

Monroe County Board of Ethics
Report in Response to a Citizen’s Ethics Complaint
November __, 2023

This report is issued by the Monroe County Board of Ethics (the “**Ethics Board**” or the “**Board**”) with respect to, and after investigation of, a certain complaint (the “**Complaint**”) filed with the Board by a citizen of Monroe County (the “**Complainant**”) on or about May 24, 2023. This report is rendered pursuant to the provisions of, and in accordance with the powers vested in the Ethics Board by, (is) Article 18 of the General Municipal Law of the State of New York (the “**GML**”), and, in particular, §808 thereof, and (ii) the Code of Ethics of the County of Monroe (Chapter 45 of the Code of Monroe County (the “**County Code**”), §§45-1 through 45-25 (collectively, the “**County Ethics Code**”), and, in particular, § 45-25.B. thereof.

I. Statement of Facts

A. The TV Ad and Somers Interview.

In 2022 a television ad appeared on one or more Rochester area television stations for a local car dealership’s collision service (the “**TV Ad**”). The TV Ad featured a racing team and the Volkswagen Beetle that the team had used to compete in a road race called the “Baja 1000” the previous fall. The two members of the race team that appeared, along with the proprietor of the dealership at its facility, were identified by name on screen as Matt Evans (“**Evans**”) and Todd Baxter (“**Sheriff Baxter**” or the “**Sheriff**”). The substance of the commercial was that the collision service would be capable of repairing minor and major damage to vehicles, including those damages that occurred, or might occur, to the car of the race team during the course of the Baja 1000. Each of the two members of the team spoke briefly during the TV Ad; the Sheriff indicated that Mr. Evans had rolled the car down a mountain and Mr. Evans asked the proprietor whether the dealership’s collision service could repair the vehicle following such an event, which the proprietor indicated it could.

Sheriff Baxter appeared onscreen in his racing gear. He was not wearing his Sheriff’s uniform nor did he wear or carry any visible insignia that would identify him in his official capacity or otherwise as an officer of Monroe County (the “**County**”). He made no mention of his title, his role as Sheriff of the County or that he was otherwise an officer or an employee of the County. His title as Sheriff did not appear beside his name displayed on screen.

In July, 2022, Brennan Somers (“**Somers**”), a reporter with Channel 10 television news interviewed Sheriff Baxter in response to a viewer’s inquiry about the TV Ad (the “**Somers Interview**”). The Somers Interview, along with a written text of it, appears on-line. The viewer

indicated that, while the Sheriff's participation in the TV Ad may not affect his impartiality "it would seem to be unethical". The viewer then asked if it was legal "for an elected sheriff to personally endorse a private business."

In the Somers Interview, the Sheriff stated that, prior to going forward with the commercial, he confirmed that there were no contracts existing between the Monroe County Sheriff's Office and the dealership in question, and that his Office had no business with the dealership. He confirmed that he received no money for his or his race team's participation in the TV Ad and that it was done solely to generate interest in the Baja 1000 race.¹

Responding to the viewer's question regarding the legality of his participation, as an elected County official, Sheriff Baxter stated "perception is reality...just the perception is the question I should reflect on and say, you know what, that's a good question. You hear the Sheriff here. He gets the issue after the fact, but what about before?" While insisting that his and Mr. Evans' participation in the TV Ad was done solely to raise awareness of the race and to have some fun, the Sheriff concluded that "[W]ith that being said, the appearance is there so we'll put that in the back of our mindset, keep track of that, and don't do that type of stuff in the future."² In the news report airing the Somers Interview, Somers notes that he went to the Empire Center for Public Policy (the "Empire Center") "to hear from its legal experts" and they told him that "there's nothing here".³

Sheriff Baxter was elected to the Office of Monroe County Sheriff in November, 2017 and has served as Sheriff since January 1, 2018, or nearly six (6) years.

¹ It should also be noted that the Sheriff indicated that any and all expenses that he incurs in connection with his participation in the race and the race team are paid solely from his own personal funds.

² The Board notes that the Sheriff, as indicated in the Somers Interview, has not, since the filming of the TV Ad, done any other ads of any similar nature.

³ As referenced later in this opinion, Counsel to the Sheriff, Paul V. Ciminelli, Esq., likewise indicates in his October 31, 2023 letter to the Ethics Board that the Empire Center conducted a "legal review" (although it is not clear if the review referenced by Mr. Ciminelli was the inquiry made by Somers or a separate one undertaken by the Empire Center at Mr. Ciminelli's request) and that an "assessment" was likewise made by John A. Mancini, Esq., Counsel to the New York Conference of Mayors ("NYCOM"), whose responsibilities for NYCOM according to its website include, among several other things, addressing ethics matters. Neither the Board nor its legal counsel for this matter were parties to these reviews or assessments, nor have any written analyses, assessments or opinions that either the Empire Center or NYCOM may have furnished Somers or Mr. Ciminelli in connection with this matter been furnished to the Board. Regardless, the lawful duty and responsibility for reviewing and interpreting the provisions of the County Ethics Code, and, when authorized under the provisions of that Code, evaluating and opining as to the conduct and activities of County officers and employees subject to the terms thereof, is vested, at least in the first instance, solely in the Ethics Board.

B. The Complaint.

Although the TV Ad's broadcast that prompted the Somers Interview took place in 2022, the TV Ad ran again several times earlier this year. As a result, the Complainant filed the Complaint by e-mail initially with the County's Whistleblower that was, at the Complainant's request, forwarded to the Board. The Complaint states that the TV Ad had been running "numerous times for weeks" wherein the Sheriff "is promoting in advertisements a for profit commercial business." The Complaint states that no County employee, elected or appointed, "should be permitted to endorse or advertise for any for profit business" and that the "conflict of interest" in this instance is egregious because the Sheriff's Office routinely responds to traffic accidents. Accordingly, elected and appointed officials and employees of that Office should be barred from appearing on "TV or any other media promotional commercials related to its work."

The Complaint concludes by asserting that the TV Ad is an overt conflict because it urges and promotes that a particular auto collision shop should be used in the event of damage to a vehicle. "All county,...employees, elected or not, should be prohibited from engaging in such conduct related to their particular line of work or any other for profit service or product used by the government."⁴

C. Communications with Sheriff's Counsel.

Prior to the issuance of this opinion, Clayton Osborne ("**Osborne**"), on behalf of the Ethics Board, communicated several times by telephone and e-mail with Counsel to the Sheriff of Monroe County, Paul V. Ciminelli, Esq. ("**Ciminelli**"), regarding the Complaint. On or about, September 18, 2023, Mr. Osborne informed Mr. Ciminelli that the TV Ad was apparently being rebroadcast by the auto dealership and referred to the Sheriff's statement in the Somers Interview that he would not participate in an ad of this type in the future. Mr. Osborne advised Mr. Ciminelli that the provision of the County Ethics Code that appeared applicable to this situation was set out in §45-13.A.⁵ Advising that the Ethics Board intended to respond to the Complaint in the very near future, Mr. Osborne invited the Sheriff to attend the next scheduled meeting of the Board to discuss his willingness to comply with the cited section of the County Ethics Code by formally advising the auto dealership that it is his "wish and expectation that the ad not be used in future airings,...."⁶

On September 26, 2023, Mr. Ciminelli responded to Mr. Osborne's September 18th and September 25th emails. Stating that his research, and that of outside counsel and the Empire Center, "found no violation of law or ethical breach in this action by the Sheriff", he indicated that no

⁴ The Board notes that, although the Complainant asserts in the Complaint and in related email correspondence with the Board that the Sheriff's participation in the TV Ad constitutes a conflict of interest, he does not cite any specific section of Article 18 the GML or the County Ethics Code that is alleged to have been violated.

⁵ §45-13 of the County Ethics Code is captioned "Course of Conduct".

⁶ To the knowledge of the Ethics Board, to date no such request has been made by or on behalf of the Sheriff to the auto dealership in question to discontinue running the TV Ad.

effective response to the asserted ethical violation could be made until the Ethics Board stated “with sufficient specificity what portion of Section 45-13 was violated and the nature of how the violation occurred.” Noting the absence of any “definitional sections or case annotations in the County Law”⁷, he indicated that references to analogous legal authority “would be helpful to explain to the Sheriff the reasoning for the Board pursuing this claim.” Mr. Ciminelli confirmed the Sheriff’s public statements “more than eighteen months ago” that “he would avoid this type of activity in the future to escape the distractions they can cause and apparently are causing still today by this Board’s actions today....”

In response to Mr. Ciminelli’s request as to what portion of §45-13.A. of the County Ethics Code was alleged to have been violated by Sheriff Baxter’s participation in the TV Ad, Mr. Osborne highlighted that portion of the section that states that “[E]very officer or employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely engaged in acts that are in violation of his trust.” Mr. Ciminelli, in turn, responded on October 19th that, while the Ethics Board has furnished the “what” of their request (i.e. what section of the County Ethics Code is in question), he and the Sheriff “have also asked and as of now have not received a statement as to ‘how’ the Sheriff’s actions are in violation of his trust.”

On October 31, 2023, in his final written communication to the Ethics Board prior to the issuance of this opinion,⁸ Mr. Ciminelli “[O]n behalf of the Sheriff of Monroe County” furnished a hyperlink to the Somers Interview, the content of which was intended to constitute “his statement in response to the sole allegation before the Board and as requested in your email, his intentions are clearly articulated therein.” Insisting that the Sheriff had not engaged in any wrongdoing at the time of the making or initial airing of the TV Ad, or at anytime thereafter, Mr. Ciminelli, on behalf of Sheriff Baxter, confirmed the Sheriff’s earlier assurance that “if his appearance could be misconstrued by someone then he would refrain from such an action in the future. Now almost two years later, the Sheriff has been true to his word.”

Mr. Ciminelli again referenced the internal and external appraisals of this issue undertaken by him, including the “review” by the Empire Center and the “assessment” of John A. Mancini, Esq. of NYCOM, both mentioned previously in this opinion, that apparently determined that there was no violation on the part of the Sheriff in this instance. He asserted that the gravamen of the Ethics Board complaint⁹ “is something that occurs almost every day in this community” (citing two instances involving the County Executive, the first a promotion involving Genesee Brewery and Dunkin Donuts giving away product in exchange for inducing citizens to get vaccinated for

⁷ Presumably, Mr. Ciminelli is referring to the County Ethics Code and not the County Law of the State of New York which does not appear to have any application to this matter.

⁸ A letter to the Ethics Board, c/o of Mr. Osborne, from Mr. Ciminelli on official letterhead of the Office of the Sheriff.

⁹ “any senior level County employee who represents him or herself in an ad of a profit making enterprise which could be construed as endorsing that particular enterprise with or without intent may raise suspicion that s/he may be unwittingly or not endorsing the enterprise....”

Covid¹⁰, and the second involving the annual televised State of the County address that took place in May, 2021 at Seabreeze Amusement Park), and that there are “hundreds more examples available in this community”.¹¹ While disclaiming any suggestion of wrongdoing on the part of the County Executive in these two cited instances, Mr. Ciminelli states that he and the Sheriff “merely raise examples to show the normality of public officials having daily contact with members of the private and not for profit sector for a myriad of perfectly justifiable reasons....” Concluding his letter, Mr. Ciminelli indicated that the Sheriff had agreed “as a courtesy” to meet with the Ethics Board regarding this matter.

II. Applicable Statutory Provisions

A. Article 18 of GML.

Matters related to conflicts of interest on the part of municipal officers and employees are governed in the first instance by Article 18 of the GML. Those officers include “county officers” who are defined as including any officer or employee paid from county funds. (GML §800(5)). Accordingly, Sheriff Baxter and officers and employees of his office paid from County funds would be subject to these provisions of the GML. Article 18 deals with certain state-wide rules applicable to municipal officers and employees, including, for example, (i) whether and under what circumstances a municipal officer or employee can engage in business, or have an interest in a contract, with the municipality for which he/she serves, and (ii) the receipt and/or solicitation of gifts.

GML §806(1) mandates certain municipalities, including counties, to adopt a local code of ethics to supplement the state-wide rules of Article 18 and to provide standards of conduct with respect to matters not covered under the GML. The local ethics codes are required under GML §806(1) to address certain matters, but they may also include other standards relating to the conduct of officers and employees as deemed advisable. (GML §806(1)(a)). The local ethics code may regulate or proscribe conduct not expressly prohibited under Article 18, but may not authorize conduct prohibited by that Article or prohibit conduct expressly permitted thereby. (GML § 806(1)(a)); See also 1992 Ops. St. Compt. No. 92-30).

¹⁰ Mr. Ciminelli apparently refers to the “Choose Your Brew” vaccine initiative announced by the County Executive in June, 2021 that offered a free beer to anyone who received their Covid-19 vaccination at one of the participating breweries or a \$5 gift card to Dunkin Donuts for non-beer drinkers who got vaccinated at any county-operated vaccination clinic, which we note was in apparent furtherance of stated County public health policy and priority at the time. We note also that the May, 2021 State of the County address referenced by Mr. Ciminelli was largely focused on the reemergence of the County as a whole, and County businesses in particular, from the shutdowns precipitated by the Covid-19 pandemic.

¹¹ Mr. Ciminelli does not share information regarding any of the other hundreds of examples referenced in his letter. However, the Board does point out that it has not received, nor is it aware of, any allegations or complaints regarding the two cited instances involving the County Executive or any other appearance by a County officer or employee in an advertisement, including one similar to the TV Ad in which the Sheriff participated.

GML Article 18 authorizes counties and other municipalities to establish a board of ethics, the function of which is to provide, in relevant part, advisory opinions to municipal officers and employees with respect to the provisions of Article 18 and the local ethics code. (GML §808(1)(3)). It may also, at the request of the municipality's governing body, provide recommendations with respect to the drafting and adoption of ethics codes and amendments thereto. (GML §808(2)). A municipality, including a county, may, by enactment of a local law, grant its ethics board the authority to receive complaints alleging violations of ethics regulations and standards, to investigate those complaints and, on its own initiative, conduct investigations as to whether any such violations exist. Likewise, the local board may be granted enforcement authority, including the administering of penalties. (1991 N.Y. Op. Atty. Gen. (Inf.) 1135; 91-68, October 25, 1991).

B. Chapter 45 of the Monroe County Code.

Pursuant to the previously cited authority granted under GML Article 18, the County adopted Chapter 45 of the County Code (§§45-1 through 45-25) entitled the "Code of Ethics of the County of Monroe", recognizing that "there are rules of ethical conduct for public officers and employees that must be observed if a high degree of moral conduct is to be obtained and if public confidence is to be maintained in our unit of government." (County Ethics Code §45-2). The County Ethics Code is expressly intended to be in addition to any prohibitions set forth in GML Article 18 or any other general or special law relating to ethical conduct. (Id.)

Article II of the County Ethics Code (§§45-4 through 45-15), captioned "Standards of Conduct", details various prohibited or otherwise regulated activities and circumstances and defines the standards that county officers and employees are required to satisfy in the discharge of, or otherwise related to, their official duties. Section 45-4 sets out the general standard of conduct applicable to all county officials:

No officer or employee shall...engage in any business or transaction or activity...of any nature which is in conflict with the proper discharge of his duties in the public interest.

Other sections under Article II prohibit specific conduct or activities such as, by way of example, having an interest in business or professional dealing with the County (County Ethics Code §45-5), and the acceptance or solicitation of gifts beyond a nominal value from any person or entity that has a direct or indirect interest in any contract for the provision of good or services to the County or one of its agencies (County Ethics Code §45-12).¹²

Most relevant for the purposes of this report, however, are the provisions of §45-13 of the County Ethics Code, captioned "Course of Conduct", a portion of which was cited by Mr. Osborne to Mr. Ciminelli as previously described. In particular, §45-13.A. provides, in relevant part, that:

¹² Note that the prohibition against the receipt or solicitation of gifts under the County Ethics Code is, on the one hand, broader than its State counterpart GML §805-a(1) in that it prohibits such activity with respect to any gift beyond a "nominal value", but, on the other hand, is more restricted in its application, requiring that the maker of the gift have an interest in a contract with the County or one of its agencies.

Every office or employee shall endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust....He should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties....

Finally, Article V of the County Ethics Code establishes the Ethics Board, setting forth its powers and duties which are consistent with those mandated and/or authorized under GML Article 18 and the informal opinion of the New York Attorney General (1991 N.Y. Op. Atty. Gen. (Inf.) 1135; 91-68, October 25, 1991).

III. Analysis

The Ethics Board's analysis is premised, as it must be in all instances, on the facts presented or made known to it, including by means of any related investigation that it may undertake. In this instance, those facts include (a) the TV Ad, (ii) the Somers Interview, and (iii) the Sheriff's statements made though and on his behalf by his Counsel, Mr. Ciminelli, in his letter to the Board, dated October 31, 2023.

A. Article 18 of GML.

The Board concludes that none of the actions taken by Sheriff Baxter in connection with his participation in the TV Ad violate any of the provisions of Article 18 of the GML. Specifically, the absence of any contractual relationship or business dealings as between the Monroe County Sheriff's Office and the dealership in question, as confirmed by the Sheriff in the Somers Interview, avoids any potential issue with respect to a prohibited interest in a contract under GML §801(1). Nor do we find that the Sheriff's participation in the TV Ad under these circumstances constitutes the prohibited receipt or solicitation of a gift under GML §805-a (1).¹³

B. County Ethics Code.

As a preliminary matter, the Ethics Board acknowledges that, through his Counsel's communications with Mr. Osborne, including, in particular, his Counsel's letter of October 31st, the Sheriff has responded to the allegations contained in the Complaint and Board's review thereof and has further agreed to appear before the Board if, at this late date, it wishes him to do so. The Board also finds that Sheriff Baxter undertook his participation in the TV Ad entirely in good faith, with no intent to violate the provisions of the County Ethics Code, nor with any knowledge that the same would or could give rise to a potential violation. However, prior intent or knowledge does not always constitute a necessary element in a finding of a violation of the County Ethics

¹³ For reasons discussed in footnote 17 to this report, however, we caution that participation in an ad, or other form of product or service endorsement or promotion, such as the TV Ad could potentially give rise to a determination that such participation would constitute a prohibited gift under Article 18.

Code and may, in some instances, only be of consequence in connection with the attempted imposition of a penalty for such an offense (e.g. County Ethics Code §45-23).

The Ethics Board finds that the actions of the Sheriff in this instance did not result in a violation of §§45-5 through 45-11 of the County Ethics Code. Nor did it result in a violation of the receipt or solicitation of gifts under §45-12 (which, as set out in footnote 12 above, is narrower in its application than its companion GML §805-a (1)).¹⁴ Finally, the Board determines that there are no provisions of the County Ethics Code that, expressly by their terms, prohibit or otherwise regulate the participation of County officers or employees in print or electronic media promoting or endorsing products or services.¹⁵

As noted above, §45-4 of the County Ethics Code establishes the general standard of conduct applicable to all County officers and employees. It requires that no officer or employee be engaged in any “activity...of any nature which is in conflict with the proper discharge of his duties in the public interest.” The Board has found no legal authority, in the form of case law or administrative agency opinions, regulations or the like, interpreting this section or language of a similar nature insofar as it relates to participation in a print or electronic product or service promotion or endorsement. The determination as to whether any circumstances create such a “conflict” is necessarily subjective in nature and must be determined from the perspective of a reasonable person with knowledge of the relevant facts. *Applying that standard of determination to the facts presented and known to the Board in this matter, we find that the Sheriff’s participation in the TV Ad did not give rise to an actual “conflict with the proper discharge of his duties in the public interest”. Accordingly, we find no violation of §45-4 of the County Ethics Code.*

§45-13.A. of the County Ethics Code by its nature necessitates a similar, and arguably more difficult, subjective evaluation of the circumstances, utilizing the same standard of determination, as the Board engaged in reaching its finding with respect to §45-4. ***The Board is not in this instance, however, required to find an actual conflict, but rather to determine a lower threshold of standard of conduct, namely, whether the officer or employee’s course of conduct would “raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust” or that his conduct could give a “reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties....” [emphasis added]***

As with its analysis of the provisions of §45-4, the Board has found no legal authority interpreting this section or language of a similar nature, at least insofar as it may relate to

¹⁴ We also note, however, the cautionary statement set forth in footnote 13 above as being potentially applicable as well to County Ethics Code §45-12 .

¹⁵ The Board notes that, under GML Article 18 and §45-25.C. of the County Ethics Code, the Board may make recommendations with respect to the drafting and adoption of the County Ethics Code or amendments thereto upon the request of the Monroe County Legislature. Although beyond the immediate scope or purpose of this report, the Board believes that the County Legislature should consider appropriate amendments to the County Ethics Code to directly address the participation of County officials and employees in certain communications, including, for example, those similar to the TV Ad. The Board would be willing to assist the County Legislature in the development of any such amendments.

participation by a public officer or employee in a product or service promotion or endorsement, whether in print, electronic or other format. However, the language of § 45-13.A. quoted above is virtually identical to that set forth in §74 of the Public Officers Law of the State of New York (the “POL”), entitled “Code of Ethics” and applicable to officers and employees of New York State. Thus, POL§74(3)(f) provides that a state agency officer or employee, legislature member or legislative employee “should not by his conduct give reasonable basis for the impression that any person can improperly influence him or her or unduly enjoy his or her favor in the performance of his or her official duties....” Likewise, POL§74(3)(h) states that such officers and employees “should endeavor to pursue a course of conduct which shall not raise suspicion among the public that he or she is likely to be engaged in acts that are in violation of his or her trust.”

A review of countless opinions rendered by New York courts and by various iterations of the New York Commission on Ethics and Lobbying in Government interpreting POL§74¹⁶ yielded none that addressed the potential application of that section generally, or the cited language in particular, to circumstances involving participation by a public officer or employee in a product or service promotion or endorsement, regardless of format. Nevertheless, under the aegis of POL§§73 and 74, the Joint Commission on Public Ethics adopted regulations, effective July 24, 2014, defining the permissible use, and promoting the proper use, of public service announcements (the “PSA”) on the part of certain specifically identified State officials. (19 NYCRR, Part 490, §§940.1-940.5). Among the requirements that the PSA must satisfy so as to permit the participation of any of the covered State official, the communication must “not advertise a commercial product or service.”

Although the Board has been unable to identify any express prohibition to participation by any state official in a communication of a commercial product or service, either in the regulations addressing the use of PSAs, or elsewhere, the requirement that the PSA not advertise a product or service suggests, at the very least, that participation in such a communication would violate the standards of conduct set forth in POL§74, including those provisions cited above that likewise appear in §45-13.A. of the County Ethics Code.¹⁷

The Board finds some guidance on this issue contained in the policy adopted by the New York State Office of Information Technology Services (No. NYS-P10-001, updated August 16, 2021), captioned “Advertisements, Endorsements and Sponsorships on State Entity Websites” (the “**State Policy**”). Concededly, this Policy addresses issues in which private entities overtly attempt to use the State’s identity, resources and platform to further their own commercial interests. As we noted

¹⁶ There were over thirty (30) pages of headnotes for decisions and opinions with respect to POL §§ 73 and 74.

¹⁷ The Board notes that the regulations applicable to State officials’ participation in PSAs also clarifies that “an appearance in a public service announcement does not ordinarily constitute a ‘gift’ under Public Officers Law §73(5).” (19 NYCRR§940.1) See also 19 NYCRR§940.4: “...the production or Publishing of a Public Service Announcement does not constitute a ‘gift’ as that term is defined or otherwise used in Public Officers Law §73(5)...” Given the express exclusion of communications advertising a commercial product or service from the definition of a PSA, the regulations do suggest that participation by a municipal officer or employee in such a communication could potentially invoke the prohibition under Article 18 of the GML and the County Ethics Code regarding the receipt or solicitation of gifts.

previously in this report, at no point in time during the TV Ad did Sheriff Baxter appear in uniform, display any insignia or item that would identify his official position, or make reference to his official position or employer. His name alone appeared without his official title as Sheriff. Nevertheless, the principles underlying the State Policy highlight some of the very concerns that we believe County Ethics Code §45-13.A. was intended to address.

Section 1.0 of the State Policy states, in relevant part, that state websites “should never be used to advertise for private individuals, firms or corporations or imply in any manner that New York State endorses or favors any specific commercial product, commodity, or service.” Section 4.2 of the State Policy expands on the rationale behind its prohibition, stating, in part, that:

Advertising for private individuals, firms or corporations can imply that the [state entity] endorses or favors a specific commercial product, commodity, or service. Citizens expect their government to be impartial. Concomitantly, business and for-profit entities expect to be treated fairly by government. Endorsing some commercial products and services, while excluding others, constitutes preferential treatment.

One final source of guidance to the Board can be found in the ethics regulations applicable to employees of the Executive Branch of the Federal government. 5 C.F.R. §2635.702 provides, in part, that a federal employee covered by the regulations “shall not use his public office ...for the endorsement of any product, service or enterprise....” In particular, 5 C.F.R. §2635.702(c), captioned “Endorsements”, states, in relevant part, that “[A]n employee shall not use or permit the use of his Government position or title or any authority associated with his public office to endorse any product, service or enterprise.” [*emphasis added*].

The Board acknowledges, as noted previously in this report, that nowhere in the County Ethics Code is the participation of County officers or employees in the promotion or endorsement of products or services, in whatever manner, expressly prohibited. Accordingly, the Board does not have the benefit of a provision like that applicable to Federal employees in the Executive Branch. However, the absence of such an express prohibition, (and, as in this instance, of any applicable case law or opinions), does not always constitute a bar to the Board’s ability, or responsibility, to evaluate a complaint it receives, investigate the actions by the County officer or employee that are the subject of the complaint, and review and determine the application, if any, of state law and, in particular, the County Ethics Code.

The term “conflict of interest” refers to a concept that has very broad application. The determination as to whether the circumstances in this instance create such a “conflict” (being, as noted previously, necessarily subjective in nature) can only be reached from the perspective of a reasonable person with knowledge of the relevant facts. Applying that standard of review, **it is our opinion that the participation by Sheriff Baxter in the TV Ad did result in a violation of the provisions of the County Ethics Code §45-13.A. His presence in the TV Ad wherein his name appeared on the screen could lead a reasonable person to conclude that the Sheriff was lending his public persona, popularity or position in support of this particular collision service.** The

Sheriff, as noted previously in this report, has served in office for nearly six (6) years, is well known by name (with or without the title “Sheriff” preceding it) and has enjoyed wide support in the community, both professionally and in his successful election efforts. A reasonable person viewing the TV Ad could readily conclude that it was intended to capitalize on the Sheriff’s name and popularity in the endorsement of the collision service. The fact, as noted in the Complaint, that the duties of the Sheriff’s Office regularly include addressing incidents in which vehicles are damaged (and thus in need of collision services), while not determinative to the Board’s decision, nonetheless adds to its concern.

We believe that the Sheriff, in retrospect, has acknowledged in the Somers Interview and in the October 31st letter of his Counsel, written on his behalf, the very concerns the Board has raised in this report and believes were intended to be covered by the provisions of County Ethics Code §45-13.A. While never acknowledging the merits of any allegation that his conduct violated applicable ethics laws, the Sheriff nonetheless conceded that “perception is reality” and “the appearance is there so we’ll put that in the back of our mindset, keep track of that, and don’t do that type of stuff in the future.” Likewise, in his October 31st letter on behalf of the Sheriff, Mr. Ciminelli stated that “if his appearance could be misconstrued by someone then he would refrain from such an action in the future.”

As noted previously in this report, the Board believes that Sheriff Baxter engaged in the TV Ad entirely in good faith, for no purpose of personal gain, with no intent to violate the provisions of the County Ethics Code nor with any knowledge that the same would or could give rise to a potential violation. However, as we have also noted, prior intent or knowledge does not always constitute a necessary element in a finding of a violation of the County Ethics Code and we find that it is not a necessary element to a finding of a violation of County Ethics Code §45-13.A.

Sheriff Baxter has previously indicated that he would not again engage in an activity such as the TV Ad. He has honored that commitment in its entirety and we are confident that he will continue to do so. Although the Board has no ability to compel compliance on the part of the dealership in question, the Board believes it would nonetheless fulfill the Sheriff’s compliance with the County Ethics Code if he made a formal, written request to the dealership to cease and desist from further airing of the TV Ad. Accordingly, the Board respectfully requests the Sheriff to do so at his very earliest convenience.

The Board notes that, under both State law and the County Ethics Code, the Board is empowered to render advisory opinions to municipal officers and employees at their request.¹⁸ The circumstances giving rise to the Complaint in this instance might have been avoided had such a request for an advisory opinion been sought in advance of the making or airing of the TV Ad. In the future, when a proposed activity is considered, or when circumstances arise, and the potential application of Article 18 of the GML and/or the County Ethics Code is in question, the Board suggests that the County officer or employee involved seek such advance guidance in that regard from the Board.

¹⁸ See, e.g., County Ethics Code §45-25.A.

This Report shall be maintained and disseminated in accordance with the provisions of the County Ethics Code.