



MICHAEL P. ROSS
BOSTON CITY COUNCIL

November 29, 2010

Dear Colleague,

Attached please find the recommended motion that I intend to submit for your consideration on December 1, 2010 at the City Council public hearing pursuant to Rule 40A with regard to Councilor Chuck Turner. I make this decision with careful deliberation and wish to outline, herein, my reasons for doing so.

In the history of the City Council, no member has ever been removed from the body. No decision could be more consequential, particularly given the voters of District 7's clear intent to re-elect Councilor Turner to his office.¹ Moreover, these voters were well-aware of the allegations at the time, including Councilor Turner's arrest on November 21, 2008 and his subsequent indictment on December 9, 2008.

Notwithstanding the mandate from the voters of District 7, there are other considerations that the Council must incorporate into its decision-making process. It is long settled that legislative bodies, such as the Boston City Council, have the right to determine the qualification of its members to serve and can alone determine appropriate action in the event members fail to act appropriately.² Further, most legislative bodies have long outlined specific rules that govern their members' behavior. For example, the Massachusetts House of Representatives' Rule 16A, and the State Senate's Rules 10 and 10A, which govern member's behavior and ethics, have been in place for decades. The Boston City Council, however, has only recently adopted rules, Rule 40A³, that specifically govern member's behavior.

¹ Councilor Turner was re-elected on November 4, 2009 with 59.83% of the vote.

² See Peabody v. The School Committee of the City of Boston, 115 Mass. 383 (1874) and Whitener v. McWatters, et al, 112 F.3rd 740 (4th Circuit 1997).

³ Rule 40A states:

Pursuant to the city charter and in accordance with the open meeting law, the council president may refer a matter to the council upon his/her determination that any member has engaged in conduct unbecoming a member of the Boston City Council or may be unqualified to sit on the body. A member may be unqualified by violating federal or state law, or any conditions imposed by the city's charter, which includes violating any provisions of the three oaths of office.

DISTRICT 8

BOSTON CITY HALL, ONE CITY HALL PLAZA, BOSTON, MASSACHUSETTS 02201
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Rule 40A was adopted by the Council, unanimously, on January 14, 2009. It was drafted in the aftermath of Councilor Turner's arrest and indictment. At the time, I made a considerable effort to include Councilor Turner directly in the discussions, and in fact, he participated in one of the Council's three public working sessions to draft Council rules, held on January 9, 2009, where Rule 40A was reviewed and discussed. Councilor Turner and I also discussed rule 40A privately.

After the body adopted Rule 40A, I was faced with an immediate decision as to whether or not to act on the arrest and indictment, as the first paragraph of the rule suggests ("...*the council president may refer a matter to the council upon his/her determination that any member has engaged in conduct unbecoming a member...*"). It was my feeling at the time that the arrest and indictment *alone* were not enough to trigger Council action and that any subsequent Council action would await the second part of Rule 40A, if triggered, namely, a "felony conviction."

On October 29, 2010, Councilor Turner was convicted of a felony at the United States District Court. Councilor Turner is now requesting that any action by the Council should be stayed, not upon conviction as our rules prescribe, but after sentencing, which is scheduled for January 25, 2011. Awaiting action until after sentencing would be contrary to our rules, and is also contrary to the general practice throughout the country⁴.

I have worked with Councilor Turner for my entire tenure on this body. We were both elected in 1999, and, since the start of my career I have found him to be a hardworking representative of the people he serves. On nights and weekends, you'll often find Councilor Turner hard at work here in City Hall, tirelessly pursuing solutions to problems and passionately standing up for the issues he cares so deeply about. I respect his commitment to the people of this city.

However, the matter before us today is larger than any one Councilor. We have but one judicial system in this country, and whether we personally agree with the verdict or not, a jury of his peers found Councilor Turner guilty of very serious crimes. As public officials, we are sworn to uphold the laws of this city, state, and nation. As City Councilors, each year, we vote and abide by the rules of the Council. We are not above the law and none of us is above the rules we have established as a body. If we act as if we

The council president shall automatically refer a matter to the council upon a felony conviction of any member by any state or federal court.

Any action by the council taken in response to any referral shall require a two-thirds (2/3) majority roll call vote and will be in accordance with local, state and federal law.

⁴ See Bell v. Treasurer of Cambridge, 310 Mass 484 (1941) citing McKannay v. Horton, 151 Cal. 711, 91 P. 598, 13 L.R.A., N.S., 661, 121 Am.St.Rep. 146; Attorney General v. Montgomery, 275 Mich. 504, 267 N.W. 550; State v. Fousek, 91 Mont. 448, 8 P.2d 791, 84 A.L.R. 303; State v. Jurgensen, 135 Neb. 136, 280 N.W. 886; In re Obergfell, 239 N.Y. 48, 145 N.E. 323; State v. Langer, 65 N.D. 68, 256 N.W. 377; State v. Chapman, 187 Wash. 327, 60 P.2d 245, 106 A.L.R. 640; State v. Livi, 109 W.Va. 277, 153 S.E. 587; Becker v. Green County, 176 Wis. 120, 184 N.W. 715, 186 N.W. 584.

DISTRICT 8

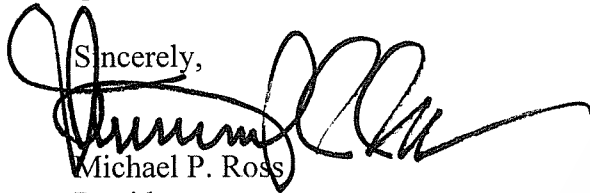
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are, this body loses its credibility, its integrity and the trust of the people we serve. Many are cynical of government as it is, we cannot add to their mistrust.

In the event Council action removes Councilor Turner from the body, as stated, we should work to mitigate the consequences of this action and to ensure the continued representation of the residents of District 7. In such an event, the Council should continue to fund the entire staff of the office of District 7 in order that they continue to provide constituent service to the residents of the district, and they shall continue to do so until a successor is duly elected and seated. In the event the Council action removes Councilor Turner, the Council should move immediately to declare the office vacant, and should take appropriate steps for an immediate special election within the limits of the law.

Attached please find my aforementioned recommended motion, a legal memorandum from Corporation Council further detailing the law as it applies to our contemplated action, and two legal memoranda from Corporation Council regarding the conflict of interest law. Both Corporation Council and myself are available for any further questions.

Sincerely,



Michael P. Ross
President

Enclosures (4)

cc: City Clerk of Boston

DISTRICT 8

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**CITY OF BOSTON
IN CITY COUNCIL**

ORDER OF COUNCIL PRESIDENT MICHAEL P. ROSS

ORDERED: That under the authority vested in the City Council by St. 1951 c. 376, § 17 and pursuant to the procedures set forth in City Council Rule 40A, the City Council, in consideration of his qualification to serve as a member of the Boston City Council, now moves that Councilor Chuck Turner vacate the office of City Councilor effective Friday, December 3, 2010.

Filed in City Council: November 29, 2010



CITY OF BOSTON LAW DEPARTMENT

City Hall, Room 615
Boston, MA 02201

THOMAS M. MENINO
Mayor

WILLIAM F. SINNOTT
Corporation Counsel

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

To: Michael P. Ross, City Council President
From: William F. Sinnott, Corporation Counsel
Date: November 24, 2010
RE: Qualification of a Councilor/Felony Conviction

I. Introduction

The purpose of this memorandum is to outline the legal parameters within which the City Council may make its determination regarding the continued service on the City Council by a City Councilor who has been convicted of a felony. As a general principle, a legislative body, such as the Council, has the right to determine the qualifications of its own members. See Peabody v. The School Committee of the City of Boston, 115 Mass 383, 385 (1874); Brady v. Dean, 790 A.2d 428 (2001). Moreover, a legislative body's right to discipline its members is a core legislative act that a court will not disturb. Whitener v. McWatters, et al, 112 F.3rd 740, 744 (4th Circuit 1997). The City Charter specifically gives the City Council the right to judge the qualifications of its members. St. 1951 c. 376, § 17.

This memorandum will outline the City Council's discretion under the City Charter and its own City Council Rules to determine the qualifications of the Councilors and its ability to take appropriate disciplinary action, up to and including removal. It will then analyze the impact of General Laws Chapter 279, Section 30 on the Council's discretion to remove or discipline and will outline the Open Meeting Law requirements for a hearing on such discipline or removal.

II. Brief Background

On October 25, 2010, City Councilor Chuck Turner was convicted by a jury of one count of attempted extortion and three counts of making false statements to federal authorities, all of which are felonies. During the thirteen day trial, at which the Councilor testified in his own defense, the jury heard evidence that Councilor Turner accepted \$1000 from an FBI informant in order to assist the informant with obtaining a liquor license for a proposed establishment in the Councilor's District and then lied to federal authorities who were investigating the allegations. While the Councilor has denied that this occurred, he has been convicted of these felonies. Sentencing is set for January 25, 2011. You have referred the matter to the full Council for a hearing on December 1, 2010.

II. City Charter and City Council Rules

Under the City Charter, “the City Council shall be the judge of the election and qualifications of its members” St. 1951 c. 376, § 17.¹ The right of the Council to determine whether an individual is qualified to serve as a member of the City Council is a long-settled right. See Peabody v. The School Committee of the City of Boston, 115 Mass 383, 385 (1874). This discretion as articulated by the City Charter is quite broad, but a determination by the City Council that a Councilor does not possess the requisite qualifications must be based upon a reasonable and dispassionate review of the facts surrounding any misconduct. The misconduct in question need not necessarily have led to a criminal conviction to warrant removal from the Council, as the determination of the Council need not be supported by the same evidence required for a finding of guilt beyond a reasonable doubt. However, in this instance a jury has found beyond a reasonable doubt that Councilor Turner is guilty of these felonies, thereby significantly simplifying the task of a reasonable and dispassionate review of the facts.

The City Council Rules are promulgated pursuant to the Council’s authority under the City Charter. City Council Rule 40A establishes the mechanism by which the Council can review the circumstances when a Councilor engages in misconduct, and specifically when a Councilor is convicted of a felony. City Council Rule 40A reads as follows:

“Pursuant to the city charter and in accordance with the open meeting law, the council president may refer a matter to the council upon his/her determination that any member has engaged in conduct unbecoming a member of the Boston City Council or may be unqualified to sit on the body. A member may be unqualified by violating federal or state law, or any conditions imposed by the city’s charter, which includes violating any provisions of the three oaths of office.

The council president shall automatically refer a matter to the council upon a felony conviction of any member by any state or federal court.

Any action by the council taken in response to any referral shall require a two-thirds (2/3) majority roll call vote and will be in accordance with local, state and federal law.”

As evidenced by the clear language of Rule 40A, the City Council President may refer a matter to the Council whenever the President has determined that a Councilor’s conduct renders the Councilor unqualified to serve on the Council. Such referral may happen in the absence of a conviction or even in the absence of a criminal charge, should the Council President consider the misconduct sufficiently egregious. As noted above, this discretion is supported by the City Charter. When a Councilor is convicted of a felony the Council President is **required** to refer the matter to the Council. In this instance, in compliance with Rule 40A, you as President of the City Council have referred the matter concerning Councilor Turner to the full Council.

At the meeting scheduled for December 1st, it is the Council’s obligation to reasonably and dispassionately review the facts surrounding Councilor Turner’s conviction and determine the appropriate action to take. As the arbiters of the qualifications of members to serve on the Council, the

¹ The Massachusetts State Constitution has a similar provision, M.G.L.A. Const. pt. 2 c. 1 § 2, art. 4; pt 2. c. 1. §3, art. 10

City Councilors should consider factors such as the duties of the Council and the Councilors, the integrity of the Council and the public's trust in the Council. While any felony conviction warrants review by the Council, certainly important factors for the Council to consider are the relation the crimes have to the duties and integrity of the Council and the public trust in the Council and its respective Councilors. See Attorney General v. McHatton, 428 Mass 790 (1999) (Chelsea City Councilor disqualified from holding office because while serving as Chelsea Police Officer he had been convicted of six felony counts of filing false income tax returns, which the court determined constituted misconduct in office); See also Bell v. Treasurer of Cambridge, 310 Mass. 484 (1941)(Where Mayor of Cambridge was convicted of one count of conspiracy to accept bribes and four counts of accepting bribes judge stayed execution pending appeal on condition that mayor not perform duties or exercise powers and privileges of office of Mayor).

Of all the factors to consider, perhaps the most critical is the public's interest. "Public officials are elected for the benefit of the community and can and should be removed, irrespective of detriment to the individuals involved if the interests of the community so require." Lubin v. Wilson, 232 Cal. App. 3rd 1422, 1429-30 (1991) (citations omitted)(Elected official removed from office for conviction of racketeering, extortion and conspiracy). When sworn into the office of City Councilor each Councilor takes an Oath of Office swearing allegiance to the Commonwealth, the Constitution and laws of the Commonwealth, and the Constitution of the United States. Each Councilor also swears to faithfully and impartially discharge and perform all the duties incumbent upon the office of City Councilor. The purpose of these oaths is, among other things, to solidify the public trust in the individuals holding these important public offices. In McHatton, the Court found that the defendant's tax evasion violated the oath of office he took as a police officer—a position of public trust.

In this instance the Council should consider the convictions for attempted extortion and lying to federal officials and the relation of these convictions to the office of City Councilor and the integrity of the City Council. The City Council must further determine whether Councilor Turner's convictions violated his oath of office and the public trust. The Council then must ultimately decide whether, given these considerations, Councilor Turner is qualified to serve as a member of the City Council.

Discipline or removal requires a "2/3 majority roll call vote." A default reading under the rules of parliamentary procedure is that unless specifically articulated this means two-thirds (2/3) of the members present and voting. In the context of the City Council Rules, other Rules such as Rule 32 and Rule 47 specifically state that the vote must be two-thirds (2/3) of all the members of the Council. In contrast, Rule 40A's silence must be construed as two-thirds (2/3) of members present and voting. This reading is further supported by the fact that the Councilor impacted by the vote, in this instance Councilor Turner, cannot vote on whether he is permitted to retain his position as a councilor and thus his salary. The Conflict of Interest Law, General Laws Chapter 268A would squarely prohibit his participation in such a vote. As such, any calculation to determine two-thirds (2/3) would not include his vote. However, under the rules of parliamentary procedure, any other abstention would be counted as a vote against a recommended removal or other discipline.

The Conflict of Interest Law may have an impact on other Councilors' ability to vote in this matter if there is an appearance that the vote can be influenced by friendship, past associations, past employment or other significant personal or professional relationships. A Councilor may overcome this appearance and participate in the vote, if he or she publicly discloses the nature of the relationship. Such disclosure must be filed with the City Clerk and should be noted in the minutes of the meeting. If however, the Councilor feels that the conflict runs deeply enough to go beyond a mere appearance and

in fact, he or she cannot be impartial in the vote, the Councilor must abstain from voting and must not participate in any official discussion of the matter. The State Ethics Commission's advice on abstaining in these circumstances is for the Councilor to leave the Council Chambers during discussion and deliberation and to remain outside during the vote. An elected official is not required to disclose the reason for his or her abstention, although it should be noted on the record.

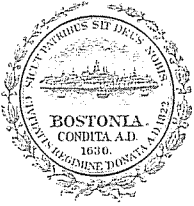
III. Impact of General Laws Chapter 279

Massachusetts General Laws Chapter 279, Section 30 mandates that upon sentencing to imprisonment to a federal penitentiary an elected official must vacate the office he or she holds. This means that if, on January 25, 2011, Councilor Turner is sentenced to a federal penitentiary he will automatically be removed from the City Council by operation of law. This is true whether he actually serves time or he receives a suspended sentence. See Matsen v. Kaiser, 443 P.2d 843 (1968). However, this potential for automatic removal has no impact on the City Council's discretion under the City Charter and its own rules to remove the Councilor from office. As set forth above, such removal can happen absent a criminal charge, let alone a conviction. The Councilors can make this determination at the December 1, 2010 meeting. Moreover, if the City Council decides to delay a decision until January 25, 2011 and a sentence to a federal penitentiary is not imposed, it may be faced with deciding whether the Councilor is nonetheless unqualified to serve on the Council.

IV. Open Meeting Law Requirements

Under the Open Meeting Law the City Council may conduct the hearing to remove or discipline Councilor Turner in executive session. M.G.L. c. 30A, section 21. The Council must provide a minimum of 48 hours' notice of the meeting and its intention to hold the meeting in executive session to Councilor Turner. Councilor Turner may request that the hearing be held in open session. Councilor Turner may have counsel present to give him advice, but said counsel is not permitted to actively participate in the proceedings.

If the hearing is held in executive session, no public will be permitted to observe. If it is held in an open session, the public may observe, but the Open Meeting Law does not require that the public be allowed to participate. In fact, because this is a disciplinary matter for the City Council to determine pursuant to its authority under the City Charter and its rules, public comment is irrelevant and would be inappropriate.



CITY OF BOSTON LAW DEPARTMENT

City Hall, Room 615
Boston, MA 02201

THOMAS M. MENINO
Mayor

November 16, 2010

WILLIAM F. SINNOTT
Corporation Counsel

VIA HAND DELIVERY AND ELECTRONIC MAIL

Michael Ross, President
Boston City Council
City Hall
Boston, MA 02201

RE: *Conflict of Interest Law Requirements for Voting or Abstaining on Certain Matters*

Dear Council President:

You have requested legal guidance relative to the State Conflict of Interest law's provisions on voting or abstaining from certain matters. Pursuant to the 2009 statute, an elected public employee must abstain from "taking any type of official action that could create an appearance of impropriety, or acting in a manner which could cause an impartial observer to believe that [his] actions are tainted with bias or favoritism."¹ An elected City employee may only vote on a matter he must otherwise abstain from after making a full, written disclosure.²

Pursuant to the state ethics law, to overcome the belief that a City Councilor may be influenced in his vote by friendship, past association or past employment, the City Councilor must file a Disclosure of an Appearance of a Conflict form (attached). The State Ethics Commission requires that elected municipal officials make such disclosures in writing and file them as public records with their municipal clerk. It would also be prudent to reiterate the disclosure as part of the meeting minutes.³ Instances where an elected official should file such a disclosure include: actions involving a friend, neighbor, business associate, past employer, or anyone with whom you have a significant personal or professional relationship.⁴ By filing a disclosure, the City Councilor may then take part in discussions and voting around the issue.

¹ See G.L. c. 268A, § 23(b)(3); *State Ethics Commission, Advisory, BHM*.

² "Before taking any type of action which could appear to be biased, [one] must first make a full, written disclosure of all the relevant facts." *Ibid*.

³ See *State Ethics Commission Code of Conduct Advisory*.

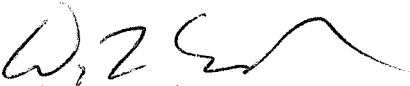
⁴ See *State Ethics Advisory BHM*.

Council President Ross
November 16, 2010
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However, if an elected official chooses not to file a disclosure - in other words, if the elected official is admitting to bias and undue influence by another - he must not act in any way on the matter. The State Ethics Commission's advice on abstaining when a conflict of interest occurs is that "not only must [the elected] employee abstain from voting, he may not participate in any official discussion [or vote on] the matter."⁵ The best course of action is to leave the room during the deliberation and remain outside during the City Council vote. Although it is not required, the elected public employee may chose to disclose the reasons for his abstention and leaving the room.

Thank you for your attention to this matter. Please let me know if you have any questions or concerns

Sincerely,



William F. Sinnott
Corporation Counsel

⁵ See *State Ethics Commission Advisory 05-03*.

DISCLOSURE OF APPEARANCE OF CONFLICT OF INTEREST AS REQUIRED BY G. L.C.268A §23(b)(3)

I make this disclosure pursuant to G.L.c.268 A, §23 (b)(3) in order to dispel any appearance of potential conflict of interest occasioned by the facts set out below, that I may be improperly or unduly influenced in the performance of my official duties, or that I would be likely to act or fail to act as a result of kinship, rank, position or the undue influence of any part or person.

Name:	
Title or Position:	
Agency/Department:	
Agency address:	
Office Phone:	
I publicly disclose the following facts (Attach additional pages if necessary):	
Signature:	
Date:	

G.L.c.268 A, §23 (b)(3): No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know, act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

**Appointed state, county and municipal officials and employees should file with their appointing authority.
Elected state officials should file with the appropriate House or Senate Clerk or the Ethics Commission.
Elected county officials should file with the county clerk.
Elected municipal officials should file with the city or town clerk.**

Attach additional pages if necessary.



CITY OF BOSTON LAW DEPARTMENT

City Hall, Room 615
Boston, MA 02201

THOMAS M. MENINO
Mayor

WILLIAM F. SINNOTT
Corporation Counsel

November 24, 2010

VIA HAND DELIVERY AND ELECTRONIC MAIL

Michael P. Ross, President
Boston City Council
City Hall
Boston, MA 02201

RE: *Conflict of Interest Law Requirements Concerning Participating in Matters in which a Councilor has a Financial Interest*

Dear Council President Ross:

You have requested legal guidance related to Councilor Turner's ability to participate in and vote on the City Council's determination as to whether he is qualified to serve as a member of the Council. There are, in fact, explicit prohibitions under the state Conflict of Interest Law. Massachusetts General Law Chapter 268A, § 19 prohibits a municipal employee, including an elected municipal employee, from participating in any particular matter that affects his own financial interests.¹ Specifically, this provision "prohibits a [municipal] employee from participating, by voting, discussing, delegating or otherwise acting, in any matter that affects his or her own financial interests."²

The State Ethics Commission has stated that the prohibition on acting on matters where your financial interests will be affected is very broad. "You may not participate as a [City Councilor] in any way: you may not vote on these matters; you may not participate in, moderate or chair discussions; you may not delegate these matters to a subordinate; you may not prepare official documents concerning these matters; and you may not take any other type of official action regarding these matters."³ Therefore, a City councilor may not act in any way that

¹ G.L. c. 268A, § 19, prohibits a public employee from participating in any particular matter that affects: his own financial interests, or those of a business partner, the financial interest of his immediate family, the financial interests of a private employer, or anyone he is negotiating employment with, or any organization in which the employee is an officer, director, partner or trustee. See G.L. c. 268A, § 1(g), which defines "municipal employee" as "a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement." "Participate" is defined as to take part in an agency action or in a particular matter personally, substantially as a state employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, § 1(j). "Particular matter" is any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, town, counties and districts for special laws related to their governmental organization's powers, duties, finances and property. G.L. c. 268A, § 1(k).

² State Ethics Commission Advisory, Selectmen.

³ *Id.* at § I.A.

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Councilor Ross
November 24, 2010

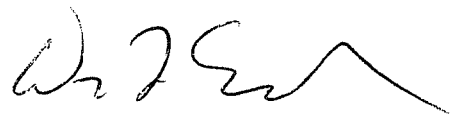
affects his or her financial interests, positively or negatively, nor may a Councilor act on any matter that affects his or her financial interests within the foreseeable future.⁴

While the Conflict of Interest Law, Section 16 specifically, prohibits a Councilor from taking any official action on matters that could affect the Councilor's financial interest, it does not prohibit the Councilor from acting on his or her own behalf and stating his or her own personal points of view.⁵ Under the Open Meeting Law, a Councilor is afforded the opportunity to speak on his or her own behalf in response to discipline or removal; however, the Conflict of Interest Law dictates that said Councilor must make it clear that he or she is acting on his or her own behalf, and not acting in any official capacity.

Because Councilor Turner has a financial interest in his continued employment as a City Councilor, he must abstain from participating in any *official capacity* in the determination of his qualification to serve as a member of the City Council. This includes participating in any discussion, recommendation and vote. Because this matter is a disciplinary one, Councilor Turner may speak on his own behalf. He may also have counsel of his choice with him. However, counsel is permitted to be there in the limited capacity of providing Councilor Turner advice. Unless permitted to do so by you, Councilor Turner's counsel is not permitted to participate in the discussions concerning his qualification to serve as a member of the City Council.

I hope that the above adequately addresses your inquiry. Please let me know if you have any questions or concerns.

Sincerely,



William F. Sinnott
Corporation Counsel

⁴ See State Ethics Commission Advisory Selectmen.

⁵ See State Ethics Commission Advisory, Selectmen, § C(2).