

**CITY OF BIRMINGHAM**  
**BOARD OF ETHICS**  
**COMPLAINT 2004-02**  
**MINORITY OPINION**  
**JUNE 8, 2004**

I agree with my colleagues' decision that a city board member may advocate on behalf of a person who has brought a lawsuit against the city and certain of its officials. I write separately because I do not agree with my colleagues' decision that it is a violation for a volunteer member of a city board to be a signatory to or a fiduciary of a bank account established to pay the cost of litigation against the city. My colleagues find a violation of four separate sections of the Ethics Ordinance on very narrow grounds. I think they place too much importance on a distinction without a practical difference. More importantly, the way they approach the problem takes more responsibility for judging individual personal conduct than the Ethics Board was meant to have.

My colleagues conclude that Mr. Seger violates Section 2-324(a)(6) because his fiduciary responsibility to the Kulak Defense Fund is inconsistent with his duty as a member of the General Investment Committee, which they characterize as "involving maximizing the financial resources of the City". When I examine the real duties in Mr. Seger's public and private roles, I do not see the conflict.

My colleagues acknowledge that Mr. Seger's duties as a signatory on the Kulak Fund bank account are to see that the funds are spent only to pay expenses for which they were donated. This is a very limited duty that has no involvement with any of Mr. Seger's official duties. I believe my colleagues correctly summarize his duty in their findings. They note that as a member of the General Investment Committee, Mr. Seger is to "assist the City Treasurer in determining the types of investments which are most appropriate within the investment policy approved by the City Commission, and to report annually to the City Commission on investment performance". In the Barnum Study Committee, he is part of a group which is to "gather data, develop an acceptable plan for the interim and long term public use of the Barnum facility, and make recommendations to the Department of Public Services, and ultimately the City Commission." Neither of these tasks "involve maximizing the financial resources of the City". In either case, Mr. Seger could properly advocate policies that give up the possibility of making additional money to serve a more important purpose, such as preservation of capital or free public use of the Barnum Center.

I do not believe that the duty to see that privately donated funds are spent for the purpose for which they were donated creates a conflict of interest with the advice Mr. Seger gives the City Treasurer or the data he gathers or recommendations he wants to make as a member of the Barnum Study Committee. Section 2-324(a)(10) lists those situations where a conflict of interest exist. None apply to this circumstance. Mr. Seger has no financial or personal interest in the outcome of the Mr. Kulak's lawsuit against the City. Whether Mr. Kulak wins or loses, Mr. Seger's conduct does not violate any other of Michigan's conflict of interest laws.

My colleagues agree that the Ethics Ordinance cannot properly be read to prohibit Mr. Seger from advocating Mr. Kulak's cause or soliciting funds.<sup>1</sup> By the same logic, Mr. Seger, like any public official, would not violate the Ordinance by urging Mr. Kulak to file or to pursue that suit.

My colleagues say that assuring that restricted funds are used only for the purpose donated is incompatible with the public interest under Section 2-320; tends to undermine respect for City officials, City employees and the City as an institution under Section 2-321; and might result in or create the appearance of affecting adversely the confidence of the public or the integrity of the City government under Section 2-323.

I think this analysis ignores the higher purpose of the Ordinance. This Ordinance could be interpreted in various ways. If Board members base their decisions on their personal view of whether conduct violates the spirit of the Ordinance, the Ethics Board could end up being the judge of propriety in every local political dispute. In my opinion, more appropriately, the Board should keep its focus on the higher purpose of the Ordinance by applying well-accepted community norms, mores and standards, and not personal opinion, to the broad, general statements of Sections 320, 321 and 323 of the Ethics Ordinance. I think saying a check signer is unethical under the general standards of the Ordinance, but advocating in favor of Mr. Kulak's lawsuit is not, crosses the line between personal judgment and community norms. I do not believe the community at large will see this as a distinction that makes a difference. The question is not whether I or any other Board member thinks it is a good idea to be a signer of a check for a legal defense fund while serving on a City board. The issue is whether it is so contrary to our community's consensus that it is incompatible with the public interest,

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<sup>1</sup> My view of this would be different if Mr. Seger offered to take some official act in exchange for a contribution to the Fund. There is no allegation that anything like this occurred.

undermines respect for City officials or adversely impacts public confidence in the integrity of City government.

The issue before us clearly arises from a political dispute within the City. There are citizens of Birmingham who believe that Mr. Kulak was properly removed from the Planning Commission, and there are those who believe it was wrong of the City Commission to remove him. We cannot ignore the fact that the peripheral issues which may be generated by any political dispute will also create a political disagreement. Some may believe filing a court action to establish Mr. Kulak's rights is proper, and some may believe it is not. Some may believe filing one court action is proper, but filing a second is not. Some may believe that City volunteers who disagree with the decision of the City Commission must choose between continued service, or silence and inactivity, while others may think the best interest of the City is in encouraging City volunteers to express their views in every and any forum, even if those views are unpopular. The point is that there is not a community consensus on the main subject, much less the narrower question of whether a member serving on a City Board may be one of three check signers on an account whose sole purpose is to pay legal expenses for a case that some significant segment of the population believes is lawful to bring.

My colleagues have rendered judgment that the mere fact that Mr. Seger is a signatory on a restricted account used to pay legal expenses for a lawsuit against the City undermines respect for City officials and for the City as an institution (Section 2-321), and might result in or create the appearance of affecting adversely the confidence of the public or the integrity of City government (2-323). They also have determined that there is an "irreconcilable conflict between his private interest in supporting Mr. Kulak's cause against the City and the public interest" in violation of Section 2-320.

I do not believe that the Ethics Ordinance empowers the Ethics Board to make such sweeping judgments based upon such broadly-descriptive language in the absence of a violation of the more narrowly-tailored provisions of Sections 2-324 unless when the conduct involves a clear violation of a widely-accepted community norm. Without this type of restraint, the Ethics Board may find itself dragged into a whole series of political issues in the future with undesirable consequences. Section 2-324 lays out in quite specific detail what constitutes a conflict of interest. Before concluding that some conduct undermines respect or may adversely affect the confidence of the public, we must be absolutely certain that we reflect the community consensus,

not our own personal opinion. Yes, there are undoubtedly situations where the Ethics Board can properly venture into this territory. But this is not one of them. I do not see how a member of the General Investment Committee or the Barnum Study Committee violates the Ethics Ordinance by signing checks from donated money to pay the expenses of a lawsuit which the Ethics Ordinance does not forbid him from supporting, or apparently from bringing himself. I fear most people will not understand the distinction either, and will conclude that the Ethics Board is setting a precedent of judging which political activities are acceptable, and which are not based on our own personal opinions, or who holds the majority on the City Council or a civic board at any given time.

The citizens of Birmingham are strong enough in their commitment to democracy to accept that City affairs generate disagreement and that there are a variety of places to express that disagreement. We are more likely to undermine respect for the City as an institution or adversely affect public confidence by creating a precedent which causes the public to believe the Ethics Board is a political body.



**SOPHIE FIERRO-SHARE**