is compounded when there is an attorney or similar professional involved as a Councilmember in that the official would not always know when his/her firm's clients have an issue somewhere in the great bureaucracy of the D.C. government. As you know, Mr. Evans was not a partner in any law firm, and therefore the interests of all a firm's clients cannot practically be imputed to him if there is no mechanism for that client to be flagged. As a non-partner, Mr. Evans is not given the type of reports partners would receive that might identify all a firm's clients. A Councilmember could work on a matter in his or her official capacity, for example, a general rule to change some zoning process, not knowing that a client of his/her firm is dealing with a request for a zoning variance from a D.C. agency on the same issue.

Furthermore, Mr. Evans' critics have unfairly conflated true conflict-of-interest situations in which a public official takes actions that confer direct benefits to an associate or client on the one hand, with the completely appropriate government acts that accrue to the benefit of many of (sometimes all) residents of the District or a ward on the other. There is a difference in the ethics rules between an official taking actions that affect his/her entire constituency than taking an action for a specific individual or entity. For example, Mr. Evans has always supported reducing taxes, whether that be property taxes, business taxes, or parking taxes. That position is based on his almost inarguable view that higher tax burdens strain citizens and businesses in the District of Columbia, put D.C. at a competitive disadvantage with cities or counties in Virginia and Maryland, and reduce opportunity for all. His support for a reduction in the District's parking taxes may (or may not) have led to some incidental benefits to all parking companies operating in the District, including a parking company owned by one of his friends/client, just like its competitors. But Mr. Evans' critics point to this as though it were an improper favor for his consulting client. That simply does not follow. It would be absurd to suggest that such an attenuated benefit or action, that accrues or applies to all the citizens of the District, could constitute special pleading for his client. That position would mean that a member of the Council who works in any industry would have to recuse from any action that promotes the overall business environment in D.C. In reality, Mr. Evans' policies promoting the general welfare indicate the opposite of the corruption his critics are accusing him of.<sup>6</sup>

Mr. Evans worked for three fairly large law firms over the years. If the interests of every one of the firm's clients was imputed to him, whether he worked on a matter at the firm or did not know about it, it becomes an impossible relationship to maintain. And, responsibility for avoiding specific conflicts, especially when an employee is not a partner, has to rest with the law firm as well. Every week law firms erect ethics walls around partners, associates and others who used to

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<sup>6</sup> See Bruce Owen, *"To Promote the General Welfare": Addressing Political Corruption in America*, BR. J. AM. LEG. STUDIES 5, at 5 (2016) ("James Madison and his colleagues were well aware of the problem of corruption. [ . . . ] It was, and remains, perfectly obvious that if there is an organization that has the power to grant **benefits to one group of citizens at the expense of others**, members of each group will want to influence that organization's policies.") (emphasis added).

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work at another firm or agency with interests coinciding with a current firm's clients. There is no evidence that Mr. Evans worked on any matters at any firm where the client's work involved actions before the D.C. government. Nevertheless, your work going forward should address what employers of government people need to do as well as putting the onus only on Mr. Evans.

It is a bright line for the Councilmember not to work on a matter for a client he/she knows about with an issue before the Council. It is a far more obscure line when the matter is that someone else in the firm is working on it and it is not something directly in front of the Councilmember. This too is made all the more difficult because the disclosure rules are not anywhere close to a model of clarity when it comes to when a Councilmember has to disclose his/her "clients" versus the firm that pays the official. Law firms have not wanted and will not want to disclose the entire list of its clients for ethical and business reasons. Having the Councilmember simply report the client he/she works on may not be enough, as we saw with the issues raised with Mr. Evans. If so, the solution is prospective rule change and/or clarification, not an *ex post facto* interpretation that was never given at the time.

The problem, then, is endemic to the permissibility of outside employment. In a city the size of Washington and with the business community as it is here and the fact that the Council really is a full-time job now, the time may have come to change the rules to prohibit outside income from any trade or business (outside employment). The Council might also then have to revisit the salaries of its Members, but most D.C. residents would likely understand the trade-off between that and the issues of conflicts.

However, the starting point for your and the Council's consideration of the issues raised in the inquiry about Mr. Evans is this issue, and he should not be penalized for the types of inherent problems that arise because of the permissibility of outside employment. Remember as well, that he explained that when he started at the Council, at least half of the members engaged in this type of employment.<sup>7</sup> That may have changed as of now, but that too is an issue we will address later in this letter (the fact that rules and practices have changed but updating and training did not).

The truth is that since he joined the Council in 1991, Mr. Evans' progressive pro-growth platform has held steady, and no consulting agreements outside jobs have ever changed that:

So what is my political philosophy? So one was to rebuild downtown, because without money you can't run anything. And when the city fails, the people who suffer the most are the people at the low end of the income scale, not the rich people. 'Cause they can buy their way out. The people who don't have any resources are the ones that suffer the most. They're the ones who don't get education or city services.

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<sup>7</sup> Transcript, September 3 Interview with Jack Evans, at 48.

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So rebuilding downtown became our philosophy. And how do you do that? How do you lure businesses back in? How do you create confidence in a city that no one has any confidence in? And that was the approach we took. [. . .] And so we started putting in place a number of economic development drivers to change the District of Columbia. [. . .] So that was an element we used. Tax incentives for people who wanted to locate here. And I can go on and on about how we rebuilt Downtown Washington.<sup>8</sup>

## II. *The D.C. Council Code of Ethics must be clarified*

You have said your mandate is to view the matters under review through the prism of the D.C. Council Code of Conduct. Whatever else became clear in the many months Mr. Evans has been answering questions is the fact that the Code of Conduct is far from a model of clarity. Even you acknowledged this reality on various occasions during the interviews. One example is when you said: “we may ultimately disagree about whether [the Councilman’s] view of how to approach conflicts is exactly the same as the view and the approach that the Code of Conduct takes.”<sup>9</sup>

We could not agree more with your observation that applying the Code of Conduct is “a somewhat technical exercise, because it has technical language in it” and that “there may be a difference between a technical violation and a more substantive violation.”<sup>10</sup> But therein lies a very serious problem: the application of the Code’s rules on conflicts of interest should never produce “technical” results that are so far afield from “substantive” ones. It is not fair to hold elected officials to account when after-the-fact critics, political adversaries or an overzealous media can muddy the waters with a “technical violation” that is of no substance.

As just some example, reading through the Code, there are a number of terms that need to be clarified and, again, Mr. Evans should not be held responsible for an interpretation that does not yet exist. For example:

*I.(a) defines conflicts as when an official action is done “in a manner that the employee knows is likely to have a direct and predictable effect on the employee’s financial interests. . . .”*

Mr. Evans explained repeatedly that he understood that the Code of Conduct restricted him from “participating in a matter [. . .] the employee knows or is likely to have a direct and predictable effect on the employee’s financial interest or the financial interest of a person closely affiliated with their employee” i.e., the client.<sup>11</sup> As Mr. Evans was a salaried employee at his law firms and had fixed retainers when he was a consultant, nothing he did or did not do was pegged to

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<sup>8</sup> Transcript, September 3 Interview with Jack Evans, at 56-57.

<sup>9</sup> Transcript, September 23 Interview with Jack Evans, at 11.

<sup>10</sup> Transcript, September 3 Interview with Jack Evans, at 121.

<sup>11</sup> Transcript, Interview with Jack Evans September 16, at 48.



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performance, work brought in, success, failure or the like. Moreover, so many of his employments came about because of long-standing friendships, it is not remotely the case that those hiring him would likely have not done so because of any position he took or did not take. In fact, you heard examples (some are detailed below) of his taking official position contrary to the interests of clients, and that did not affect his employment or income in any fashion. Moreover, the definition that the benefit has to be “direct and predictable” meaning that it has to be *real* and not *speculative* makes it even more remote that any of the situations you are examining with Mr. Evans would reach that threshold. His being hired by the law firms or given consulting contracts at NSE simply did not depend on the positions he took or opposed.

*I.(c) that describes recusals speaks of when an elected official . . . would be “required” to act in a manner prohibited in section I.(a).*

But, as you saw, Mr. Evans and other Councilmembers routinely avoided such issues coming up by transferring them to other committees or by simply allowing them to lapse. He explained one such example was the transferring of the issue of the Scottish Rite Temple which included other members including the Chairman. Thus, the practice of the Council was to sidestep the need for formal recusals. But much more important were his answers to questions you asked about when and why he would “recuse” himself. As he made clear on the issues of his opposition to various taxes, converting gas stations into some other type of project, the zoning changes for the Scottish Rite Temple, his promotion of a way D.C. could get more film production revenue and the restoration of the New York Avenue corridor, he has maintained long-standing positions before he worked for law firms and before he started his consulting company. At various times during his maintaining these long-held positions, clients of his law firms or his own business may have become involved in the same issues in some manner, even if not directly (e.g. Richie Cohen being one of the people who appeared and merely testified at a hearing on the issue of development or the film industry). If Mr. Evans “recused” himself from any issue where someone he knew as a friend or a client or the client of a law firm was interested or decided to show up or send a letter, he would, as a result, allow that person to take him out of the issue. In effect, people could manipulate him out of his opposition to their positions. The businessman who wanted to convert gas stations would hire Mr. Evans’ law firm and then cause Mr. Evans to cease being the opponent to that client. Sometimes Mr. Evans was the only (or at the least the most effective) official to oppose the interests of a person or business he knew or was a client of his firm. How completely contrary to proper government and the rules of conduct would that be to allow that type of manipulation.

So in the areas you questioned where a client or friend might have an interest, these were *all* areas where Mr. Evans’ positions were well-known and asserted somethings for decades. Of course, it is not an automatic rule that if an official has a long-standing position then it is never a conflict to continue that position which can help a friend or client. But much more than attending a public hearing or reintroducing a bill or opposing all increases in taxes would be needed to raise a red flag. In these areas, conflicts should be identified by the official (in this case Mr. Evans)

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doing something different, or more, that is specific to that friend or client – not just maintaining the stance he had for decades, many of which apply generally across D.C.:

- a. Mr. Evans opposed virtually all new or increased taxes. So, if an issue came up about new or increased parking taxes, this was not a position he took for Rusty Lindner who had a company who owned a parking company.
- b. Mr. Evans was an early and vocal supporter for expanding film production in D.C. and to renovate more of the New York Avenue corridor. If he maintained those positions at a time that Richie Cohen decided to become interested, Mr. Evans' positions had been firm and transparent. This was not Mr. Evans taking a position because one of his friends or clients asked him to. It was the opposite – one of his friends and clients deciding to become involved perhaps knowing Mr. Evans was someone with a record of support for that issue.
- c. Mr. Evans was a long proponent for changes, expansions and better service at PEPCO. If, a few days after he started working for the Manatt law firm, he became the seventh of seven council people to sign a general letter of support consistent with his however many prior expressions of support, that was not done for a Manatt client. (And correspondence seems to suggest that Mr. Evans did not even know that it was a Manatt client at the time he committed to being the last signature or signed that expression of support.)

During the interviews, Mr. Evans said you should look for the opposite—look for a time when Mr. Evans changed his position to be *for* something he had opposed in the past or *against* something he supported in the past to match the interests or position of a client. It never happened.

*I.(d) prohibits officials from acquiring stock or other similar investments which could unduly influence or give the appearance of unduly influencing the official.*

As with other important phrases in the Code against which Mr. Evans is now being judged, there is no definition or example of what could “unduly” influence. In addition, there is no definition of what is “an appearance” of undue influence and by what measure or whose measure that would be – a political opponent? a community organization? a media after the fact? And then even the gifts prohibition, Section III., specifically allows for “opportunities and benefits” that others could get. This would certainly apply to or be analogous to purchasing stock that others could purchase for fair value.

With specific reference to the phrase that so many have been using in criticizing Mr. Evans – “the appearance of a conflict” – the few examples we have provided make clear what a slippery and unfair term this is to use in the context of a law enforcement investigation or ethics inquiry. The U.S. Supreme Court struck down this ever-expansive attempt to create expanding violations

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in the breach of honest services cases because of the lack of notice and subjectivity of such a concept. *Skilling v. United States*, 561 U.S. 358, 409-412 (2010). For this reason, we had asked Michael Frisch, a recognized legal expert in the courts of the District of Columbia and elsewhere on attorney and government ethics, to review Mr. Evans' activities a few months ago. Mr. Frisch was a senior assistant bar counsel to the D.C. Bar and is Ethics Counsel at Georgetown University Law Center. We asked you to meet or discuss these issues with him and will make him available to you. In the meantime, he did send a letter on July 1, 2019 that is worth quoting here:

Especially, in applying any rule about what constitutes 'the appearance of a conflict of interest,' the current best view is **that standard is subject to wide misunderstanding and arbitrary, hindsight and inconsistent application.** This is even more the case when applied to public officials in jurisdictions that permit outside employment and income, where **almost any position or work with anyone who also does business in that area, can be subject to criticism under that vague standard.** The issues involving Mr. Evans and his work illustrate this problem.

First, the American Bar Association rejected the so-called appearance of impropriety standard when it moved from the Model code of Professional Responsibility to the Model Rules of Professional Conduct several decades ago. The District of Columbia Court of Appeals (along with virtually every state court) replaced former DR 9-101 with rules that now focus on the existence of an actual rather than apparent conflict of interest. State courts – including the District of Columbia – followed the ABA retreat from the standard as too slippery a slope upon which to impose any professional sanction. While the appearance standard retains some vitality for purposes of judicial disqualification, it has been deemed **far too vague to serve as a basis for professional sanction.**

Where such an appearance exists, it can be resolved through recusal. It is my understanding that Mr. Evans specifically apprises potential clients in writing of his recusal in matters which may involve the council or has made it a practice to recuse himself if his clients' issues relate to his official position. To determine if an actual conflict would exist, **one has to identify whether his paid-for work existed at a time when such an issue existed in his official position and whether he acted on that issue.**" (emphasis added throughout).

Another commentator also made this same point when he stated:

But do rules outlawing the appearance of a conflict of interest really bolster citizen confidence? **Proponents offer no evidence to support the claim.** No opinion poll data comparing attitudes before and after the adoption of such a rule nor any comparison of citizen confidence in government between countries with an appearance ban and without one. The argument rests on logic instead. If citizens think when making a decision an

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official has a conflict of interest, no matter whether she does or not, they will lose trust in government.

This is true as far it goes, but the logic breaks down when one asks the critical question: In whose eyes is there an appearance of a conflict? A political opponent? An individual with a personal grudge against the office holder? Someone ignorant of the facts surrounding the alleged appearance of a conflict? **If it is enough to deem a public official “guilty” of an appearance violation if anyone in any of these categories levels a charge, we can expect the spread of appearance laws to produce a glut of charges.** Will a surfeit of charges really bolster citizens’ trust and confidence in government? Or will it, as many argue has happened in the U.S. and fear is about to happen with the ‘ethicization’ of Western Europe, drive it down as **citizens begin to think they ‘are all crooks.’**<sup>12</sup> (emphasis added throughout).

The issues seized upon by Mr. Evans’s critics fail both of Mr. Frisch’s tests. Consider, for example, complaints that Mr. Evans should not have served as the seventh signatory on a letter in favor of the Pepco-Excelon merger. While a disingenuous framing of the episode could create an appearance of impropriety in the mind of an uninformed observer, such an impression crumbles under the facts. Mr. Evans agreed to sign the letter *before* he ever took a position at Manatt, and he put pen to paper on something he agreed to do only a few days into his employment at the firm. Furthermore, in reconstructing the timeline of this event, it seems he was not even aware of the relationship between Manatt and Pepco until months later, in May of 2016, when he drafted a letter to BEGA raising the issue as having just “come to [his] attention that Manatt continues to represent Pepco holdings and Excelon Corp.”<sup>13</sup> And the council did not even have the authority to officially direct the issues discussed in the letter in the first place. Thus, his paid-for work for Manatt – which *never* involved Pepco – did not exist at the time he committed to signing the letter, nor could he have possibly been acting on behalf of Pepco when he ultimately did sign it, because he was not even aware Pepco was a Manatt client at the time.

There is no doubt that your report will be rapturously received by Mr. Evans’ critics, and we implore you to make this context clear.

*II. (a) The prohibition on outside employments speaks of such when it “conflicts or would appear to conflict” with the fair, impartial and objective performance” of the official’s work.*

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<sup>12</sup> Rick Messick, *Banning the Appearance of a Conflict of Interest: Another Misguided Ethics Rule*, Global Anticorruption Blog (Feb. 6, 2015) (available at <https://globalanticorruptionblog.com/2015/02/06/banning-the-appearance-of-a-conflict-of-interest-another-misguided-ethics-rule/>).

<sup>13</sup> See Transcript, September 9, 2019 Interview with Jack Evans, at 56.

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Putting aside the same problems with the “appearance of conflict” standard, the Code specifically states that work for “consultative activities” is allowed and then refers back to the general Section I. Conflicts provisions which, among other problems, does *not* have an appearance provision. You pointed out other examples where the code or forms seem to be unclear or actually contradict each other. Please make those same observations in any report you submit.

*VI.(a) which restricts use of government resources does not apply to “de minimis” use that does not interfere with official work.*

Here too there is no definition of *de minimis* or an example of time (i.e., more than X hours a week). In any event, the help Mr. Evan’s staff gave him after hours to type a few things (like an invoice) or printing out a handful of papers certainly would fit even a common definition of *de minimis*. If an employee logging into her/his private email accounts during work is more than *de minimis*, then thousands of people in D.C. are violating this standard every day.

#### *Financial Disclosure Form*

The instructions for the financial disclosure forms filed by Councilmembers are no better. At one point in our discussions, you said that even you were having trouble reading it correctly.<sup>14</sup> You mentioned that you “went back and looked at this since I was sort of confused by it.”<sup>15</sup> We were too.

For example, in 2016 the BEGA public disclosure statement requires disclosure of, *inter alia*, income received from non-district employment and requires that the employee disclose the identity of the employer, the amount of compensation, and descriptions of the work. It only required the name of a client *where the spouse, domestic partner, or dependent were paid by a client* with a contract with the District of Columbia or which stood to gain a direct financial benefit from legislation pending before the Council.<sup>16</sup> You suggested that this might be an error with the drafting of the disclosure form (“It would appear to me that – that sentence belongs under question 1 and the client clarification belongs under question 2”<sup>17</sup>), but as Mr. Tuohey pointed out at the time, confusing drafting errors should not be used against Mr. Evans now. Even after the language was changed in 2017, the form only required specific disclosure if the client had a *contract* with the District of Columbia or stood to gain a *direct financial benefit* from legislation pending before the council (see attached BEGA disclosure form of Jack Evans for 2016). No such situation ever occurred.

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<sup>14</sup> Transcript, September 23, 2019 Interview with Jack Evans, at 190-91, (“I didn’t write the form [. . .] So, I’m not sure I’m reading it correctly”).

<sup>15</sup> Transcript, September 23, 2019 Interview with Jack Evans, at 187.

<sup>16</sup> 2016 BEGA Financial Disclosure Form of Jack Evans.

<sup>17</sup> Transcript, September 23, 2019 Interview with Jack Evans at 190.

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After years of conforming to the disclosure practice of law firms – who do not provide full lists of their clients – Mr. Evans did the same when he set up his own firm. If the Council wants attorneys or consultants who have outside employment to list their clients, and if that can be done consistent with the rules of client confidentiality and ethics, the Council should make that clear. Until that is done, Mr. Evans should not be held to a requirement that does not exist or, at the very least, is not clearly set out. Even you stated that this issue is a “quasi-philosophical question about the form,”<sup>18</sup> but for Mr. Evans—who is facing a barrage of unfair criticism based on out-of-context accusations—the question is very concrete. There is no indication whatsoever of wrongdoing in his choice to apply the disclosure rule exactly as many other lawyers have before him.

### III. *Ethics guidance training for officials and employees has to be improved.*

Practices of Councilmembers with outside employment have changed since Mr. Evans was first elected 28 years ago. In addition, several aspects (i.e., when disclosure of stock ownership is required --- 2005 when Jack bought Eagle Bank and what was then known as Bank of Georgetown stock v. after 2013 amendments) of the Code have gone through substantive revision throughout the Councilman’s decades of service on the D.C. Council. In Section XI., the Code itself speaks of training and counseling, but the reality is that whatever has been provided is few and far between.

Mr. Evans wrote Ellen Efros about the potential pitfalls in setting up NSE Consulting and, as you saw, received what in retrospect was not much of an answer when she replied “you nevertheless must adhere to the applicable policies and regulations of the DC Board of Ethics and Government Accountability (“BEGA”) and to the applicable rules set forth in the Office Code of Conduct for the Council of the District of Columbia with regard to conflicts of interest. Provided that you are in compliance with those policies, rules and regulations, there is no prohibition to you forming a consulting entity through which you will provide consulting services to private sector clients.”<sup>19</sup> In fact, it appears that the Counsel’s office allowed Mr. Evans’ counsel to submit a draft response to the inquiry. This is not a problem or improper, but it underscores that the office did not see its role as being very proactive. Discussing that episode, you rightly observed that “there’s not a whole lot of guidance here at some level.”<sup>20</sup>

As to initial or subsequent training, that was minimal and inconsistent.<sup>21</sup> Councilmembers receive at most an hour of training on updates to the Code once per year as some part of a

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<sup>18</sup> Transcript, September 16 Interview with Jack Evans, at 181.

<sup>19</sup> Sept. 22, 2016 Letter from Ellen Efros, Office of the General Counsel, Council of the District of Columbia to Jack Evans. *See also* Transcript, September 3, 2019 Interview with Jack Evans, at 179-80 (“Q: [ . . . ] And then [Efros], she essentially says, not a problem, as long as you follow the rules.”)

<sup>20</sup> Transcript, September 3, 2019 Interview with Jack Evans, at 180.

<sup>21</sup> Transcript, September 23, 2019 Interview with Jack Evans, at 184 *et seq.*

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Councilmembers' retreat.<sup>22</sup> Such a sparse training regime is inadequate to prepare officials to navigate rules with "technical" applications that can trigger legal and political investigations in the absence of any "substantive violation." Surely, your report should point out the need for more training.

**IV. *Specific examples of issues at his law firms and when he set up a consulting firm indicate Mr. Evans' desire and intent to comply with ethics rules and avoid conflicts.***

**1. *Baker Hostetler***

In the 1990's the Council took up the issue of tort reform. At the time, Mr. Evans worked as an attorney at Baker & Hostetler, which represented a trade group of medical professionals who took a position on the proposed legislation. Mr. Evans did not participate in any consideration of the issue in light of the potential conflict.

**2. *Patton Boggs***

When the Council was considering taking action to facilitate the construction of the Marriott Hotel and Convention Center in downtown D.C., some in the press began to speculate that Patton Boggs was engaged in lobbying on behalf of Marriott. In fact, Marriott *was not* represented by the firm, but out of an abundance of caution about something that he saw as a concrete example of what could be an "appearance" issue, Mr. Evans removed himself from any consideration of the issue.

**3. *Manatt***

The Scottish Rite had retained Manatt to represent it in its efforts to redevelop a tract of land adjacent to its temple on 16<sup>th</sup> Street, Northwest. Mr. Evans had no personal involvement in the Scottish Rite's account at Manatt, and furthermore, as a legislator he was *opposed* to the Scottish Rite's position before the Council. Nonetheless, he took himself out of any consideration of the matter because he wished to avoid an apparent conflict.

Additionally, Manatt represented Joe Mammo, a D.C. developer who wished to tear down and redevelop several area gas stations. As a Councilman, Mr. Evans has long been concerned about the shrinking set of options for District drivers to get fuel and repairs. In direct opposition to the desires of his employer's client, Mr. Evans kept true to his long-held position on the issue. Any suggestion that he should have recused based on a mistaken application of law firm imputation would have the perverse effect of *enhancing* the client's ability to influence Council business, rather than safeguarding against it.

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<sup>22</sup> *Id.*

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#### 4. *NSE*

##### *a. Eagle Bank – Ron Paul*

In the summer of 2016, Mr. Evans began to seek outside employment beyond his duties as a councilman to supplement his income, as the rules provide. He approached his longtime friend Ron Paul to inquire about part-time employment with Eagle Bank. Mr. Paul suggested to Mr. Evans that he should instead consider launching his own consulting firm and engage Mr. Paul as a client to provide strategic business advice, similar to a relationship he had with a former Maryland legislator. Mr. Paul also suggested that a similar retainer relationship should be discussed with Richie Cohen (Willco) and Anthony Lanier (Eastbanc). Mr. Evans agreed, and as a result of that conversation, he established his own consulting firm and discussed retainer relationships with Richie Cohen and Anthony Lanier.

##### *b. Forge, Eastbanc/Squash on Fire, and Forge – Cohen, Lanier, and Lindner*

In 2016, Mr. Evans approached a number of his longtime friends about the possibility of establishing a consulting relationship based on Mr. Evans' extensive knowledge of the D.C. landscape. Among these potential clients were Ritchie Cohen (Willco), Anthony Lanier (Eastbanc/Squash on Fire), and Rusty Lindner (Forge).

As Mr. Evans repeatedly explained, he provided strategic business advice to Messrs. Cohen, Lanier, and Lindner during the pendency of their various consulting agreements. And as Mr. Lindner himself has explained in other inquiries, when the consulting agreement began, he sought Mr. Evans' advice on specific business issues, as well as introductions with Mr. Evans' local business contacts, above and beyond what had previously been the norm within their friendship. The same was true for all of Mr. Evans' clients. They each agreed to retain Mr. Evans as a consultant for advice and introductions separate and apart from Mr. Evans' position as a Councilman for the District of Columbia.

Some have complained that Cohen's testimony before the Council should have triggered Mr. Evans' recusal from advancing his long-held public position in favor of redevelopment of the New York Avenue corridor. This is a step too far for a number of reasons. First, it does not make sense as a theory of corruption. Taking these bad-faith critiques on their face for the sake of argument, assume that Mr. Cohen was trying to improperly influence Mr. Evans. The entire concept of a conflict of interest is that people may use their private relationships with government officials to create a *non-transparent* influence over government acts. But here, the allegation is not that Mr. Cohen called Mr. Evans on the phone and directed him to take a new position for Mr. Cohen's benefit; it's that Mr. Cohen



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testified *publicly* before the whole Council and that his testimony happened to track with Mr. Evans' long-held position.

Secondly, and more importantly, a rule requiring recusal in these circumstances would *enhance* rather than eliminate the ability of private individuals to influence government acts. If all one had to do was testify at a public hearing, a person with interests opposed to a government official's stated position would not have to pay a bribe, but would merely need to engage that official's law firm or other business in his or her private capacity on some other issue, then testify about that position. The official would be forced to recuse and abandon that position. Under that rule, the undue influence would come cheap.

With respect to NSE's consulting for Anthony Lanier's companies, Mr. Evans told you that at no point then or now did he have any reason to believe that Eastbanc had any business before the Council or with the District of Columbia government. Much of your questioning focused on evolving provisions across iterations of NSE's consulting agreements. As Mr. Evans explained, these provisions were cribbed from other contracts, and evolved just like any other aspect of a new business.<sup>23</sup>

Regardless of the inclusion or not of specific conflict of interest language in early versions of NSE's consulting agreement, Mr. Evans never lost sight of his ethical obligations under the Council's Code. While there has never been any serious suggestion of misconduct arising out of these consulting relationships, some of your questioning focused on the fact that Mr. Evans supported a bill that included a technical correction to legislation from *five years earlier* that appropriated funds to maintain the historic fire station below Mr. Lanier's squash facility.<sup>24</sup> As Mr. Evans explained, the vote in question occurred very shortly after Mr. Lanier became an NSE client, had very likely been scheduled days or weeks *before* Mr. Lanier became an NSE client. Moreover, the vote in 2016 merely addressed a technical error that had been written into legislation passed *several years* before NSE even existed, and that bill reflected Mr. Evans' long-held development-focused policies. The vote in 2016 did not impact the substance of the earlier bill, and correcting a technical error so that prior legislation operates as intended is routine, not scandalous.

Finally, you asked a single question about whether Mr. Evans' severance pay from Manatt was in any way contingent on the success of a piece of "Empowerment Zone" legislation before the Council. As Mr. Evans explained, it was not.<sup>25</sup> Furthermore, the Empowerment

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<sup>23</sup> See, e.g., Transcript, September 23, 2019 Interview with Jack Evans, at 65 ("I just want to stress there was no conscious effort to do anything here as far as these. It evolved to a better one and why it's not in that one, I just can't even tell you. I'm surprised as you are to look at it and it's not there, as I was last week.")

<sup>24</sup> Transcript, September 23, 2019 Interview with Jack Evans, at 72-79.

<sup>25</sup> Transcript, September 16 Interview with Jack Evans, at 194-196

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Zone legislation was never actually funded, which further shows that there was no connection between that legislation and Mr. Evans' pay.

*c. Digi Media– Don McCord*

Mr. Evans started to engage Don McCord—the President of Digi Media—as a client. Even though Mr. Evans was trying to build a consulting firm to replace the income he relied on to continue to support his three children and other needs, he reconsidered the arrangement before it was fully consummated, returned the retainer payments and did not take on that client because of the controversy surrounding Digi Media's business activities erecting multi-media billboards in downtown D.C. This was done by Mr. Evans *before* there was any attention to him, any question asked, any controversy, or any investigation. It is strong evidence of his intent to avoid conflicts.

Similarly, in 2016, Don McCord offered Councilman Evans stock in Digi. While Councilman Evans believed in Digi Media's business, found the opportunity to own stock appealing, and determined that to purchase the stock would be fully lawful, he ultimately concluded that it was the type of transaction that was, as he called it, something "he knew when he saw it" and turned the offer down. Again, he did this *before* anyone knew the offer existed, before there were any questions or any investigations.

*d. Steven Fisher*

Mr. Evans' relationship with Steve Fisher was short-lived. Fisher was not a resident of the D.C. area, and Mr. Evans never ascertained the nature of Mr. Fisher's business interests in the District beyond some real estate holdings that largely lie in Maryland. They met one time on the recommendation of Mr. Cohen. Mr. Fisher retained Mr. Evans and the two hoped to build a professional relationship, but after a year with little activity, Mr. Fisher terminated the consulting engagement. That's it. In our meetings, you asked several questions about the language of Mr. Evans' agreement with Mr. Fisher, which had been cribbed from an early draft and inadvertently excluded the conflict-of-interest provisions that made their way into later versions. But there was no suggestion then or now, nor could there be, that Mr. Fisher ever called on Mr. Evans for anything untoward. At most, Fisher is relevant as an example of a less-than-productive consultancy that ended unceremoniously after a year. Mr. Fisher had no business or interests in the D.C. government different from the thousands of other businesses that operate here, and Mr. Evans took no actions for him or depending in any way on his relationship.

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**V. *The retainer agreements Mr. Evans had were in keeping with D.C. practice and actually help avoid conflicts.***

Mr. Evans created retainer (“on call”) relationships with all of his consulting clients. By definition, this arrangement does not envision that there will be time sheets or constant activity. In fact, it is often the case that long periods can occur when there is no activity but the right to call upon the consultant when needed. Especially in D.C., this is a common arrangement. Mr. Evans explained that his model, among a few, were the client relationships he saw when he was at Patton Boggs, probably one of the foremost firms with these types of contracts. Mr. Boggs in particular, who Mr. Evans mentioned, was well known for having dozens and dozens of such arrangements with clients where large sums would be paid for what might be a phone call over a long period of time.

A number your questions asked what Mr. Evans did for each of his consulting clients and when. As he explained, there was a wide difference in activity between when he was called on in his agreement with someone like Rusty Lindner who he knew very well for a long period of time and lived in D.C. and saw frequently to someone like Steven Fisher in California who wanted his eyes and ears in D.C. and did not need him much. Whatever the differences and level of activity, there was nothing at all wrong with these agreements. It might be that those close to Mr. Evans wanted to help him and valued his occasional input as such that they were willing to have \$25,000 or \$50,000 yearly retainers. This violates no rules and in fact helps prevent conflicts. In Mr. Evans’ agreements, his payments were not depending on an outcome or performance or success. He did not have to achieve a particular result which might raise more questions concerning how his work interacted with official duties. He just needed to be available and provide advice when called upon. If you determine to criticize or find fault with this type of arrangement, you will be singling Mr. Evans out among what has to be hundreds of others who operate in this manner. Again, your report should address the issue of outside employment and not a retroactive “how could it have been done better” approach.

\* \* \* \*

The bottom line is that Jack Evans did not engage in any activities that compromised his impartiality as a member of the D.C. City Council, and a fair-minded observer with a view of all the facts would not conclude otherwise. As we have discussed, through nearly three decades on the Council, Mr. Evans of course encountered opportunities where he could have compromised positions he had taken for decades or cater to a friend or client differently than he did for thousands of others who called for help to his D.C. office. He did not do that. The ethics rules allow members to pursue outside employment. Mr. Evans specifically addressed the potential for conflicts of interest and established responsible guidelines with each of his outside clients. In the very few instances where Mr. Evans recognized the risk of a conflict after taking on a particular client or matter, he did not take part or did not take on a client before any of his actions could create such a conflict in fact. And while reasonable people can disagree about the meaning, scope, or clarity of

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the Council's disclosure rules, Mr. Evans disclosed his relationship with NSE Consulting exactly as any other lawyers or consultants would disclose their employer.

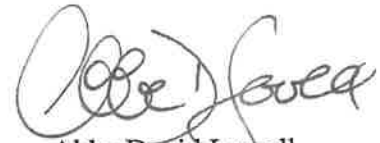
As you wrap your investigation, we hope you will pause and consider what is at stake. Mr. Evans has been a hard-working and dedicated public servant in D.C, for three decades. His constituents have approved of his service and returned him to his seat time and time again. He now faces an onslaught of critics on the Council and outside with their own political and other motives. No matter what you write, your conclusions and public statements will have implications beyond the four corners of your mandate as outside counsel; they will very likely determine Mr. Evans' future career, both his ability to serve out his term and someone who still needs to make a living. We urge you to take this into account as you conclude and present your work, and to focus your framing of these issues accordingly.

Please do not hesitate to contact us with any questions or concerns you have about this matter.



Mark H. Tuohey

Sincerely,



Abbe David Lowell

*Counsel for Jack Evans*



## GEORGETOWN LAW

Michael S. Frisch  
Ethics Counsel and Adjunct Professor

November 4, 2019

Councilmember Mary Cheh  
Council of the District of Columbia  
1351 Pennsylvania Avenue, N.W.  
Suite 108  
Washington, D.C. 2004

Dear Councilmember Cheh:

I have been retained as an expert in legal ethics to provide opinions concerning the report of the law firm of O'Melveny & Myers into Councilmember Jack Evans.

As a bar prosecutor and professor teaching professional responsibility, I have over 35 years of experience in the interpretation and enforcement of codes of ethics. I have carefully reviewed the findings and conclusions of the report submitted by the law firm of O'Melveny & Myers to the D.C. City Council. Throughout, and for reasons detailed more fully below, I conclude that the report reflects an inaccurate and flawed understanding of a significant number of ethics rules that govern attorney and non-attorney professional behavior. The flaws in reasoning that I have identified have led to a number of conclusions that cannot be supported when the proper legal analysis is applied to the matters at issue.

First, the Report suggests that the Digi Media representation was not properly terminated and that Mr. Evans owed some present duty to Digi after the representation was terminated through a clear and unequivocal communication that any representation was concluded. The consideration of the Digi Media issues occupies a disproportionate amount of the Report and a great deal of their conclusions about rule violations result from their view of this brief engagement. In my opinion, Mr. Evans fully complied with his obligations under D.C. RPC 1.16(d) in connection with the termination of the engagement. The report's suggestion that he had present duties to Digi as a "prospective future client" is actually a frivolous conclusion. Putting aside whether the allusion to some future possibility was more than a courtesy, O'Melveny's conclusion is wrong as a matter of ethics law. Simply stated, any terminated representation carries the possibility of future employment and create no ethical duty other than to avoid conflicts with the former client. See District of Columbia Rules of

Professional Conduct ("D.C. RPC") 1.9. Indeed, it might well be unethical to foreclose the possibility of future employment. Cf. D.C. RPC 5.4; *In re Hager*, 878 A.2d 1247 (D.C. 2005) (plaintiff's attorney sanctioned for, among other things, agreeing to forego future lawsuits against settling defendant).

Notably, the District of Columbia declined to adopt the provisions of ABA Model Rule 1.11(d)(2)(ii) that limit a present government attorney from negotiating for private employment in matters of personal and substantial responsibility. The court likely recognized the unique obstacles to such a rule in the jurisdiction that more than any other has a revolving door between public service and private practice.

Second, in so many instances, the report twists D.C. RPC 1.10 (imputed disqualification) beyond any recognition. Among the errors is when the Report concludes (a) that if a law firm might benefit from having a client (with an interest in D.C. government issues) that would be the same as Jack Evans as a salaried employee having that same interest; (b) that any client of a law firm (whether Mr. Evans was involved or not) created a bar from Mr. Evans being involved on a matter of interest of that client in D.C. government; and (c) that a law firm's possible attempt to acquire a client in the future created the same conflict to Mr. Evans's. The Rule permits the screening of personally-disqualified attorneys and allows the screen to cure the conflict. The District of Columbia Court of Appeals has recently enacted revisions to the Rule that allow for non-consented screening, thus expanding the use of the device. The report suggests that Mr. Evans - a salaried employee with no financial stake, for example, in the Pepco matter in which the law firm he joined Manatt was involved - somehow derived a prohibited financial benefit from the representation. Simply stated, he did not. If the fees paid by a client were deemed a financial benefit to the screened attorney and thus a rule violation, the entire structure of D.C. RPC 1.10 would collapse and be rendered nugatory. That is not - and could not be - a legitimate interpretation of a rule that is crucial to the ethical operation of a law firm.

Third, the report entirely fails to place the investigation in the proper context of a system that permits a legislator to engage in outside employment. Throughout the report, Mr. Evans is tasked with knowledge of provisions that the report elsewhere acknowledges that there was a significant lack of clarity, guidance and training in the areas of conduct examined here. Ethics rules are rules of reason that judge an actor's conduct in light of the facts and law reasonably known at the time of the conduct. The reports persistent use of post hoc analysis and interpretations that were not extant at the time in question is fundamentally unfair. So much of what the Report addresses results from the inherent tension of public officials being allowed to have outside income by taking on clients (whether for legal or other advice). The Report fails to address this (as Mr. Evans' counsel did in their October 25, 2019 letter to O'Melveny).

Fourth, the standard of "appearance of conflict" has been demonstrated to be unfair and unworkable as a basis for sanction. I addressed this in a letter I wrote concerning the WMATA issues and this too was addressed in the October 25, 2019 letter to O'Melveny.

Fifth, the suggestion that availability retainers to clients might constitute a "gift" is a frivolous suggestion. A fee for any legal service - including availability - is never deemed a gift by the lawyer, client or Internal Revenue Service. Such a fee is entirely consistent with an attorney's ethical obligation. See D.C. RPC 1.5(a). If a lobbyist's, consultant's or attorney's fee structure is allowed to be second-guessed after the fact with no guidelines, there is no end to how the ethics rules can be bent to make a violation where none exists. Especially in this city, where retainer agreements that have people on call and reserved are common, this is an odd suggestion in the Report.

Sixth, the report purports to interpret key ethics concept relevant here – the "substantial relationship" test and the definition of a "matter" – without reference to the key District of Columbia Court of Appeals opinion interpreting those phrases. In *In re Sofaer*, 728 A. 2d 625 (D.C. 1999), the court admonished a former legal advisor to the Department of State for switching sides by representing Libya as private counsel. The court found his personal and substantial participation as a government attorney in responding to third party subpoenas in a specific matter – litigation brought in connection with the Lockerbie bombing – violated DC RPC 1.11 (revolving door).

Here, in contrast, there is no showing of such participation on behalf of a private client that in any way resembles a special pleading on that client's behalf. His positions on matters of general application to the citizens of the District of Columbia do not constitute a matter on behalf of a specific client as ethics rules prohibit.

Seventh, the Report appears to create requirements and instructions that do not exist in the Code of Conduct or financial disclosure forms. For example, the suggestion that an official can consider not identifying individual clients applies only when a privileged relationship exists is not a distinction in the rule. Interpreting that stock ownership disclosure rule that stated the need to disclose when a company transacted business *with* the City had meant more than if there was a specific contract or similar financial arrangement with the City is also not contained in the rule.

Finally, the Report faults Mr. Evans for failing to recuse himself on certain matters in which someone he knew – as a friend and client – had an interest or position. The Report does so whether or not the issues were one Mr. Evans supported in a general manner (opposing all tax increases, supporting development of an entire area) or specifically (a tax break for an individual). The Report does so if a client came to an issue after Mr. Evans' positions were well-

known for years, sometimes decades. Similarly, the Code recognizes that a large part of a Councilmember's job is to provide services to constituents. There are no automatic rules that a person who received such services in the past forfeits the ability to seek them again after he or she becomes a client of the public official.

The Code of Conduct provides that when a Councilmember confronts a conflict of interest, he or she may recuse from consideration or official action on the matter. This is of course a sensible rule, but it must be applied appropriately as in judicial recusal matters. When the mere appearance of a conflict of interest is enough to trigger a recusal, or when the standard of what constitutes an actual conflict is defined in an overly broad manner, constituents can be denied representation beyond what is necessary or appropriate to police abuses. It also can place a would-be client in a position to hire an official with the very notion of having the official recuse himself or herself and remove an opponent to that client's positions.

Appearance issues can arise in many contexts, especially for lawyers, real estate developers, and consultants with clients and interests that are likely to arise over and over again in the daily business of city government. Ethical rules that allow such outside employment, but then overly constrain the performance of an official's duties, can result in an erosion rather than a promotion of public faith in the political system. Furthermore, it feeds partisan cynicism and incentivizes disruption in the day-to-day business of government, as officials face investigations of conduct that is ultimately above-board, and political rivals spend more time lobbing allegations than carrying out their official duties.

Over-reliance on recusal also can be a vector for other forms of undue private influence. An overly rote recusal regime that does not adequately examine individual circumstances creates a mechanism for an official's political opponents to force his or her recusal. Most of the time, attention is focused on undue influences that manifest in the acts of compromised officials. For example, perhaps an official would have voted against a bill, but was paid to drop her opposition. Over-recusal can produce the same result through slightly different means when an official is forced to drop her opposition because of some unrelated and ultimately irrelevant association that requires her to recuse.

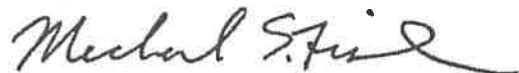
Indeed, the danger of over-recusal in judicial matters is acknowledged in the ABA Model Rules of Judicial Ethics Canons that address the issue by severely limiting the outside activities of a judicial officer. See, e.g. Canon 2 Rules 2.1 2.4 and 2.7 ("a judge shall hear and decide matters assigned to the judge, except where disqualification is required..."). The dangers of over-recusal are far more evident in the activities of a political actor as opposed to a judge.

I offered to meet with O'Melveny to raise these points, and I offer to do the same for the Council as it considers these issues.



The views stated herein are my own and are not attributable to any organization with which I am affiliated.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael S. Frisch". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Michael S. Frisch



## GEORGETOWN LAW

Michael S. Frisch  
Ethics Counsel and Adjunct Professor

July 1, 2019

Mark Tuohey, Esquire  
Baker & Hosteller LLP  
1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036-5403

Dear Mr. Tuohey:

You have asked me to review the memorandum written by the law firm of Schulte, Roth & Zabel for WMATA that has been released to and commented in the media. Specifically, you asked me to opine on the actions attributed to your client, Councilperson Jack Evans and the various codes of conduct and ethics cited in the memorandum.

I currently serve as Ethics Counsel to Georgetown Law School. I have been a member of the District of Columbia Bar since 1975. I worked as Assistant and Senior Bar (now Disciplinary) Counsel to the District of Columbia Court of Appeals from 1984 – 2001. I have taught Professional Responsibility as an Adjunct Professor at Georgetown Law School since 1991 and was chosen as its first ethics counsel in 2001. I also serve as co-faculty advisor to the Georgetown Journal of Legal Ethics.

The views stated herein are my own.

In a short summary, I believe the memorandum has completely overstated its conclusions of ethical violations. Especially in applying any rule about what constitutes "the appearance of a conflict of interest," the current best view is that standard is subject to wide misunderstanding and arbitrary, hindsight and inconsistent application. This is even more the case when applied to public officials in jurisdictions that permit outside employment and income, where almost any position or work with anyone who also does business in that area, can be subject to criticism under that vague standard. The issues involving Mr. Evans and his work illustrate this problem.

First, the American Bar Association rejected the so-called appearance of impropriety standard when it moved from the Model Code of Professional Responsibility to the Model Rules of Professional Conduct several decades ago. The District of Columbia Court of Appeals (along with virtually every state court) replaced former DR 9-101 with rules that now focus on the existence of an actual rather than apparent conflict of interest. State courts - including the District of Columbia - followed the ABA retreat from the standard as too slippery a slope upon which to impose any professional sanction. While the appearance standard retains some vitality for purposes of judicial disqualification, it has been deemed far too vague to serve as a basis for professional sanction.

Where such an appearance exists, it can be resolved through recusal. It is my understanding that Mr. Evans specifically apprises potential clients in writing of his recusal in matters which may involve the council or has made it a practice to recuse himself if his clients' issues relate to his official position. To determine if an actual conflict would exist, one has to identify whether his paid-for work existed at a time when such an issue existed in his official position and whether he acted on that issue.

Second, the communications/proposals at issue must be seen and evaluated in context. Rules governing lawyer conduct are rules of reason and permit an attorney freedom to pursue his profession. ABA Model Rules, Preamble at comments 9, 14. The District of Columbia Court of Appeals has explicitly adopted a policy for solicitation of potential clients as expansive as any in the country by declining to adopt any version of Model Rule 7.3. The ABA recognizes (in the context of far more restrictive rules than adopted in DC) that there is no "serious potential for overreaching when the person contacted is a lawyer." ABA Model Rule 7.3, comment 5. It is my opinion as a former disciplinary prosecutor and longtime ethics professor that the business proposal letters I have reviewed do not violate any provision of the D.C. Rules of Professional Conduct.

With respect to specific issues raised in the press, I understand that the Digi Outdoor Media consulting agreement was cancelled within days and before any work was done. No action was taken on any matter in his official position, no work was done and, so, no actual conflict ever arose. Mr. Evans' rejection of the consulting agreement and return of payment negates any suggestion of a forward-looking conflict of interest. This situation is a textbook example of the slippery slope of the appearance of impropriety standard. This is also true with respect to the draft of a business plan with language that can best be characterized as puffing Mr. Evan's contacts and experience as a public official. This was a draft exchanged between attorneys and never was sent to any clients; nor was the position ever finalized or done. Here too, there could be no actual conflict of interest and the here too you can see the problem with applying any "appearance" rule in what was a private exchange between attorneys.

On the issue of disclosure, like many jurisdictions, D.C. has rules which require someone filling out financial forms to list her/his employer or sources of income. When such a filer is an attorney or consultant, the rules do not require that the person's clients or customers are also listed. With respect to lawyers, disclosing the names of clients could itself be a violation of ethics rules, that require an attorney to keep client confidences which often involves the identity of clients. Rule 1.6 of the D.C. Rules of Professional Conduct; Opinion 214 of the D.C. Legal Ethics Committee.

Finally, any official acts while with WMATA appear to have taken place prior to the existence of the consulting proposal or involve matters with Colonial Parking. If, as reported, Colonial did not submit to get any and did not intend to pursue the parking business from WMATA, there was nothing for Mr. Evans to recuse himself from.

Again, my review is based on the memorandum written by WMATA's lawyers and the facts and rules they present. The recitation in that memorandum of the ethics rules did not take into account the current application and consideration of those issues.

Sincerely,



Michael S. Frisch