The Florida House of Representatives

Office of the General Counsel

Steve Crisafulli
Speaker

Matthew J. Carson
General Counsel

MEMORANDUM **OPINION 16-01**

To: The Honorable Ritch Workman, District 52

From: Matthew J. Carson, General Counsel

Date: January 26, 2016

Re: House Member Engaging in Certain Business Relationships

You have asked for an opinion as to whether a member of the Florida House of Representatives may conduct business as a driver with a transportation network company.

FACTUAL BACKGROUND

You are a member of the Florida House of Representatives. You also drive a vehicle-for-hire as an independent contractor with Uber ("company"). Uber is one of several transportation network companies ("TNC") that operate in Florida. Generally, a TNC is a company that uses a smart phone application to connect passengers with drivers who use their personal vehicles. There are many thousands of independent contractors driving for TNCs in Florida.[1]

Recently, members of the Florida Legislature have proposed legislation regarding the regulation of TNCs in Florida.

The issue to be addressed is whether this arrangement presents a conflict of interest or potential voting conflict under the Florida Constitution, Florida Statutes, or the Rules of the Florida House of Representatives.

[1] http://www.sun-sentinel.com/features/fl-uber-drivers-second-jobs-20150522-story.html ("Uber officials say they have more than 12,000 drivers in South Florida's tricounty area.")

ANALYSIS:

Conflict of Interest

Section 112.313(7), Fla. Stat., prohibits contractual conflicts of interest between a member and entities or agencies subject to regulation by his agency.

> (a) No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.
> [. . .]
> 2. When the agency referred to is a legislative body and the regulatory power over the business entity resides in another agency, or when the regulatory power which the legislative body exercises over the business entity or agency is strictly through the enactment of laws or ordinances, then employment or a contractual relationship with such business entity by a public officer or employee of a legislative body shall not be prohibited by this subsection or be deemed a conflict.

In this instance, your agency is the Florida Legislature. Under the first prong of § 112.313(7)(a), Fla. Stat., it is my opinion that there is no prohibited conflict related to you regarding the company. To the extent that the company is regulated by the Legislature through the enactment of laws, the exemption provided in § 112.313(7)(a)2, Fla. Stat., would make the prohibition inapplicable. Section 112.313(7)(a), Fla. Stat., also prohibits a member from having a contractual relationship with any business entity doing business with or regulated by their agency. Nothing in your request suggests that you or the company will be doing business with the Legislature. Nor is there any indication that there is something unique or extraordinary about this business that would create a continuing or frequently recurring conflict between your private interests and the performance of your public duties, or which would impede the full and faithful discharge of your public duties. In *Zerweck v. State Commission on Ethics*, 409 So.2d 57 (Fla. 4th DCA 1982), the District Court of Appeal concluded this provision establishes an objective standard which requires an examination of the nature and extent of the public officer's duties together with a review of his private interests to determine whether the two are compatible, separate and distinct, or whether they coincide to create a situation which "tempts dishonor." I am not aware of anything in the facts above or inherent in your employment with the company that creates a conflict that would "tempt dishonor."

Nonetheless, you should avoid any appearance of seeking favorable treatment for the company as the result of your public office. In CEO 77-168, the Commission stated:

> The preamble to s. 8, Art. II, is as follows: "A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. . . ." Reading this language in conjunction with subsection (e), the purpose of that subsection appears to be to secure the public trust against abuse by prohibiting a legislator from using the influence of his office over state agencies in order to gain benefits for a private client. However, this provision also operates to prohibit members of the Legislature from undertaking to represent clients in situations which would give the appearance of improper influence even in the absence of intentional efforts to misuse the power of legislative influence.

Accordingly, I would advise that you refrain from combining business pertaining to the company with your legislative business. For example, if you are meeting with someone related to the company's business, refrain from discussing matters related to legislative business, and vice versa.

Voting Conflict

As you begin to consider legislation that comes before you, please keep the following in mind.

House Rules 3.2 and 9.1 obligate every member to vote on each matter that comes before them in any committee or subcommittee to which they have been appointed and upon each question that is put to them during session, unless required to abstain. A member must abstain from voting on "any measure that the member knows or believes would inure to the member's special private gain or loss" *and* must disclose the conflict. *See* House Rule 3.2(a). Not voting on a measure does not relieve you of the obligation to disclose your reason for abstaining. A member would be obligated to vote on all other matters, but the member must disclose certain other conflicts which may exist.

Under the House Rules, a member must disclose a conflict vote in three circumstances. A member must disclose a conflict vote on any measure that the member knows or believes would inure to the special private gain or loss:

1. Of any principal by whom the member or the member's spouse, parent, or child is retained or employed,
2. Of any parent organization or subsidiary of a corporate principal by which the member is retained or employed, or
3. Of any relative or business associate of the member.

See House Rule 3.2(b)(l).

For the purpose of the rule and statute the terms *know* and *believe* are not clarified or otherwise defined in statutes or interpreting case law. "[W]here a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense." *See State v. Hagan*, 387 So.2d 943 (Fla. 1980). Knowledge is defined as "[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact." Black's Law Dictionary, 9th ed. (2009). Belief means "[a] state of mind that regards the existence of something as likely or relatively certain." Black's Law Dictionary, 9th ed. (2009). Using these definitions, a member would have the requisite knowledge or belief where the member has no substantial doubt about the existence of a special private gain or loss or that a special private gain or loss is likely or relatively certain related to their vote on a measure. Where the prospect of a special private gain or loss is speculative or uncertain, the requisite knowledge or belief would be lacking. Where a member has such knowledge or belief of a conflict *at the time they cast their vote or at the time they abstain*, they must disclose the conflict.

The meaning of "special private gain or loss" does not appear to have been addressed by any Florida state court; however, the Commission on Ethics has approached the term in this manner:

> In a number of opinions, we have analyzed whether a particular vote would inure to the "special gain or loss" of a public officer by examining the "size of the class" of persons who stand to benefit or lose from the measure to be voted upon. *See* CEO 77-129. Where the class of persons is large, we have concluded that "special gain" will result only if there are circumstances unique to the officer under which he or she stands to gain more than the other members of the class. Where the class of persons benefiting from the measure is extremely small, we have concluded that the possibility of "special gain" is much more likely. *See* CEO 90-56. In other words, we have long held that when a measure affects a class of sufficient size, the gain is of a "general" nature and thus is not the "special" gain addressed by the voting conflicts law.
>
> We also typically have concluded that no voting conflict was presented in situations where the interests of the public official involved one percent or less of the class. *See* CEO 78-96 (38 out of 5,000 acres involved); CEO 84-80 (1 out of 500 persons whose property would be down zoned); CEO 85-5 (90% of 250 residents affected); CEO 87-18 (300 out of 29,000 acres); CEO 87-27 (involving the rezoning of a town having a population of 210); CEO 87-95 (650 property owners affected); CEO 91-18 (385 other property owners in the area affected by varying degrees); CEO 92-20 (land-use measures affecting 1,000 condominium units and specifically 500 which could have their northerly view impeded by high-rise construction on their north); CEO 92-52 (owner of two five-acre parcels out of 276 parcels of varying size affected by a 4.5 mile road-widening project); CEO 93-12 (297 persons is not so small a class that gain to a firefighter pension board trustee, as an individual member of the class, would be "special"); and CEO 96-12 (owner of four non-residential parcels out of 605 similar parcels affected by a proposed convention center project.)

CEO 00-13. From a review of the Commission's opinions, it is clear that the operative term is "special." It is not enough for a member or one of the member's conflict relations to receive a benefit or adverse impact from passage or non-passage of a measure; they must receive a *disproportionate impact* compared to the rest of those affected by the measure in a large class or be a part of a small impacted class.

Under the rule and the statute, where such a conflict exists, the member must file a memorandum disclosing the nature of the conflict within 15 days after the vote. *See* House Rule 3.2(c); and § 112.3143(2), Fla. Stat. For floor votes, the memorandum should be filed with the Clerk. For committee or subcommittee votes, the memorandum should be filed with the corresponding administrative assistant. *See id.*

By way of example, HB 509 (2016) would preempt the permitting and regulation of TNCs to the state, and create a regulatory framework governing the operation of TNCs in the state. As stated above, many thousands of independent contractors drive for TNCs in Florida. Accordingly, the class of individuals driving for TNCs in Florida is sufficiently large, and any gain or loss to your personal business interests from passage of HB 509 would be generalized. Therefore, there would be no special private gain or loss, and no voting conflict.

The above opinion is based upon facts which you have provided. If the situation outlined is materially different than the facts offered, or if there are additional relevant facts that have been omitted, I would need to review the new information, and my opinion may change accordingly.

In closing, I would like to provide some additional cautionary advice that is standard in these advisory opinions. The Rules of the Florida House of Representatives, and the Code of Ethics, provide that "[a] member may not corruptly use or attempt to use the member's official position or any property or resource which may be within the member's trust in a manner contrary to the trust or authority placed in the member, either by the public or by other members, for the purpose of securing a special privilege, benefit, or exemption for the member or for others." Rule 15.5; see also § 112.313(6), Fla. Stat. Moreover, a member "may not use or provide to others, for the member's personal gain or benefit or for the personal gain or benefit of any other person or business entity, any information that has been obtained by reason of the member's official capacity as a member and that is unavailable to members of the public as a matter of law." Rule 15.6; see also § 112.313(8), Fla. Stat. While I am not aware of any facts which would indicate that these provisions are applicable to your situation, it would be prudent to keep these in mind. The law grants latitude to members based upon the recognition that they are part-time legislators that require outside employment and have lives outside their public office. That concept sometimes may get lost in public discourse, and what may be a legally tolerated conflict of interest may be viewed as inappropriate or corrupt in the court of public opinion.

cc:
Office of the Speaker
Rules, Calendar & Ethics Committee
Commission on Ethics
Senate General Counsel
OLS General Counsel
Office of the Clerk
Majority Office
Minority Office