

The “Litigation Exception” to the One-Year Post-Employment Appearance Ban

Background

The conflicts of interest law contains three post-employment prohibitions:

- For one year after you leave City service, you may not communicate with your former City agency on behalf of your private sector employer or private business, except on ministerial matters.
- At no time may you work in the private sector on any “particular matter” with which you were personally and substantially involved while in City service.
- You may not use or reveal confidential City information.

The “Litigation Exception”

This exception, when applicable, will permit you to communicate with your former City agency during your first post-employment year. (This is an exception *only* to the one-year appearance ban, *not* to the particular matter or confidential information bans.) This exception will permit a former public servant to “mak[e] communications with the agency served by the public servant which are incidental to an otherwise permitted appearance in an adjudicative proceeding before another agency or body, or a court, unless the proceeding was pending in the agency served during the period of the public servant’s service with that agency.” Charter Section 2604(d)(2).

What This Means

1) For the exception to apply, there must first be an “adjudicative proceeding” and that proceeding must be before some agency or tribunal *other than* your former City agency. A proceeding in state or federal court is a typical example.

2) Even if there is adjudicative proceeding before a tribunal other than your former City agency, however, the exception will be available only if that proceeding was not pending at your City agency while you worked there. This means, generally speaking, that the proceeding must have not been on the docket of your agency during your tenure – which might include your agency having commenced an investigation into the underlying allegations, been served with a complaint, or brought enforcement proceedings. This requirement that the matter not have been “pending in the agency” during your tenure is sometimes a nuanced one, so do not assume that this requirement has been satisfied.

3) If the conditions for the litigation exception have been met (there is an adjudicative proceeding before a body other than your former City agency AND that matter was not pending in your former agency during your tenure there), what will this exception permit? The short answer: you may, during your first post-employment year, have *any and all* communications with employees of your former City agency that are related to your involvement in that proceeding. So, for example, if you are a former Law Department attorney who, six months after leaving City service, is retained to represent a client in state or federal court on a matter that just arose (that is, a matter that clearly was not pending at the Law Department during your tenure) and the City is the opposing party, you may have any and all conversations with your opposing counsel at the Law Department, from scheduling conversations to settlement negotiations.

The Takeaway

When the “litigation exception” is available, it permits the full range of communication with your former City agency during your first post-employment year. But certain conditions must be satisfied first. And, if those exceptions are not satisfied, your post-employment communications will violate the one-year appearance ban, thereby exposing you to civil fines of up to \$25,000 per violation. A word to the wise: consult with the COIB if you are in any doubt as to whether your proposed communications would be permissible.

MORE QUESTIONS?

WHEN IN DOUBT, CHECK IT OUT! FREE LEGAL ADVICE FROM COIB.

There are plenty of additional topics not covered here that might be relevant to your personal situation.

Our attorneys will be happy to walk you through all the details you need to know.

Call the New York City Conflicts of Interest Board at **(212) 442-1400** for free legal advice .

All questions are confidential, and you may contact the Board anonymously.

