



OUTSIDE COUNSEL GUIDELINES

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TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION	1
CONFLICTS OF INTEREST	1
A. No Waiver of Conflicts	1
B. Counsel Are Responsible for Adhering to all of the Rules of Professional Conduct	2
C. The State's Conflicts Requirements Go Beyond Those the RPCs Mandate	2
1. Client Conflicts	2
2. Positional Conflicts	3
D. Initial Conflicts Check	4
E. Continuing Obligation	4
F. No Representation of Other Persons/Entities Absent Approval	4
G. Withdrawal	5
H. Adherence to Ethical Standards	5
I. Gratuities	5
OUR WORKING RELATIONSHIP	5
A. Retention	5
B. Identification of Objectives/Relationship Attorney	6
C. Bond/Transactional Retentions - Requirement for Fee Caps	7
D. Staffing	7
E. Rates	7
F. Discovery	8
G. Settlement	8
H. Exceptions to the Guidelines	8
I. Media Relations/Law Firm Advertising	9
J. Engagement of Secondary Law Firms	9
K. Engagement of E-Discovery and Other Vendors, Including Experts	9

L. Malpractice Insurance	10
M. File Retention	10
CONFIDENTIALITY	10
INVOICING POLICY	11
A. Invoicing Rules	12
B. Expense-only Invoices for Vendor Expenses	18
C. Appealing from Deductions	18

APPENDIX A - CREATING & SUBMITTING AN INVOICE ON COUNSELLINK

APPENDIX B - USING COUNSELLINK TO ATTACH A DOCUMENT

APPENDIX C - CONFIDENTIALITY AGREEMENT

APPENDIX D – PAYMENT VOUCHER

APPENDIX E – MAY 15, 2019 LEGAL OPINION OF ATTORNEY GENERAL GREWAL

I. INTRODUCTION

The Attorney General of New Jersey, through the Department of Law and Public Safety, Division of Law ("Division"), serves as legal representative and counsel for the departments, boards, offices, authorities, agencies, commissions, and other instrumentalities of the government of the State of New Jersey ("State"), along with their officers and employees. When appropriate, the Division will retain outside counsel to represent the State.

In those cases where the Division retains outside counsel, the objective of these Outside Counsel Guidelines ("Guidelines") is to ensure that outside counsel provide the highest quality of legal representation and services for the State while maintaining effective supervision and cost controls.

These Guidelines are effective for all work performed as of the date of issuance. They supersede previously issued guidelines and, unless exceptions are approved in writing by the Director of the Division of Law or his or her designee, constitute the terms under which outside counsel are engaged.

The Division expects you to inform all attorneys, senior managers and billing team members working on State matters of these Guidelines and request that they all personally review these Guidelines. Any questions about these Guidelines should be promptly directed to the Division attorney designated in the written engagement letter as the principal point of contact (the "Designated Attorney"). The Division reserves the right to amend these Guidelines from time to time. The Guidelines are applicable to all duly retained counsel.

By accepting a retention agreement with the State, law firms will be deemed to have familiarized themselves with these Guidelines and to have agreed to adhere to them in all respects, now and as they may change from time to time upon written notice.

II. CONFLICTS OF INTEREST

The Division of Law has a duty to protect the public interest. As part of this responsibility, the Division sets policies to ensure the legal system operates in a manner that safeguards the public's confidence in the integrity and impartiality of its administration.

A. No Waiver of Conflicts.

State agencies cannot waive any conflicts that the Rules of Professional Conduct ("RPCs") prohibit, and counsel should neither request nor expect the Attorney General to grant such a waiver. See RPC 1.7(b)(1), 1.8(l) and 1.9(d).

B. Counsel Are Responsible for Adhering to all of the Rules of Professional Conduct.

Counsel representing a State client must adhere to all of the requirements of the RPCs, including, but not limited to, RPC 1.7, RPC 1.8, and RPC 1.16. For example, a lawyer representing a State client “shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.” RPC 1.8(k).

C. The State’s Conflicts Requirements Go Beyond Those the RPCs Mandate.

1. Client Conflicts

Counsel must avoid a conflict of interest involving the State client they represent. As part of the retention process, the Division of Law will identify those entities the Division deems to be the “client” for conflicts of interest purposes. The Division prohibits counsel that represent a State client from:

- a) Representing private parties before the State client (or its officers) in an adversarial, transactional or non-adversarial proceeding. By way of example and not limitation, outside counsel are prohibited from representing any private party before a State client in connection with applications for government approvals, as well as in quasi-judicial and/or quasi-legislative proceedings before the State client. Outside counsel also may not, on behalf of a private client, lobby a State client they represent.
- b) Representing private parties in any matter in which the State client is also a party, if the private party has interests adverse to the State client.
- c) Representing the State client in a matter in which a private client is adverse to the State if the firm represents the private client in other matters, even if the firm does not represent the private client in the matter involving the State client.
- d) Representing the State agency in a matter in which a private client appears before the agency, submits an application to the agency or otherwise is requesting the agency take some action or refrain from taking some action, if the firm represents the private client in other matters, even if the firm does not represent the private client in the matter before the agency.

- e) Representing a private party who has interests adverse to the State client.
- f) Representing another client where the outside counsel's knowledge of the State's legal positions or strategy, derived from the representation or prospective representation of the State client, could be used to the advantage of the other client or to the disadvantage of the State client.

Please note that the Division's designation of the State clients does not relieve counsel of the independent obligation to ensure that counsel fully complies with the RPCs' requirements regarding conflicts of interest. Such a designation does not constitute a waiver of any conflicts of interest in contravention of the RPCs' requirements. The RPCs require a determination regarding whether counsel is simultaneously representing and adverse to the same specific government client. The relevant government client may be a particular Department or Authority, or it may be a specific subsidiary unit within that Department or Authority. Adversity to one governmental unit while representing another governmental unit does not necessarily create a conflict. But a conflict would arise if the governmental units are considered the same client for conflicts purposes. Identification of the particular government client for conflicts purposes is inherently fact bound. On May 15, 2019, Attorney General Gurbir S. Grewal issued the letter Identifying Government Clients for Purposes of Conflicts of Interest. See Appendix E. The letter updates and supersedes the August 2, 1984 opinion of former Attorney General Irwin I. Kimmelman regarding Identifying Government Clients for Purposes of Conflicts of Interest, and provides advice and guidance regarding conflicts of interest involving governmental entities. Counsel should be familiar with the issues and conclusions set forth in the May 15, 2019 letter.

2. Positional Conflicts

A conflict may also arise from counsel's advocacy of positions conflicting with important State interests. Positional conflicts could arise in litigation matters, transactional matters, and lobbying efforts. Prior to your engagement, your firm should carefully review whether any such conflict exists or if there is a potential for such a conflict. Whether a positional conflict exists is a fact-sensitive determination. Outside counsel, however, should generally avoid advocating a position that would limit the authority of the State client, would expand the scope of potential liability of the State client, or would require the State client to divulge information that the State client generally regards as confidential or privileged. Outside counsel must promptly report positional conflicts to the Designated Attorney before the firm accepts an engagement that will require the firm to advocate a position that may be adverse to a State legal interest or otherwise prejudicial to the interests of the State. Outside counsel have a continuing obligation to ascertain whether positions they intend to assert on behalf of other clients are inconsistent with the interests of the State and must promptly report such potentially adverse positions to the Designated Attorney. After consultation with outside counsel, the Division shall

determine, in its sole discretion, whether an impermissible positional conflict exists, or whether other circumstances exist that would undermine the public's confidence in the fair and proper operation of State government.

D. Initial Conflicts Check

Prior to your engagement, your firm should carefully review whether any client or positional conflicts exist and, if so, bring those conflicts to the attention of the Designated Attorney. The Division expects to be promptly informed of and consulted with respect to all potential conflicts. Although positional conflicts may not necessarily result in a disqualification of your firm, the Division does expect to be consulted before your firm accepts an engagement that will require the firm to advocate a position that may be adverse to a State legal interest or otherwise prejudicial to the interests of the State. The Division in its sole discretion shall, after consultation with you, determine whether an impermissible State agency conflict exists, or whether other circumstances exist that would undermine the public's confidence if your representation continued.

Outside counsel's acceptance of an engagement on a matter without written disclosure of any conflicts constitutes outside counsel's representation that it has conducted an appropriate conflict check and no conflict exists.

E. Continuing Obligation

The obligation to disclose conflicts continues throughout the course of the representation. Outside counsel must review conflicts of interest on an ongoing basis as new matters are opened or new clients are retained. Any new attorney/client relationship that potentially creates a conflict of interest shall immediately be reported to the Designated Attorney.

F. No Representation of Other Persons/Entities Absent Approval

Outside counsel engaged to represent a State entity (as opposed to a named person) should consider themselves to have formed an attorney-client relationship *only* with that entity, and not with any of its individual employees. When speaking with current or former employees of the client entity, outside counsel should, as appropriate, advise those employees that although their dialogue will be considered attorney-client communications to the fullest possible extent, counsel's responsibility is to the client entity and they do not represent those employees in their individual capacities. As a matter proceeds, if employees of a client entity will be examined under oath or interviewed in other adverse contexts, and if outside counsel believes it advisable for them to represent the employees in their individual capacities at such events, outside counsel must obtain the Designated Attorney's advance consent before agreeing to represent such persons in their individual capacities. The Designated Attorney, in consultation with other Division

personnel, will determine if it is appropriate for the individual to receive representation and, if so, by whom.

G. Withdrawal

Counsel that undertake representation of a State client owe a duty to the State client to continue that representation until its conclusion. Accordingly, counsel must not terminate representation of a State client in order to avoid a conflict with another potential client. Nonetheless, if representation is otherwise terminated, outside counsel agree to take all proper action to mitigate the harm to the State client. Among other things, outside counsel must diligently take all appropriate action to ensure an orderly transfer of the representation to new counsel.

H. Adherence to Ethical Standards

The State conducts itself in accordance with the highest ethical standards and expects the same of its outside counsel. No State employee ever has authority to instruct outside counsel to act in an unethical manner. If outside counsel believes that a State employee has engaged or will engage in illegal or unethical activity, the Relationship Attorney must immediately advise the Designated Attorney or, if the alleged breach involves the Designated Attorney, advise his/or her supervisor or the Director of the Division of Law. The Division will terminate its relationship with any outside counsel who, in the Division's sole discretion, fails to adhere to the foregoing ethical standards.

I. Gratuities

State officers and employees are prohibited from accepting any gift, favor, service or other thing of value related in any way to the State officer's or employee's public duties. In addition, Executive Order No. 189, signed by Governor Kean, prohibits any State vendor from offering a gift or other thing of value to a State officer or employee or special State officer in an agency with which the vendor transacts business or offers to transact business. Executive Order No. 189 also prohibits any State officer or employee from soliciting a gift or thing of value from a State vendor. This includes charitable donations made in the name of a State employee.

III. OUR WORKING RELATIONSHIP

A. Retention

An engagement with a law firm consistent with the authority of the Attorney General begins with a retention agreement.¹ Outside counsel must properly execute the

¹ Importantly, the retention runs with the *firm*, not with any attorney assigned to the matter within the firm. If the firm dissolves and that attorney moves to a new law firm, the Designated Attorney will evaluate whether the new firm is eligible to be retained by virtue of being on an appropriate list of approved firms by matter type. The new firm must hold independent eligibility for retention by the State.

original of the retention letter and complete and execute all additional forms the retention packet may require, and must provide all additional documentation or information the retention packet requests. The additional documentation and information is demanded by various statutory and regulatory provisions. This includes, among other things, disclosure of political contributions pursuant to P.L. 2005, chapter 51 and Executive Order 117 (Corzine 2008).

The retention letter contains critical information for outside counsel including the name of the deputy attorney general (DAG) or assistant attorney general (AAG) assigned as the Designated Attorney in a matter who will be your regular point of contact for financial and strategic decisions. (The Designated Attorney may be an employee of another State office or agency.) The retention letter also includes the rates/rate structure and other substantive parameters governing the engagement. Counsel must return to the Designated Attorney a signed original of the executed retention letter, together with all other required information and documents, in accordance with the letter's instructions.

B. Identification of Objectives/Relationship Attorney

The Designated Attorney will be your firm's principal contact with the Division. Outside counsel shall designate a Relationship Attorney to be the Designated Attorney's principal contact. In all matters, the State is responsible for making all substantive decisions and determining the costs and benefits of contemplated legal activity. Division attorneys may act as co-counsel and be engaged with you in the day-to-day conduct of the case. In matters where you are handling that day-to-day conduct without Division personnel as co-counsel, the Division expects to be consulted on a regular basis throughout the course of your engagement and to be kept fully informed of the current status and proposed course of the matters assigned to your firm. All strategic, tactical, staffing (including any proposed staffing changes) and significant resource allocation decisions about State legal matters must be made in collaboration with the Designated Attorney.

Documents prepared for service or filing should be sent to the Designated Attorney with enough lead time to allow for meaningful review (e.g., upon request, a minimum of one week for briefs). You must advise the Designated Attorney when extraordinary circumstances will prevent you from providing the reasonable lead time specified in this paragraph. No motions, briefs or other correspondence with a court may be filed on behalf of the State unless those briefs have been approved by the Designated Attorney or designee. Unless otherwise instructed, outside counsel shall forward copies of all substantive pleadings, motion papers, correspondence and work product to the Designated Attorney, once sent or filed.

Outside counsel must consult the Division **in advance** of all contemplated significant steps in a matter including, but not limited to, pleadings, motions, briefs, settlement discussions, or legal research exceeding two hours.

C. Bond/Transactional Retentions - Requirement for Fee Caps

For bond matters and other transactional engagements, outside counsel may be expected to provide a fee cap for the transaction, approved by the Division, prior to commencing work. Only where a transaction materially changes in scope will the Division consider revisions to an agreed fee cap. **No payments above the agreed fee cap shall be made unless and until a revised fee cap has been approved in writing by the Director of the Division.**

D. Staffing

Outside counsel must submit to the Designated Attorney for review and approval a Staffing Report. The Staffing Report must include all staff from the law firm proposed to work on the matter. Each attorney included on the Staffing Report must be designated as either a Partner or Associate for the purpose of assigning rates. **Outside counsel will not be paid for any work performed by staff not included on the approved Staffing Report.**

A revised Staffing Report must be submitted for approval in the event of any change in the composition of attorneys working on the matter and/or title change of any member of the legal team **prior** to submitting invoices seeking changed/increased hourly rates for that individual. Example: If Associate James Doe, Esq., is promoted to Partner, a revised Staffing Report must be submitted and approved prior to the firm billing Partner rates for Mr. Doe.

In those cases being handled on a contingency fee basis, the above requirements should serve as guidelines for determining outside counsel's lodestar. Similarly, outside counsel shall comply with these Guidelines concerning fees, administrative tasks, disbursements and costs, and travel, notwithstanding the fact that outside counsel may not be submitting monthly invoices for payment to the State. Lodestar information and expenses for which reimbursement will be sought must be submitted at least quarterly via informational invoicing through CounselLink.

E. Rates

The State will pay for actual services rendered at rates set forth in the retention letter. **Because of State procurement rules, the rates applicable at the inception of each specific matter must remain in effect for the duration of that matter.** Hourly rates should include all overhead costs, none of which should be included as disbursements.

Pursuant to Executive Order No. 304 (Murphy 2022), the State may enter a relationship with Outside Counsel on a pro bono basis. A pro bono retention is subject to the conditions outlined in the Executive Order including disqualification from providing

legal services to the State for remuneration throughout the duration of the pro bono relationship and for a period of six months thereafter.

F. Discovery

You must discuss discovery planning with the Designated Attorney at the outset of the matter and throughout the life of the case. The State will insist on processes that mitigate risk and are cost-effective, while meeting all discovery obligations imposed by applicable rules, practices, and orders.

Document review processes should be discussed and agreed upon in advance with the Designated Attorney. In cases requiring significant document review, the Division prefers Technology Assisted Review ("TAR") to manual review when TAR is an appropriate substitute for manual review. Where manual review must be undertaken, the Division generally prefers first-pass review to be conducted by non-associate in-house reviewers or contract reviewers, closely supervised by outside counsel. Only in matters of significant complexity or sensitivity will it be appropriate to use associates for first-pass relevance reviews. We also ask that particular care be given to ensure that internal firm consultation and reporting about reviews is done cost-effectively. In the event outside counsel engages contract attorneys, the associated charges should be passed through as disbursements, with no cost markup.

The parameters for any in-house hosting of TAR and discovery-related platforms (e.g., Relativity) must be agreed upon in advance in writing by the Designated Attorney.

G. Settlement

Outside counsel have no settlement authority unless and until such authority is provided in writing by the Designated Attorney. If you believe that settlement should be pursued, you must seek instructions in this regard from the Designated Attorney, and not pursue formal or informal settlement discussions without the Designated Attorney's written approval. Outside counsel should immediately inform the Designated Attorney of any settlement proposal or overture, formal or informal, by the opposing party or counsel.

Under no circumstances can the State agree to designate a settlement agreement as confidential. All State settlement records are, by definition, public documents. Settlement agreements also may not contain non-disparagement provisions.

H. Exceptions to Guidelines

It is outside counsel's responsibility to discuss with the Designated Attorney all questions concerning the application of these Guidelines before proceeding on a course of action not specifically authorized by the Guidelines.

The State will not reimburse outside counsel for any fees or expenses incurred in violation of these Guidelines.

I. Media Relations/Law Firm Advertising

The State does not authorize outside counsel or vendors to comment publicly in any manner on any aspect of the State's legal matters. All media inquiries relating to the State should be referred promptly to the Designated Attorney and discussed with the Designated Attorney before responding to the media contact in any manner. This includes even "no comment" or other non-substantive responses. If time is of the essence and you cannot reach the Designated Attorney, please contact the Director of the Division of Law or the Director of Communications for the Department of Law and Public Safety. Charges by firms to handle press communications, review/research press statements about the matter handled by the firm or for a press clipping service, will not be approved.

The State does not permit outside counsel to advertise or promote their relationship with the State, other than by listing the State as a representative client.

J. Engagement of Secondary Law Firms

During the course of a matter, if it is necessary to retain a secondary law firm and/or local counsel, outside counsel must consult with the Designated Attorney. Outside counsel may not retain local counsel without the Division's prior written approval. The rates established for local counsel must be approved in writing by the Designated Attorney. Once retention has been approved, the Designated Attorney will determine if the secondary firm should: (1) be managed by, and invoices passed through outside counsel; or (2) register in CounselLink so that it may invoice the Division directly. If local counsel's invoices are passed through outside counsel as a disbursement, outside counsel must submit local counsel's itemized invoices. Local counsel must agree to have their fees and expenses governed by these Guidelines, and the Division will not reimburse local counsel fees and expenses that are inconsistent with these Guidelines.

K. Engagement of E-Discovery and Other Vendors, Including Experts

Before engaging any vendor with costs that may exceed \$2,500, outside counsel must obtain written approval for the engagement from the Designated Attorney or client agency representative. The State will not be responsible for vendor fees or costs greater than \$2,500 unless that vendor's engagement was preapproved in writing by the Designated Attorney or the client agency representative. Outside counsel must contract with vendors themselves. The Division may require outside counsel to engage vendors with which the State has master contracts or preferred pricing arrangements. Vendor costs must be borne by outside counsel in the first instance and submitted to the Division for reimbursement. Outside counsel must provide full copies of vendor invoices as supporting documentation for the vendor expense. Credit card statements and law firm

expense ledgers are not sufficient supporting documentation to accompany the law firm's invoice.

Outside counsel has the responsibility to ensure that there are no conflicts between any vendor and the State. In addition, all vendors must execute the confidentiality agreement attached as Appendix C and upload that agreement to CounselLink prior to submitting invoices for reimbursement. (See also, Section IV., Confidentiality). It is outside counsel's responsibility to confirm that all third party billings comply with these Guidelines.

L. Malpractice Insurance

Outside counsel representing the State are expected to maintain malpractice insurance coverage that is reasonable and prudent in relation to the types and sizes of matters handled. Outside counsel shall, upon request, promptly provide the Designated Attorney with copies of any applicable policies required under this section, and/or a certificate of insurance. Each policy provided must be certified by the agent or underwriter to be a true copy. If outside counsel does not have coverage or if coverage is cancelled and not immediately replaced with comparable coverage, outside counsel must immediately report this to the Designated Attorney for appropriate review and action.

M. File Retention

For Litigated Matters: Outside counsel shall retain pleadings, correspondence, discovery materials, deposition transcripts and similar documents and work product for a period of no less than seven (7) years from the date the matter is concluded or for the time period specified by rule or law in the jurisdiction in which the matter was pending, whichever is longer. Beyond this period, outside counsel shall notify the Division in writing no less than sixty (60) days prior to destroying any file. Along with the written notification, outside counsel shall submit an inventory of any original State documents contained in the file to be destroyed and a representation that any electronic version of the file will also be destroyed or deleted.

For Bond and Other Transactions, and Advice Matters: Documents shall be retained in accordance with the same policies applicable to litigated matters unless applicable law mandates any longer retention schedule. However, bond counsel and transactional/advice counsel shall retain all transcripts of transactions and memoranda of advice indefinitely unless otherwise directed by the Designated Attorney.

IV. CONFIDENTIALITY

In the course of representing the State, outside attorneys frequently gain access to nonpublic and confidential information. The State requires outside counsel to maintain the confidentiality of such information both during and after the course of the firm's representation of the State. Outside counsel must have in place appropriate procedures

to ensure the protection of all such confidential information. In the event the representation requires outside counsel to become privy to protected personally-identifiable information about any person, such as health or financial records, Social Security numbers or other such information, then this information must be handled with the utmost care both within facilities in outside counsel's control, and certainly when that information is being transported. Under no circumstances should such confidential information be transported outside your offices--either physically or over the public internet-unless the information is appropriately encrypted. In the event information is compromised or potentially compromised, outside counsel must notify the Division immediately.

Outside counsel must follow all statutory, regulatory, and ethical provisions relating to privacy, confidentiality and nondisclosure of all privileged, proprietary and confidential information. Outside counsel must take appropriate measures to ensure that all legal and nonlegal personnel are familiar with this requirement and are effectively supervised in this regard.

If a protective order or an agreement governs the disclosure of information, outside counsel shall ensure that all personnel fully comply with the terms of the order or agreement. Outside counsel shall ensure that personnel and vendors execute and deliver such documents as the order or agreement requires in order to obtain access to the information.

Vendors to whom outside counsel give access to confidential or proprietary material of the State (including work product) must sign the confidentiality agreement attached as Appendix C, as noted above. It is the responsibility of outside counsel to obtain a signed confidentiality agreement from each vendor and to retain those agreements. If a protective order or an agreement governs the disclosure of information, outside counsel shall ensure that all personnel fully comply with the terms of the order or agreement. Outside counsel shall ensure that personnel and vendors execute and deliver such documents as the order or agreement requires in order to obtain access to the information.

V. INVOICING POLICY

The State utilizes the LexisNexis CounselLink™ platform as its electronic billing and outside counsel management provider. The State uses this platform for review and approval of all outside counsel invoices and therefore firms must submit all invoices via CounselLink.

CounselLink is compatible with the majority of legal time and billing systems and there is no charge or fee to outside counsel for submitting invoices via CounselLink. Firms and their billing personnel are encouraged to familiarize themselves with the CounselLink platform. Instructions for creating a matter, and uploading invoices and critical documents

can be found in Appendix A and B. Technical Invoice requirements can also be found in Appendix A. Outside counsel also must complete and submit the State of New Jersey's Payment Voucher (attached as Appendix D), for those matters in which the Payment Voucher is a prerequisite for payment.

For litigation, advice, and non-bond transactional matters, outside counsel are expected to submit monthly invoices within thirty days of the conclusion of the billing period, absent the Division's prior written approval. For bond matters, outside counsel are expected to submit their invoice after the conclusion of the transaction.

Invoices must be reviewed by the Relationship Attorney for accuracy, consistency and reasonableness before submission. Every bill from outside counsel is deemed to be a certification by the firm and billing partner that all legal services and disbursements reflected in the bills submitted are reasonable for the legal matter involved and necessary for the proper provision of legal services to the State.

Invoicing Rules are set forth with specificity in section A, below. Compliance with all CounselLink requirements and Invoicing Rules facilitates the efficient processing and review of invoices. Reviewers may deduct charges deemed inconsistent with these Guidelines or otherwise inappropriate. The State reserves the right to audit all fee and disbursement details that outside counsel submit, as well as the corresponding legal file.

Outside counsel should bear in mind that invoices, including the amount approved and unapproved, may be disclosed pursuant to the Open Public Records Act.

A. Invoicing Rules

To ensure the consistent and appropriate scrutiny of legal invoicing, the following rules will be applied to the review of invoices.

Rules may be waived in appropriate circumstances by the Designated Attorney or client agent, where appropriate. For example, specific rules may be waived in matters of special urgency, the presence of imminent deadlines or where cases are in or are approaching trial. Waivers must be sought in advance except where impractical and, in every instance, memorialized in a writing by the firm and uploaded to the matter Documents tab on CounselLink.

1. Billing Time. Time must be billed in 0.1 hour increments and on a per-task basis. The time entry description must be specific, detailing the action taken and the subject matter.
2. Block billing. Outside Counsel may not block bill. This means that each line on an invoice should reflect a discrete task. Grouping multiple activities under a single time charge will result in the line being disapproved for payment.

3. Ten-Hour Limit. The Division will not approve more than ten (10) hours of time by a single timekeeper in a single day, across all matters that timekeeper may be working on for the State.
4. Multiple Timekeepers. Excluding transactional/bond matters, outside counsel may bill for only one (1) attorney to attend events such as depositions, witness meetings, settlement conferences, motion arguments, negotiations, meetings with other parties' counsel and appellate arguments. Outside Counsel may bill for only two (2) attorneys to attend a jury trial.
5. Intra-office conferences. Outside counsel may bill **only** for the most senior attorney attending firm intra-office conferences.
6. Support Personnel tasks. The State will not pay for time billed by attorneys or paralegals to perform tasks (filing, indexing, etc.) that could and should have been handled by support personnel.
7. Excessive Time/Efficiency. If the Division determines that excessive time was spent on a particular task, the time billed will be reduced prior to approval.
8. Duplication of Effort. Attorney and paralegal assignments should not result in unnecessary duplication of time or effort. Additionally, where multiple attorneys are billing for the same task, only one attorney's time will be approved.
9. Proofs of Service. Time billed for preparing proofs or certifications of service will not be approved.
10. Transmitting/Serving/Filing Documents. Time billed for preparing standard transmittal letters, transmitting documents, forwarding attachments, serving documents or filing (electronic or hard copy) documents will not be approved.
11. Uploading/Downloading Documents. Charges for uploading or downloading items into electronic files or platforms will not be approved.
12. Receiving E-Court Notices. Time billed for receiving E-Court notices will not be approved.
13. Intra-Office Communications. Time billed for preparing or reviewing intra-office communications will not be approved.

14. Legal Research. Outside Counsel may not bill for basic legal research. Outside counsel are expected to be familiar with the basic substantive law and rules at issue in the matter for which the firm was retained. If legal research benefits other clients, only the proportionate share of that cost should be billed to the State. The State expects to benefit from previously prepared briefs and memoranda, and when such briefs or memoranda exist, will pay only for actual time spent updating or tailoring the same. **Legal research projects of more than two (2) hours duration must be approved in writing in advance by the Designated Attorney before the research is commenced.**
15. Supervising/Training/Assignment of Work. Outside Counsel may not bill for any routine training or supervisory time, which includes assigning tasks, obtaining status updates from associates on work to be completed, managing workflows or receiving work assignments. Also included in this category is time billing for “getting up to speed” that may result from staffing changes at your firm.
16. Overhead Charges. Outside Counsel may not bill for overhead charges which the State deems to be part of the firm’s overhead and built into its rates. Listed staff, tasks and expenses below are considered overhead and will not be approved:

Staff

- a. Librarians;
- b. Secretaries;
- c. billing, filing, docketing or document clerks;
- d. internal messengers/couriers;
- e. temporary or clerical support staff;
- f. word processors; and
- g. IT professionals.

Tasks and Expenses

- a. billing inquiries and inquiries/communications regarding invoicing;
- b. conflicts checks and investigating potential conflicts;
- c. preparing Staffing Reports;
- d. opening and closing files;
- e. reviewing and executing retention agreements;
- f. internal filing;
- g. general administrative and/or clerical tasks;
- h. word processing or proofreading;
- i. maintenance of a calendar or tickler system;
- j. preparing audit letter responses;
- k. library usage (including book purchases or subscriptions);

- l. office supplies;
- m. conference room charges/facilities fees/rent (including temporary office space);
- n. postage;
- o. Westlaw, Lexis and other legal database services;
- p. Expert, IDEX and Verdict searches;
- q. PACER fees;
- r. cost or usage of computers or mobile devices or internet service charges;
- s. equipment rental;
- t. storage charges;
- u. catering for internal meetings;
- v. telephone or teleconference charges;
- w. facsimile charges;
- x. allocated charges from a firm's blanket service agreements with outside vendors;
- y. expenses incurred to register as a vendor with NJSTART; and
- z. late payment fees, interest, or penalties of any kind.

17. Copying, Printing, Scanning and Bates-stamping. Outside counsel may bill a per-page charge for copying and printing in connection with document productions, trial preparation, and required hard-copy filings. Outside counsel may not otherwise bill a per-page charge for copying and printing. Copying charges may be billed to the State at the lesser of the most favorable rate applied by your firm or eight cents (\$0.08) per page for black and white copies and twenty-five cents (\$0.25) per page for color copies. Use of color copies requires prior written approval from the Designated Attorney.

A per-page charge for document scanning, uploading and downloading will not be approved. Similarly, time billed for scanning or bates-stamping documents as well as scanning and filing court papers and correspondence will not be approved.

18. Couriers and Overnight Mail. Invoices for couriers and overnight mail will not be approved.

19. Court Reporting Services. Outside counsel can request only one official transcript and one DVD. Expedited copies and additional transcript copies will not be approved.

20. Filing fees. The State is exempt from paying any filing fees in the Superior Court of New Jersey (including the trial court level and Appellate Division) and the Supreme Court of New Jersey. **Consequently, any such fees mistakenly**

paid by outside counsel will not be reimbursed. The State will reimburse the actual cost of any approved court filings in any jurisdiction where the State is not exempt from paying applicable filing fees.

21. Disbursements. Outside counsel must itemize out-of-pocket costs. The State will reimburse outside counsel for reasonable, documented and itemized out-of-pocket disbursements and costs incurred on behalf of the State, with the exceptions and limitations set forth in these Guidelines. Outside counsel's invoices to the Division should reflect the actual cost and should not include any markup. All disbursements must be fully itemized with a description sufficient for review.

The State will refuse to pay for disbursements billed as 'miscellaneous,' billed in a group (e.g., Travel Expenses - \$4,000.00) or disbursements without descriptions.

Back-up documentation **must be provided** for all out-of-pocket disbursements and costs. Receipts and invoices are appropriate back-up documentation. A credit card statement or copy of check cut to the vendor is **not** sufficient for review of expense. Copies of receipts shall be submitted to the State along with the firm's invoice in the same billing period as the expense was incurred.

Vendor discounts and rebates must be passed through to the State. If your firm receives a discount or rebate from a vendor based on your aggregate level of business with that vendor, the State expects such discount to be disclosed and to receive the benefit on a proportionate basis. This does not include frequent-flyer miles or similar perquisites allocated to individual travelers.

22. Air and Rail Travel. All air and rail travel, including costs, must be first approved in writing by the Designated Attorney. The State does not reimburse for extravagant expenses, and all air and rail travel must be coach class. Non-working air and rail travel time is not billable. If the travel involves another client, the State can be billed only for its proportionate share of both time and related expenses.

23. Automobile Expenses/Billing for Driving Time. Travel and automobile expenses are reimbursable as set forth below. Notwithstanding the mode of travel, local travel costs (mileage and tolls) for travel of thirty (30) miles or less one-way or sixty (60) miles or less roundtrip will not be reimbursable as counsel is often selected based on geographic proximity to the venue of the matter. Outside counsel must submit documentation (receipts) for parking, tolls, rideshare or other transportation and some documentation to demonstrate miles traveled, such as google maps, to show distance between points traveled.

- a. **Use of Ridesharing.** Use of ridesharing such as Uber or Lyft is permitted, excluding categories such as “luxury,” “lux,” “Lux Black,” “or “XL”. For trips longer than thirty (30) miles one way, outside counsel passengers may bill at full rate if they can demonstrate, with appropriately detailed time entries, that they were actively working on the matter billed while in transit. Time billed by the operator to “wait” or “idle” for outside counsel will not be reimbursed.
 - b. **Use of Taxis.** The use of a taxi is permitted. The local travel restrictions are applicable to taxi service so it is necessary for outside counsel to demonstrate through a detailed receipt or other means that the local mileage standard was exceeded. For trips longer than thirty (30) miles one way, outside counsel passengers may bill at full rate if they can demonstrate, with appropriately detailed time entries, that they were actively working on the matter billed while in transit. Time billed by the operator to “wait” or “idle” for outside counsel will not be reimbursed.
 - c. **Use of Car Service.** Use of a car service for business travel is only permitted when approved in advance and expected to be the most economical option as compared to travel via ridesharing or taxi. For trips longer than thirty (30) miles one-way, outside counsel passengers may bill at full rate if they can demonstrate, with appropriately detailed time entries, that they were actively working on the matter billed while in transit. Time billed by the operator to “wait” or “idle” for outside counsel will not be reimbursed. Tolls may be submitted for reimbursement if billed separately from cost of service.
 - d. **Use of Rental Cars.** The cost of a rental car is only permitted when outside counsel has been approved for overnight travel out of state and it is the most economical option as compared to travel via ridesharing or taxi. If a rental car is the most economical option, the State will reimburse for compact class unless three or more lawyers are traveling together, in which case a full-size car would be appropriate. The driver may bill the associated travel time at 50% of that counsel's agreed rate. Outside counsel passengers may bill at full rate if they can demonstrate, with appropriately detailed time entries, that they were actively working on the matter billed while in transit. The State will reimburse the actual costs of tolls and parking charges. No mileage reimbursement is permitted.
24. Overnight Accommodations. Outside counsel will not be reimbursed for overnight accommodations without prior written approval (including cost) from the Designated Attorney.
25. Reimbursement of Meals for Overnight Travel. The State will only reimburse for meals consumed while traveling overnight on State business, but limited to

no more than seventy dollars (\$70) per person, per day. Under no circumstances will the State reimburse costs for alcoholic beverages.

26. Personal Expenses. Outside counsel must distinguish between personal expenses and properly chargeable business expenses. The State will not reimburse for personal expenses.

B. Expense-only Invoices for Vendor Expenses

In order to facilitate prompt payment of expert and other vendor related expenses, outside counsel may submit expense-only invoices. These invoices must be identified with an "E" at the end of the invoice number. Appropriate receipts or other back-up documentation must accompany an expense-only invoice. Please note that expense-only invoices may not include travel-related expenses incurred by outside counsel. Those costs must be submitted with the invoice itemizing the appearance or meeting necessitating travel.

C. Appealing From Deductions

Outside Counsel may seek review of invoiced charges that were deducted by a reviewer as inconsistent with these Guidelines. All appeal invoices must be submitted through CounselLink consistent with the following protocol:

1. Submit the appeal of the challenged deductions through CounselLink on a separate invoice.
2. Include the letter "A" at the end of the law firm invoice number.
3. Include in each charge description, that "this charge was previously submitted as line item [X] under CounselLink Inv. No. xxxxxxxx."
4. Attach to the appealed invoice, as separate documents, the justification for payment of the deducted charge, original CounselLink Invoice (Click on the picture of 2 mountains in the upper right corner of the screen under "Invoice" tab) and signed Payment Voucher, if applicable.
5. The Division reserves the right to leave in place some or all of the challenged deductions in the original CounselLink invoice. The Division's determinations with respect to the deductions are final.

APPENDIX A

CREATING AND SUBMITTING AN INVOICE ON COUNSELLINK

The Division of Law will use the CounselLink application to receive and process your invoices. To accomplish this, all legal invoices will need to be submitted through CounselLink.

Retained firms are encouraged to **create CounselLink invoices online** using the following instructions:

- Log into www.counselink.net using the assigned login and password
- Click on the Matter Search link on the law firm home page
- Search for the matter on which the invoice is to be submitted
- Select "Create Invoice" from the Action bar dropdown
- Enter information on the "Edit Invoice Screen" if applicable and click on Submit
- Enter fees and expenses from the invoice screen

Be advised of the following **Invoice Requirements** when creating an invoice for review and payment:

- Unique invoice number
- Invoice date
- Matter name
- Division of Law's matter number (DOL Docket Number)
- Outside counsel's matter number
- Date(s) services were performed
- Timekeeper name or ID
- Timekeeper title or level
- A narrative description of the services provided or tasks performed for each specific task. The description should clearly state the nature of the task performed sufficient to allow the Division of Law to determine why it was necessary.
- Time entry to the nearest tenth (.10) of an hour
- Timekeeper rate
- Charge total
- Detail of reimbursable expenses and disbursements at actual cost
- **Where preapproval is required for a specific fee or expense, all preapprovals must be in writing (email is sufficient) and attached to the invoice**

The detailed billing report from your computerized billing system will provide this information. If your firm provides services on more than one matter during a billing period, a separate invoice for each matter is required.

To secure prompt and accurate payments to your firm, invoices in structured data format (LEDES) submitted via the website www.counsellink.net is preferred. However, CounselLink accepts invoices in any one of the following three methods:

1. UPLOAD - Upload a Structured Data File to CounselLink

- Export the invoice to the LEDES (ASCII) structured data format, e.g., LEDES 19988, 199881, 2000 and XML 2.1
- Log into www.counsellink.net using your assigned login and password
- Click on the 'Upload Invoice' link on the law firm home page
- Browse to the saved LEDES invoice, select it and click "Open"
- Complete any other necessary information on the Invoice Submission page and click "Submit File"

2. EMAIL

- Create the invoice using your preferred output format, i.e., pdf; .doc; .txt; or .xis.
- In CounselLink search under the MATTERS tab to obtain the MATTER ID (column 1) and MATTER TITLE (column 2). Copy and paste this information into the body of the email.
- Email invoice documents to counsellinkinvoices@lexisnexis.com
- There should only be ONE INVOICE PER EMAIL, but multiple attachments can be included in the same email.
- Please do not use the "return receipt" option in your email program. A verification email will be sent out that can be used as a receipt.

3. REGULAR MAIL

- Mail an original copy of an invoice on white paper.
- If submitting paper invoices, a separate invoice must be submitted for each matter.
- When submitting invoices for multiple matters at one time, each invoice must begin on a new sheet of paper and must have a unique numerical identifier.
- Unique invoice numbers for individual matters may be created by adding a suffix to the invoice number created by your system, e.g., 12345-1, 12345-2, 12345-3
- Paper invoices should be mailed to:
New Jersey Division of Law c/o LexisNexis Inc.
Attn: CounselLink Invoices
1801 Varsity Drive
Raleigh, NC 27606

Invoices or charges that do not conform to the Outside Counsel Guidelines may be returned to your firm, in whole or in part, for correction at the State's discretion. Common errors resulting in invoices being returned include:

- Uploaded invoice is not in the LEDES format
- Missing or unsigned payment voucher, where applicable
- Unknown Timekeeper
- Matter has been closed
- Invalid Fee Charge
- Invalid Expense Charge
- Missing, Unknown or Incorrect Matter ID
- Missing Invoice Number
- Missing Line Number
- Missing Timekeeper Name
- Missing Line Item Unit Cost
- Missing Line Item/Invoice Total
- Missing Line Item Description
- Duplicate invoice number
- Invoice does not contain a date
- Invoice date is in the future
- Invoice is an exact duplicate of previous invoice
- Charges do not contain a date
- Time increments not in tenths of an hour
- Failure to follow appeal instructions
- Total miles traveled not listed in the Unit column

CounselLink Customer Support

CounselLink technical expertise is available 24/7 to our outside counsel at no cost. For technical support, please contact LexisNexis Examen's Customer Support Department at 800-600-2282, option 2. If outside the United States, please contact 1-919-378-2713.

APPENDIX B

USING COUNSELLINK TO ATTACH A DOCUMENT

Law firms may attach case supporting documents such as third-party invoices and receipts electronically to either an invoice or a matter on the CounselLink platform. Most document formats are accepted including PDF files.

PLEASE DO NOT USE DOCUMENT ATTACHMENT TO SUBMIT LAW FIRM INVOICES.

1. Attaching a document to an Invoice (e.g., expense receipts)

- Log in to <http://www.counselink.net>
- From the Home page, click on either **Created** or **Scheduled** Invoices (dependent upon the status of your invoice)
- Click on the CounselLink Invoice Number
- To add or search for a document, click on the **Documents** link
- To add a document, click on the **Add Document** link
- Type in the document name as you want it to appear in CounselLink
- Browse your file directory for the document to add by clicking the **Browse** button
- Select the **Category** from the drop down
- Select **"Yes"** from the **Shared** drop down
- Select **"Public"** from the **Access Level** drop down
- Click on **Upload**

2. Attaching a document to a Matter (e.g., Retention letter, approved Staffing Report, written memorialization of Guideline waivers)

- Log in to <http://www.counselink.net>
- From the Home page, click on **Matter Search**
- Enter the **Matter Search** criteria
- Click on the Matter ID or Matter Title
- Select **Documents** from the **Action** drop down
- Type in the document name as you want it to appear in CounselLink
- Browse your file directory for the document to add by clicking the **Browse** button
- Select the **Category** from the drop down
- Select **"Yes"** from the **Shared** drop down
- Select **"Public"** from the **Access Level** drop down
- Click on **Upload**

APPENDIX C
CONFIDENTIALITY AGREEMENT

CONFIDENTIALITY AGREEMENT

_____ (Subcontractor), as a contractor of the law firm retained by the State of New Jersey, hereby acknowledges and agrees as follows:

1. All documents and data, including but not limited to financial, statistical, personnel, customer and/or technical documents, owned or supplied by the State to the Subcontractor, shall be treated as confidential (Documents and Data). The Subcontractor shall take all necessary and reasonable precautions to ensure that the State's Documents and Data are safeguarded. Use of the Documents and Data is strictly limited to that use necessary to complete the scope of work agreed upon, which may include disclosure to employees, officers or agents of any subcontractor assisting with the scope of work. Any other use, and any sale or offering of the Documents and Data in any form by the Subcontractor, or any individual or entity in the Subcontractor's charge or employ, will be considered a violation of this Confidentiality Agreement and may result in termination of the agreement between Subcontractor and the law firm retained by the State, and the Subcontractor's suspension or debarment from State contracting. In addition, such conduct may be reported to the State Attorney General for possible criminal prosecution.

2. Subcontractor shall be responsible to ensure that all agents and individuals or entities in the Subcontractor's charge or employ adhere to this Confidentiality Agreement. A breach of confidentiality by any individual or entity in the Subcontractor's charge or employ will be considered a violation of this Confidentiality Agreement by the Subcontractor.

3. In the event that Subcontractor, its agent or any individual or entity in the Subcontractor's charge or employ receives a subpoena, demand, or other request for any of the State's documents or data, Subcontractor shall promptly notify the State and shall not turn over any of the State's documents or data.

4. The Subcontractor shall comply with all applicable State and Federal laws that require the notification of individuals in the event of unauthorized release of personally-identifiable information or other event requiring notification. In the event of a breach of any of the Subcontractor's confidentiality obligations or other event requiring notification under applicable law ("Notification Event"), the Subcontractor agrees to assume responsibility for informing all such individuals in accordance with applicable law and to indemnify, hold harmless and defend the State of

New Jersey and its trustees, officers, and employees from and against any claims, damages, or other harm related to such Notification Event.

5. Upon termination of this Confidentiality Agreement the Subcontractor shall return to Outside Counsel all Subcontractor copies of State Documents and Data, both physical and electronic, and certify in writing that these actions have been completed within 30 days of the termination of this Confidentiality Agreement or within 14 days of the request of an agent of the State, whichever shall come first.

6. This Confidentiality Agreement shall terminate upon the Subcontractor's termination of the contract between the law firm retained by the State and Subcontractor or upon completion of the scope of work related to the State.


Firm _____

By _____

Title _____

Date _____

APPENDIX D
PAYMENT VOUCHER

	STATE OF NEW JERSEY PAYMENT VOUCHER (VENDOR INVOICE)		DOCUMENT						BATCH						ACTG PER	FY
			TC	AGV	NUMBER				TC	AGV	NUMBER					
			PP START			SCHED PAY			CHK	OFF	F	RF	CK	(A) VENDOR ID NUMBER		
MO DY YR			MO DY YR			CAT	LIAB	A	TY	FL						
PO#			PV DATE													

CONTRACT NO.	AGENCY REF	BUYER	(B) TERMS	PAYEE: SEE INSTRUCTIONS FOR COMPLETING ITEMS (A) THROUGH (G)	(C) TOTAL AMOUNT
(D) PAYEE NAME AND ADDRESS				(E) SEND COMPLETED FORM TO:	

(F)	PAYEE DECLARATIONS CERTIFY THAT THE WITHIN PAYMENT VOUCHER IS CORRECT IN ALL ITS PARTICULARS THAT THE DESCRIBED GOOD OR SERVICE HAVE BEEN FURNISHED OR RENDERED AN THAT NO BONUS HAS BEEN GIVEN OR RECEIVED ON ACCOUNT OF SAID DOCUMENT PAYEE SIGNATURE PAYEE TITLE BILLING DATE
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REFERENCE				LINE	(G) PAYEE REFERENCE
DC	AGY	NUMBER			

FUND	AGCY	ORG CODE	SUB-ORG	APPR UNIT	ACTIVITY CD	OBJECT CD	SUB-OBJ	REV SRCE	SUB-REV	PROJECT NO

RPT	BS ACT	DT	DESCRIPTION	QUANTITY	AMOUNT	ID	PF	TX

ITEM NO	COMMODITY CODE / DESCRIPTION OF ITEM	QUANTITY	UNIT	UNIT PRICE	AMOUNT

CERTIFICATION BY RECEIVING AGENCY: I certify that the above article have been received or services rendered as stated herein.	
..... Signature Title
..... Date	

CERTIFICATION BY RECEIVING AGENCY: I certify that this Payment Voucher is correct and just, and payments is approved.	
..... Authorized Signature Title
..... Date	

APPENDIX E

MAY 15, 2019 LEGAL OPINION OF ATTORNEY GENERAL GREWAL



PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
PO BOX 081
TRENTON, NJ 08625-0080

GURBIR S. GREWAL
Attorney General

May 15, 2019

Matthew Platkin, Esq.
Chief Counsel, Office of the Governor
State House, Box 001
Trenton, NJ 08625

Re: *Identifying Government Clients for Purposes of Conflicts of Interest*

Dear Mr. Platkin:

You have asked for our advice regarding whether and when special counsel appointed to represent specific New Jersey state government entities can represent private parties with interests adverse to other New Jersey state government entities. This Office first addressed this issue in an August 2, 1984 letter from then Attorney General Irwin I. Kimmelman (the “Kimmelman Letter,” a copy of which is attached). Subsequent case law has confirmed and expanded upon the position the Kimmelman Letter espoused. In short, the Rules of Professional Conduct (“RPCs”) require a determination regarding whether special counsel is simultaneously representing and adverse to the same specific government client. The relevant government client may be a particular Department or Authority, or it may be a specific subsidiary unit within that Department or Authority. While identification of the particular government client is inherently fact bound, this letter provides general guidance for conducting that conflicts analysis.

An attorney who represents a public body has the same obligation as any other attorney to comply with RPCs regarding conflicts of interest. See, e.g., In re Advisory Comm. On Prof'l Ethics Opinion 621, 128 N.J. 577, 592 (1992); Michels, New Jersey Attorney Ethics § 20:1-1 (2017). As relevant here, RPC 1.7(a) provides that an impermissible conflict 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. In other words, RPC 1.7 establishes that no attorney can serve two masters. See State ex rel. S.G., 175 N.J. 132, 139 (2001). A government entity—unlike private clients—cannot waive such conflicts of interest. RPC 1.7(b)(1); RPC 1.8(l); RPC 1.9(d).

The question thus becomes which government entity qualifies as the represented “client” for conflicts purposes. Longstanding Attorney General guidance and New Jersey case law make clear the State is “so varied, so multifaceted, so extensive that to regard it as one unitary monolithic



employer/client is unrealistic.” In re Opinion 621, 128 N.J. at 597. Indeed, the Kimmelman Letter advised that counsel appointed to represent a specific “agency” may not appear on behalf of private parties before that agency or take adversarial positions against it on behalf of other clients. The Kimmelman Letter recognized that representation of a particular government entity while being adverse to a different government entity does not necessarily create a conflict of interest. The Department has consistently taken that position in the years since.

Subsequent case law has further established that the retention of special counsel for discrete engagements on behalf of one government unit subsidiary to a Department or Authority does not necessarily disqualify the lawyer from being adverse to another unit within the same Department or Authority. In In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697, 188 N.J. 549 (2006), the Court considered whether a law firm was precluded from serving simultaneously as bond counsel for the governing body of a municipality and representing a private client before one of the municipality’s boards or agencies. Id. at 555. The Court held that “an attorney who plenarily represents an agency subsidiary to the governmental entity’s governing body is barred from representing private clients before that subsidiary agency only.” Id. at 553. The analysis was based on an examination of the relationship between the entity represented and the municipality to determine whether counsel for the entity in fact has the municipality as a client for purposes of determining the existence of a conflict with the interests of the attorney’s private client. Id. at 560. The Court concluded that a law firm is “not *per se* precluded from serving simultaneously as bond counsel for the governing body of a municipality and representing a private client before one of [its] boards.” Id. at 568.

The Superior Court’s ruling in the unreported decision in Correctional Medical Services v. State, Docket No. MER-L-2771-08 (Law Division, Mercer County 2008), also confirms that the government client may be a subsidiary component of a Department or Authority. In that case, the court considered whether representation of the Treasury Department’s Division of Pensions and Benefits by Ballard, Spahr, Andrews and Ingersoll, L.P. and that same law firm’s representation of a private party in contract litigation with the Treasury Department’s Division of Purchase and Property created a conflict of interest. Id., slip op. at 1. The court found no conflict. Among other things, the court found that the firm did not represent the Treasurer. Instead, the court concluded that the firm’s representation extended only to the pension plans and the Division of Pensions and Benefits. Id., slip op. at 31-40. The court recognized that the firm was adverse to the Division of Purchase and Property, but that matter was “substantially different and discreet” from the firm’s representation of the Division of Pension and Benefits. Id., slip op. at 50. The court implicitly rejected the notion that the Treasurer or the Department of the Treasury were the clients for conflict analysis in all cases where a firm represented one Division in the Department.

That longstanding conclusion makes sense. The observation that the State is “so varied, so multifaceted, so extensive that to regard it as one unitary monolithic employer/client is unrealistic” is applicable to many Departments within the State. Several Departments have various functions that are distinct and essentially unrelated. For example, Treasury includes, among other entities, the Division of Pensions and Benefits, the Division of Purchase and Property, and the Division of Taxation. The Department of Health includes, among other entities, the Office of the Chief State Medical Examiner and the Office of Health Care Financing. And my own Department includes,

among other entities, the Division of Consumer Affairs, the Division of Gaming Enforcement, and the Division on Civil Rights. The units in a Department do not necessarily share confidential information as part of their day-to-day operations, engage in the same functions, or have the same management teams. Moreover, such units generally retain outside counsel to perform discrete functions that do not involve all of the operations of the larger entity to which that unit belongs. See Fitzgerald v. Linnus, 336 N.J. Super. 450, 470-71 (App. Div. 2001) (recognizing that an attorney and client may limit the scope of representation). In light of the complexity and diversity of the government entities within a single Department or Authority, the representation of one subsidiary unit within a Department or Authority while being adverse to another subsidiary unit will not necessarily create a conflict.

As a result, the RPC conflict analysis requires identifying with particularity which unit is truly the party in interest and is therefore the relevant government client. In some instances, the client may be a Department or an Authority, but in other cases the client may be a subsidiary unit other than a Department or an Authority.

As the above discussion makes clear, the identification of the particular government client is a fact sensitive process that must rely upon a careful analysis. Based on longstanding practice and the relevant case law, factors that may be considered include but are not limited to:

- Whether the matter involves an operation or responsibility that is unique to a particular government unit and is distinct from the operations of the other units within the relevant Department or the Authority.
- Whether retention of outside counsel is limited to a circumscribed and well-defined role. For example, counsel's retention is limited to serving as bond counsel, or providing tax advice to a pension fund.
- Whether outside counsel is dealing primarily with personnel inside the unit when providing advice or formulating litigation and settlement strategy.
- Whether resolution of the matter will directly affect the authority, funding, or privileges of another government unit within the relevant Department or Authority.

The following factors provide additional evidence that a subsidiary unit is the government client, but these factors are not necessary for reaching such a conclusion:

- The represented unit has "sue and be sued" authority.
- The represented unit is "in but not of" the relevant Department.

Please let me know if I can be of further assistance.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Gurbir S. Grewal', followed by a period.

Gurbir S. Grewal
Attorney General