



City of Cleveland
Justin M. Bibb, Mayor

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January 8, 2025

Joshua D. Nolan, Esq.
Bricker Graydon LLP
1100 Superior Avenue
Suite 1600
Cleveland, OH 44114-1840
[REDACTED]

Re: Bricker Graydon LLP representation of City of Cleveland and City of Brook Park

Dear Mr. Nolan:

I was extremely disappointed to learn from the media of Bricker Graydon LLP's recent engagement by the City of Brook Park ("Brook Park") with respect to the proposed Cleveland Browns relocation and domed stadium project. For several years, the City of Cleveland ("Cleveland") has engaged Bricker as its trusted legal counsel for confidential advice and communication. This trusted relationship included, among other things, planning for a New Community Authority related to economic development to support the City's professional sports stadium investments. The continued presence of the Cleveland Browns in Cleveland was, and is, an important element of these plans. At a minimum, Bricker should have informed Cleveland well in advance of its intention to play a role adverse to Cleveland's interests.

While Cleveland has already orally terminated its agreements with Bricker, this letter serves to address the termination of these agreements as well as the conflict of interest posed by your firm's representation of Brook Park. Bricker's access to Cleveland's confidential information renders it impossible to now represent Brook Park in such an adversarial posture.

I respectfully ask that you contact the Law Department to address the next steps required of Bricker as a consequence of its conflicting representation.

I. BACKGROUND

Cleveland engaged Bricker for advice and counsel regarding the following:

- American Rescue Plan Act (ARPA) eligibility and regulatory compliance (City Contract No. PS 2021-0237, as amended) (“ARPA Contract”);
- Assistance with establishing a New Community Authority (NCA) and analysis related to potential community development charges (City Contract No. PS 2024*0232) (“NCA Contract”); and
- As-needed legal services for municipal law issues and projects (City Contract No. PS 2024*0339) (“Legal Services Contract”).

In the course of its representation of Cleveland under the above contracts, Bricker was privy to Cleveland’s approach, strategy, and philosophy around sports stadium financing and sports team retention, including the Browns. This information was necessary, in particular, for proper creation and execution of the NCA to support future capital repairs and associated economic development on and around the Gateway stadium properties and Public Auditorium.

Specific details about Cleveland’s duties and liabilities with respect to Gateway and Public Auditorium provide insight into the extent of Cleveland’s ability to negotiate with Haslam Sports Group (“HSG”) to keep the Browns downtown. Such specific information includes, but is not limited to, Gateway East Garage parking revenue actuals (prior to sale of the garage to the Guardians); 2023 Gateway ticket sales and admissions taxes and associated modeling for the Guardians, Cavs, and Browns; Gateway Economic Development Corporation’s capital repair funding deficiencies projections for the next three years; full leasehold information and documents for the Cavs and Guardians; City parking revenue for Canal Basin; City street parking assets and potential revenue; the Gateway funding sources memorandum; and the identity of target properties for inclusion in the Gateway NCA. The collection of information and records was unique to the attorney-client relationship and directed specifically to Cleveland’s game plan for stadium financing and sports team retention, including the Browns.

Despite the trust reposed by Cleveland in Bricker concerning sensitive matters bearing on the Browns negotiations, Bricker entered into an attorney-client relationship with Brook Park that was approved during Brook Park’s December 17, 2024, City Council meeting. Brook Park Mayor Edward Orcutt was quoted as saying Bricker would play a critical role in representing Brook Park’s interests as the city navigates the complex process of negotiating the Browns’ move, securing financing, planning the domed stadium and developing surrounding areas. *Brook Park hires law firm to assist with Browns relocation and domed stadium project*, Cleveland.com (Dec. 27, 2024).

Furthermore, Mayor Orcutt stated that he expects the legal bills that Brook Park accrues from its engagement with you to be paid “as part of the overall costs of the domed stadium project.” *Id.* This is to say: to be paid directly or indirectly by HSG, Cleveland’s counterparty on any number of high-stakes negotiations and disputes involving the Cleveland Browns. To have the owners of the Browns ultimately pay for Cleveland’s former attorneys to represent Brook Park as it works to Cleveland’s detriment on the very issue of the Browns is simply unacceptable.

The interests of Cleveland and Brook Park are directly and indirectly adverse with respect to providing a stadium for the Browns. The team can only play in one city.

II. TERMINATION OF AGREEMENTS

This confirms that the ARPA Contract, the NCA Contract, and the Legal Services Contract are terminated.

Please provide your final invoice for services in December 2024 under the ARPA Contract and any other matters.

With respect to the NCA Contract, several matters need to be addressed. First, please submit a revised invoice based on the value of legal services prior to termination in accordance with Article III of this agreement. The City received Bricker’s Invoice No. 2054627 dated December 11, 2024, in the amount of \$35,000. But, as noted by Bricker attorney Brendan Heil, Esq., this project is under budget on your firm’s end due to the timing of the work. Second, in accordance with Section C of Article I of this agreement, please transfer any files and/or documents not previously provided to the City to me no later than seven business days from receipt of this email. Finally, the City hereby revokes its consent for Bricker to represent any NCA formed as described in Section E of Article I of this agreement.

Finally, as to the Legal Services Contract, please provide your invoice for all services under the agreement and any incomplete or complete reports for which the City is being invoiced for services.

III. CONFLICT OF INTEREST

Bricker’s representation of Brook Park is contrary to the NCA Contract and the Ohio Rules of Professional Conduct. Under Article VI of the NCA Contract, Bricker was contractually obligated to “not acquire any interest, direct or indirect, that would conflict in any manner or degree with performance of services required under this Agreement without approval of the Director.” As Law Director, I assure you Cleveland would not have approved of the dual representation.

Further, such representation is not permitted under the Ohio Rules of Professional Conduct, as Bricker has not requested, and Cleveland has not given, its informed consent to Bricker's representation of Brook Park.

A. Duties to current clients

Rule 1.7, Conflict of interest: current clients, provides:

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

(1) the representation of that client will be directly adverse to another current client;

(2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client or by the lawyer's own personal interests.

(*Italics in original.*)

Official Comment 1 to Rule 1.7 states that all "potential conflicts of interest involving a new or current client must be analyzed under this rule" in order not to "dilute the lawyer's loyalty to the client." *Toledo Bar Assn. v. Rehkopf*, 2018–Ohio–3907, ¶ 8 ("Lawyers must avoid all actual and potential conflicts of interest so as not to dilute their independent loyalty to each client") *quoting Disciplinary Counsel v. Jacobs*, 2006–Ohio–2292, ¶ 8.

Official Comment 2 "provides a roadmap of the five-step analysis required by the rule." *Carnegie Cos., Inc. v. Summit Properties, Inc.*, 2009–Ohio–4655, ¶ 21 (9th Dist.). A lawyer must: (1) identify the clients; (2) determine whether a conflict exists; (3) decide whether the representation is barred regardless of client consent; (4) evaluate whether the lawyer can competently and diligently represent all clients affected by the conflict of interest; and (5) if representation is otherwise permissible, consult with the clients affected by the conflict and obtain the informed consent of each of them, confirmed in writing. *Id.*

At the time Brook Park engaged Bricker to assist with the proposed Browns relocation and domed stadium construction, the firm already was providing Cleveland with legal advice and economic analysis concerning development projects and other vehicles for the lakefront and designed to keep the Browns in downtown. On its face, the dual representation presents an obvious conflict. Brook Park wanted the Browns stadium in Brook Park and Cleveland wanted it in Cleveland. Even if the situation did not pose such an actual and direct conflict given the two cities' adverse interests with respect to the Browns, Bricker still had the contractual and professional obligation to consult with Cleveland and seek its informed consent to the dual representation in writing.

See Article VI of the NCA Contract (prohibiting the acquisition of any interest, direct or indirect, that would conflict in any manner or degree with Bricker's performance of services, without approval of the Director); Rule 1.7, Official Comment 2 (even "if representation is otherwise permissible," a lawyer has the duty to seek the approval of its current client); *Carnegie Cos., Inc., supra*.

B. Duties to former clients

Now that Cleveland has terminated its contracts with Bricker, Rule 1.9, Duties to former clients, applies. Rule 1.9 provides:

(a) Unless the former client gives *informed consent, confirmed in writing*, a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a *substantially related matter* in which that person's interests are materially adverse to the interests of the former client.

(*Italics in original.*)

Official Comment 3 states that the meaning of "substantially related matter" is defined by Rule 1.0(n); *i.e.*, "one that involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation of a client would materially advance the position of another client in a subsequent matter."

As stated in Official Comment 2, the scope of a "matter" for purposes of this rule is context-specific and the lawyer's involvement "can also be a question of degree." Official Comment 1 states that the rule does not just apply to lawsuits between clients, but to matters such as rights under a contract drafted by the lawyer.

Courts apply the following three-part analysis to determine whether counsel should be disqualified under Rule 1.9: (1) is there a substantial relationship between the matter at issue and the matter of the prior representation; (2) if so, can it be said that the former client's attorney has no role in the current matter; (3) if the attorney did have personal knowledge of the related matter, were timely and adequate ethical screens put in place? *Litigation Management, Inc. v. Bourgeois*, 2009–Ohio–2266, ¶ 15 (8th Dist.).

Cleveland and Brook Park have competing interests with respect to a "transaction or legal dispute" under Rule 1.0(n), concerning the location of the Browns stadium. Brook Park also sued Cleveland in Common Pleas Court, in a case going to trial on January 13, 2025, over Cleveland's alleged responsibility with respect to land formerly planned for a new airport runway and now possibly involved in the domed stadium project.

Even if the same attorneys are not involved in counseling Brook Park in these matters, the confidential information about Cleveland's specific planning, finances, and other information material that would disadvantage Cleveland in Bricker's current representation was not limited to just those attorneys. This is reflected by the execution of the Legal Services Contract, under which Bricker was essentially on call for Cleveland, showing a trusted relationship involving multiple attorneys as needed.

In the words of Official Comment 3, Bricker's Cleveland attorneys have "knowledge of specific facts...that are relevant to the matter in question," such that the representation of Brook Park ordinarily should be precluded. *See Musser v. Youngstown Orthopaedic Association, Ltd.*, 2021–Ohio–4301, ¶ 18 (7th Dist.) (the general rule in disqualification cases has been that, "upon proof of a former attorney-client relationship concerning substantially related matters, disclosure of confidences is presumed") (citations omitted).

C. General duties of lawyers

In addition, under the Preamble to the Ohio Rules of Professional Conduct, titled A Lawyer's Responsibilities, and under Rule 8.4, Misconduct, Bricker's participation in a project that would strip Cleveland of one of its most iconic institutions while leveraging knowledge gained during the representation undermines public confidence in the legal profession and the quality of justice. Far from a technical infraction, this implicates the role of an attorney as an officer of the court.

Thus, Bricker's duties to Cleveland are specifically addressed in the Ohio Rules of Professional Conduct, in addition to its contractual obligations contained in Article VI of the NCA Contract.

Given the depth and breadth of the previous relationship between the professionals working for Bricker and City Hall, Bricker's decision to engage with Brook Park on the Browns stadium violates not just words on a page but good faith expectations that Bricker was a partner with Cleveland in public service and preserving the City's iconic institutions. *See, e.g., Haley, Conflicts of Interest for Former Law Clerks Turned Lawyers*, 7 St. Mary's J. Legal Mal. & Ethics 376, n. 182 (2017) (referencing the fact that "a client's feeling of betrayal due to a conflict of interest is important for the legal profession to understand"). To say Cleveland is disappointed would be an understatement.

IV. NEXT STEPS

Please contact me to discuss the concluding work required with respect to the ARPA Contract, the NCA Contract, and the Legal Services Contract, as set forth above.

Given Bricker's conflict of interest, Cleveland reserves all rights. However, I am available to discuss this situation with you and any of your involved colleagues.

Respectfully,

/s/ Mark Griffin

Mark D. Griffin
Director of Law

cc: Mayor Justin M. Bibb
James F. Flynn, Esq.
Melissa M. Carleton, Esq.
John Caleb Bell, Esq.
Catherine M. Swartz, Esq.
Brendan Heil, Esq.