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March 4, 2020

Juan Torres  
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**VIA EMAIL ONLY**

**Re: Thomas McGill, et al. v. John Bassett, et al.**  
**Case No.: D-101-CV-2020-328**

Dear Mr. Torres:

The purpose of this letter is to respond to your request to provide the Town with an opinion addressing the question of whether our firm can represent the Town of Edgewood as its attorney, while at the same time represent Mayor Bassett in a suit naming him as a defendant in both his official and individual capacities. We request that you provide each member of the Governing Body, including Mayor Bassett, with a copy of this opinion.

#### I. INTRODUCTION.

An Amended Complaint filed by three residents of the Town of Edgewood names Mayor John Bassett as a defendant in his individual capacity and official capacity as mayor. Also named as a defendant is the Governing Body of the Town of Edgewood (of which Mayor Bassett is a member). Six causes of action are pled and denominated as COUNTS 1 through 6, respectively, for quo warranto, declaratory judgment, mandamus, fraud, unjust enrichment, and qui tam for a violation of the Fraud Against Taxpayers Act.<sup>1</sup> All of these causes are predicated on alleged wrongdoing and violations by Mayor Bassett of state and local law. The quo warranto cause of action also seeks the Mayor's removal from office.

The qui tam portion of the suit is brought by the same residents on behalf of the Governing Body of the Town of Edgewood, on relation of the same residents, against Mayor Bassett in his

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<sup>1</sup> NMSA 1978 §44-9-1 through §44-9-14.

individual and official capacities, as well as against his mother and brother who are also defendants. In a qui tam action, a private party called a relator brings an action on the government's behalf. The government, not the relator, is considered the real plaintiff. If the government succeeds, the relator receives a share of the award.

Our firm provides representation to the Town of Edgewood as general municipal counsel through a professional services agreement. The Governing Body of the Town is the Town Council, which is comprised of a mayor and four councilors. We provide legal services to the Governing Body, of which Mayor Bassett is a member. We also closely work with the Town Administration. Under the Rules of Professional Conduct, our duty is to the Town of Edgewood as the municipal corporation. Under normal circumstances, the interests of its constituent parts are not in conflict with those of the Town itself. However, conflicts occasionally arise between the constituent parts of the Town as a municipal corporation and with that in mind we provide this opinion.

## **II. ANALYSIS.**

### **A. REPRESENTATION OF CLIENTS WITH CONCURRENT CONFLICTS OF INTEREST.**

NMRA Rule 16-107 is controlling on whether there is a conflict of interest in an attorney's representation of one client at the same time as another client. It reads as follows:

#### **RULE 16-107. CONFLICT OF INTEREST; CURRENT CLIENTS**

##### **A. REPRESENTATION INVOLVING CONCURRENT CONFLICT OF INTEREST.**

Except as provided in Paragraph B of this rule, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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

##### **B. PERMISSIBLE REPRESENTATION WHEN CONCURRENT CONFLICT EXISTS.**

Notwithstanding the existence of a concurrent conflict of interest under Paragraph A of this rule, a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

A lawyer is strictly prohibited from representing one client if the representation will be directly adverse to the interests of another client. This is termed a concurrent conflict of interest and is defined in paragraph A (1). Another situation where a concurrent conflict of interest arises is when there is a significant risk that a lawyer's representation of one client will be limited by the lawyer's responsibilities to another client, former client, third party or personal interest of the lawyer.

An attorney cannot represent opposing parties in the same litigation where one client is asserting a claim against the other client under Paragraph B (3), even if the clients were to consent.<sup>2</sup>

The simultaneous representation of parties in litigation whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by Paragraph A (2).<sup>3</sup> A concurrent conflict of interest exists if *“there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client”*.

#### **B. THE ALLEGATIONS OF THE AMENDED COMPLAINT.**

For purposes of analyzing whether there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibility to the other client, we need to examine the allegations in the complaint. At least at this stage of analysis, we need to consider the possibility that the plaintiffs are able to succeed on one or more of their causes of action in order to determine the extent to which their legal interests are the same or different. This should in no way be construed as an opinion on our part concerning either the validity of the allegations in the amended complaint or the merits of the case itself.

COUNT 1 of the Amended Complaint is in the nature of quo warranto and seeks to have the district court remove the Mayor from office for allegedly *“making any profit out of public moneys or*

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<sup>2</sup> Paragraph 23 of the Committee Commentary to Rule 16-107. It reads as follows:

#### **Conflicts in Litigation**

[23] Subparagraph (3) of Paragraph B prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by Subparagraph (2) of Paragraph A. A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of Paragraph B are met.

<sup>3</sup> Id.

*using the same for any purpose not authorized by law”* in violation of Article VIII § 4 of the New Mexico Constitution.<sup>4</sup> If the Mayor is found to have committed any such prohibited acts, he would be deemed to have forfeited his office and would continue to hold the office as a usurper.<sup>5</sup> Should a court find him to have forfeited his office for this reason, Mayor Bassett would be disqualified to hold public office, and would not qualify for re-election.<sup>6</sup>

The Town’s interest would be for any elected member of its Governing Body who has forfeited office to be removed. If the Mayor were to be found to have committed wrongdoing that resulted in the forfeiture of his office, he would be barred from ever holding public office – a legal interest which is his as an individual and which does not impact any legal interest of the Town.

COUNT 2 of the Amended Complaint is for declaratory judgment wherein the Plaintiffs seek to have the court declare that Mayor Bassett violated the Town’s Nepotism Ordinance by twice appointing his first cousin to the Town’s Planning and Zoning Commission. It further asks the court to declare that the Mayor is subject to the penalties of that Ordinance, including removal and prosecution for a misdemeanor. The Mayor’s cousin resigned from the Commission in November of 2019.

The Town’s interest is to have its ordinances obeyed and not violated by anyone, including elected or appointed officials of the Town.

COUNT 3 of the Amended Complaint is for a writ of mandamus directing the Mayor to enforce the Town’s Nepotism Ordinance by immediately resigning. It also seeks to have the court issue mandamus ordering the Town Council to file a complaint or other proceedings against Mayor Bassett for malfeasance in office.

The legal interests of the Mayor and the Town Council would not conflict since they would both be defending their respective discretionary authority. If COUNT 3 were the only cause of action, there would arguably be no conflict of interest in representing both the Mayor and the Town Council.

COUNTS 4, 5 and 6 of the Amended Complaint all deal with official actions taken by Mayor Bassett allegedly to enable a Town sewer line extension to be constructed through property owned by his mother, brother and/or a family trust for their benefit.

COUNT 4 of the Amended Complaint is for alleged fraud on the part of the Mayor for misrepresentation and failure to disclose that certain parts of the sewer line extension would be constructed on land owned by his family members, and seeks to have him “disgorge and repay the Town of Edgewood for any benefits received, or reimburse the Town for any losses incurred as a

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<sup>4</sup> Section 4 of Article VIII of the New Mexico Constitution provides:

Any public officer making any profit out of public moneys or using the same for any purpose not authorized by law, shall be deemed guilty of a felony and shall be punished as provided by law and shall be disqualified to hold public office.

<sup>5</sup> *State ex rel. Martinez v. Padilla*, 1980 NMSC 064, 94 N.M. 431, 612 P.2d 223.

<sup>6</sup> *Id.* at ¶ 18, citing *State v. Bohannon*, 101 Az. 520421 P.2d 877 (1966).

result of his fraudulent representation.” (Amended Complaint ¶ 106). This cause of action is against the Mayor individually and not the Town of Edgewood or the Town Council.

The Town’s interest, obviously, would be to recoup any Town funds expended as a result of misrepresentation by any person. Were the Plaintiffs to be successful on this cause of action, the interests of the Town and the Mayor would be opposed.

COUNT 5 of the Amended Complaint is strictly against Mayor Bassett’s mother, Josephine Bassett, and his brother, Eugene Bassett, for alleged unjust enrichment, and seeks reimbursement to the Town for the value of the sewer improvements to their properties.

The Town’s interest, obviously, would be to recoup any Town funds expended as a result of misrepresentation, including those persons who are found to have been unjustly enriched. Although the Mayor is not a defendant in this cause of action, the interests of his family members are directly the opposite of the Town’s if the Plaintiffs were to succeed.

COUNT 6 of the Amended Complaint is against the Mayor and his mother, but not his brother Co-Defendant Eugene Bassett. It is brought by the Plaintiffs as relators in a qui tam action on behalf of the Town under the Fraud Against Taxpayers Act. It seeks treble damages, civil penalties and the costs of the action, including attorney fees from the Mayor and his mother.

Since this qui tam action is nominally brought on behalf of the Town against the Mayor and his mother, their interests are entirely different as opposing parties, and representation would be prohibited by Rule 16-107 B (3), even if both clients were to consent.

### III. CONCLUSION.

This firm cannot represent either Mayor Bassett or the Town of Edgewood in this suit, since there is a concurrent conflict of interest in five out of the six causes of action pled in the Amended Complaint. The Mayor and the Town’s Governing Body are co-defendants in one out of the six causes of action (COUNT 3).

1. In the qui tam cause of action (COUNT 6), the Town is the nominal plaintiff against the Mayor and his mother as co-defendants. Our representation of both the Town and the Mayor would be prohibited by Rule 16-107 B (3).
2. The interests of the Town are the opposite of those of the Mayor if the Plaintiffs are successful for any of the causes of action in COUNT 1 (quo warranto), COUNT 2 (declaratory judgment), and COUNT 4 (mandamus);
3. The interests of the Town are the opposite of the Mayor’s mother and brother for Count 5 (unjust enrichment), which would be imputed to the Mayor; and

4. Potential cross examination of any of the members of the Governing Body on behalf of the Mayor or vice versa certainly presents a significant risk that the representation of one or more members of the Governing Body, including the Mayor, would be materially limited by our responsibility to the other members. This alone demonstrates that the conflict of interest would be insurmountable.

Please contact us if you have any questions with regard to our determination as set forth in this opinion. Thank you for your attention to this matter.

Sincerely,



William W. Zarr

WWZ/clm

cc: Mayor John Bassett, Mayor  
Sherry Abraham, Councilor  
John Abrams, Councilor  
Linda Holle, Councilor  
Audrey Jaramillo, Councilor