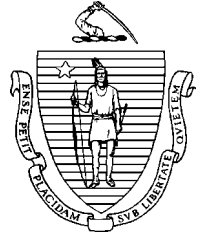




# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-94-4

### FACTS:

You are a full-time court officer assigned to a department of the Trial Court, providing security in a courthouse. You are interested in simultaneously serving as an appointed constable in order to serve civil and/or criminal process. You do not intend to serve process during your normal working hours as a court officer.

### QUESTION:

May you work as a constable while serving as a court officer?

### ANSWER:

Yes, subject to the limitations set forth below.

### DISCUSSION:

While constables have a wide range of statutory power, their chief function is the service and execution of legal process. G.L. c. 41, §92.<sup>1/</sup> Constables who are bonded in the maximum amount have the authority to serve the following types of documents: summonses and complaints where the amount of damages is \$2,500 or less; executions and real estate attachments not exceeding \$2,500; supplementary process in any amount; summary process; notices of all kinds; demands; restraining orders; orders of notice; injunctions; civil and criminal capias; treasurers warrants and proclamations; certain probate and family court process; subpoenas and other writs and papers from district courts, superior courts, the supreme judicial court and federal courts; and mittimus or other required precept posting notices of town meetings and other notices. G.L. c. 41, §§ 92-5. A constable's return of service is *prima facie* evidence of service. Thus, a constable's primary duty is to properly serve all lawful processes issued by a court, judge, or judicial officer that are legally directed to her. G.L. c. 220, §6.<sup>2/</sup>

Nothing in the conflict of interest law would prevent a state employee from serving process as a constable on behalf of a private party or a non-state party. This is true even where the state is a party to the litigation or has a direct and substantial interest in the case.<sup>3/</sup> However, you need an exemption to §7 of G.L. c. 268A in order to serve as a constable on behalf of a state agency.

#### 1. Section 7

Section 7 is implicated where you wish to provide compensated constable services for the Commonwealth or a state agency. Section 7 prohibits a state employee from having a financial interest, directly or indirectly, in a contract made by a state agency<sup>4/</sup>, in which the Commonwealth or any state agency is an interested party, unless an exemption applies. This section would prevent you, in some cases, from performing paid services as a constable for the Commonwealth or any state agency. *EC-COI-85-41*.

Section 7 is intended to prevent state employees from using their positions to obtain contractual benefits from the state and to avoid any public perception that state employees have an "inside track" on such opportunities. "Because it is impossible to always distinguish employees who are in a position to influence the awarding of a contract from those who are not . . . the law treats all state employees as though they have influence." *EC-COI-85-3*. See also Buss, *The Massachusetts Conflict of Interest Statute*, 45 Law R. 299, 374 (1965).

As a full-time state employee in your court officer position, the only exemption potentially available to you is §7(b). This section would permit a court officer to receive compensation from a state agency if *all* of the following conditions are met:

- (1) you are not employed by the contracting agency or an agency which regulates the activities of the contracting agency;
- (2) you do not participate in or have official responsibility for any of the activities of the contracting agency;
- (3) the contract is made after public notice, or, where applicable, competitive bidding;
- (4) your constable services will be provided outside of your normal working hours as a court officer;
- (5) you are not compensated as a constable for more than 500 hours during a calendar year;
- (6) the services are not required as part of your regular duties as a court officer;
- (7) the head of the contracting agency files a written certification with the State Ethics Commission that no employee of that agency is able to perform the services as a part of his regular duties; and
- (8) you file a full disclosure of your financial interest in the arrangement with this Commission.

Thus, the first issue under §7(b) is: what is the state agency by which you are employed — the entire Trial Court, or merely the Department of the Trial Court to which you have been assigned. In 1978, the Legislature enacted the Court Reorganization Act, which first effected an administrative consolidation of all of the courts in the Commonwealth with trial jurisdiction. Chapter 478 of the Acts of 1978.<sup>57</sup> Subsequently, on January 13, 1993, the Governor signed into law the Act Improving the Administration and Management of the Judicial System of the Commonwealth, c. 379 of the Acts of 1992 (commonly referred to as The Court Reform Act). The Court Reform Act further modifies certain aspects of the Trial Court system, including jurisdictional features specifically referencing court officers. Because of the significant legal change to the court system pertaining to court officers, we can no longer conclude that court officers are employees of the Department to which they are assigned. Rather, court officers are employees of the entire Trial Court, as described below.

While the earlier version of the court system provided for a Chief Administrative Justice, the Court Reform Act establishes the position of a Chief Justice for Administration and Management (“CJAM”), whose duties are broadened. G.L. c. 211B, § 1. Under the Court Reform Act, the CJAM is responsible for the overall administration of the entire Trial Court. A significant change under the Court Reform Act is that all court officers appointed to any department of the Trial Court are specifically designated as employees of the CJAM, rather than of an individual court. G.L. c. 211B, § 9A. The CJAM explicitly has the power to appoint, discipline, transfer<sup>68</sup> and define the duties of court officers, including those court officers who were appointed prior to the adoption of the Court Reform Act. It is clear that court officers are *not* employees of the chief justice of each department. Instead, the Court Reform Act specifically excludes court officers from the category of personnel of the chief justice of a particular department, and instead explicitly identifies court officers as employees of the CJAM.<sup>71</sup>

Since the CJAM is the administrative head of the entire Trial Court and court officers are employees of the CJAM, court officers are employed by the Trial Court rather than the department to which they have been assigned. G.L. c. 211B, § 9. *Cf. EC-COI-85-41* (based upon the 1978 Act). Thus, you are an employee of the entire Trial Court, not of the Department to which you are currently assigned.<sup>81</sup> Therefore, you may not receive compensation from the Trial Court or any Department of the Trial Court as a constable, because you will not be able to obtain a §7(b) exemption under G.L. c. 268A.<sup>91</sup>

Another important condition for a §7(b) exemption is the “public notice” requirement. If you wish to provide constable services for compensation from a state agency, the agency must “publicly advertise” for a constable. The Commission has recognized that, in certain specialized personal service contract areas, the requirements of public notice are not practical. *EC-COI-85-27*. At a minimum, the Commission has required a “good faith effort to notify all qualified individuals in the geographic area.” *Id.* This is necessary to provide equal access to the

position. In certain circumstances, the comparison of fees charged for a service was sufficient. *EC-COI-83-56*. Here, where the fees that constables may charge are set by statute, and the only variables are for the portion of fees based upon travel or photocopying, it is not logical to require a state agency to contact several constables to compare terms. There are several publications, such as Massachusetts Lawyer's Diary and the Massachusetts Constable Association Directory, that contain complete lists of eligible constables. Since all qualified individuals would be listed, if you are contacted by a state agency which obtained your name from such a list, the public notice requirement will be fulfilled by this method of selection.

If you were able to comply with all of the §7(b) provisions, you may provide paid constable services for a state agency. Thus: you may not provide constable services for the Trial Court; the state agency must contact you after using a complete list of eligible constables; your constable services must be provided outside of your normal working hours as a court officer; you may not be compensated as a constable for more than 500 hours per year; the head of the contracting state agency must file a written certification with the State Ethics Commission that no employee of that agency is able to perform such constable services; and you must file a full disclosure of your financial interest with this Commission.

## 2. Section 23

Section 23, the standards of conduct provision, also applies to you. Section 23(b)(2) prohibits a state employee from using or attempting to use his official position to secure an unwarranted privilege or exemption of substantial value<sup>10</sup> for himself or another. For example, you may not use state time, resources, or personnel to benefit yourself or another. See *P.E.L. 89-4*. Nor may you use your state title or the state seal to promote or endorse your constable services. See, e.g., *EC-COI-84-127*; *86-11*; *92-5* (seal); *92-39*; *85-41* (a court officer may not perform constable duties during court sessions, may not serve capias in cases where the constable must appear in the court with the person arrested pursuant to the capias to collect her fee). Additionally, you are prohibited from "soliciting potential clients for your constable services by referring to your qualifications as a state employee" and you may not solicit individuals who have business in the court house where you are working as a court officer. *EC-COI-85-41*. Solicitation includes oral representations, passing out business cards, and mailings directed to specific individuals.

Finally, §23(e) permits a head of a state agency to establish and enforce additional standards of conduct beyond those contained in the conflict law. G.L. c. 268A, §23(e). While an agency's own standards of conduct may not be any less restrictive than those found in G.L. c. 268A, the Commission will defer to rulings or standards established by the agency itself which give guidance to its employees in the area of conflict of interest and which are consistent with the principles and aims of §23. *EC-COI-93-23*; *84-55*.

In conclusion, you may provide constable services for non-state parties whether or not the state is a party or has a direct and substantial interest in the particular matter. However, you must obtain a §7(b) exemption if you wish to receive compensation as a constable from *state agencies*. Finally, you may not use state time or resources to effectuate your constable duties, you may not use your qualifications as a court officer to solicit potential clients, and you may not solicit individuals who have business in the court house where you are working as a court officer.

**DATE AUTHORIZED:** February 25, 1994

<sup>10</sup> We note that §78 of the Court Reform Act amends G.L. c. 211B, §9 by adding §9A, which states in pertinent part, "[c]ourt officers . . . may serve warrants, mittimus, precepts, and orders and processes of the court, and shall perform such other duties as chief administrative justices for administration and management may assign." The language in G.L. c. 211B, §9A does not specifically authorize a court officer to accept a post as a constable, but rather appears to permit a court officer, as part of her official duties, to serve certain types of court documents *only* at the direction of the Chief Administrative Justices for Administration and Management. This section does not address the issue of whether a court officer may serve as a constable. We advise you to seek further guidance concerning the interpretation of G.L. c. 211B, §9A from the CJAM and/or the Director of Security of the Trial Court.

<sup>2</sup> A process server must determine that the process which he is called upon to execute is in due form and issues from the court which has jurisdiction of the subject. *Morrill v. Hamel*, 148 N.E.2d 283 (1958). Additionally, service must be served in the manner prescribed by law.

<sup>3</sup> Section 4(a) of G.L. c. 268A prohibits a state employee, otherwise than as provided by law for the proper discharge of official duties, from receiving compensation from anyone other than the Commonwealth or a state agency in connection with a particular matter in which

the state is a party or has a direct and substantial interest. Section 4(c) prohibits a state employee, otherwise than in the proper discharge of his official duties, from acting as agent or attorney for anyone other than the Commonwealth or a state agency in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.

The Commission stated in *EC-COI-84-143* that §4(a) would prevent a state employee from receiving compensation from private individuals as a Bail Commissioner in connection with criminal cases. However, we subsequently determined that since such fees were provided for by law, no issues would be raised under §4(a). See *Quinn v. State Ethics Commission*, 401 Mass. 210 (1985). Since fees for constable services are provided for by statute, §4(a) of the conflict of interest law will not be implicated for a state employee who receives compensation as a constable from non-state parties in connection with a matter in which the state is a party or has a direct and substantial interest. Thus, you may provide constable services for private individuals whether or not the state is a party or has a direct and substantial interest in the particular matter. However, issues will arise under §7 if you wish to receive compensation as a constable from state agencies, as described below.

Additionally, §4(c) is not implicated, as constable services do not rise to the level of acting as an “agent”. The Commission has held that, in general, a public employee acts as agent for the purpose of G.L. c. 268A when he speaks or acts on behalf of another in a representational capacity. See, e.g., *EC-COI-92-25*; see also, *Zora v. State Ethics Commission*, 415 Mass. 640 (1993); *Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992). Some examples of acting as agent are: appearing before a government agency on behalf of another, submitting an application or other document to the government for another, or serving as another’s spokesperson. See, e.g., *EC-COI-92-18*, and *Commission Advisory No. 13 (Agency)*.

<sup>4/</sup> “State agency”, any department of a state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town. G.L. c. 268A, §1(p).

<sup>5/</sup> After reviewing this consolidation, we held that each department of the Trial Court was a separate state agency for purposes of G.L. c. 268A. *EC-COI-84-86*. Based upon the 1978 Court Reorganization Act (the 1978 Act), we held that a court officer of the Probate Court was not an employee of the entire Trial Court. *EC-COI-85-41*.

<sup>6/</sup> The CJAM has the power to transfer a court officer to any court which needs the services of a court officer. Thus a court officer in one department could be transferred to another department in any county. G.L. c. 211B, §9.

<sup>7/</sup> In *EC-COI-84-86*, we held that the Brockton District Court was not the “same agency” as the Boston Juvenile Court for purposes of §7. The new Court Reform Act does not disturb our conclusion that those two entities are different state agencies. Here, however, we address whether a court officer is an employee of the department that she is assigned to, where court officers are explicitly designated as employees of the CJAM.

<sup>8/</sup> However, a court stenographer in a particular department of the Trial Court, for example, is an employee of the chief justice of that department, and is not an employee of the CJAM. Thus, a stenographer would be an employee of that department, rather than an employee of the entire Trial Court.

<sup>9/</sup> Even though constables are qualified to file subpoenas and other writs and papers, among other documents, from district courts, superior courts, and the supreme judicial court, you may not do so as a *paid constable* because you are employed by the entire Trial Court, and would not be able to fulfill the first requirement under §7(b). Additionally, since court officers may be directed to file such documents by the CJAM under the Court Reform Act, you would not be able to fulfill the sixth and seventh requirements, as such service may be required as a part of your regular duties as a court officer. However, if as a *court officer*, you are directed to file such documents by the CJAM, §7 will not be implicated, as those tasks would be a part of your official duties as a court officer, and will not constitute paid constable services.

<sup>10/</sup> Anything valued at \$50.00 or more is “of substantial value”. *EC-COI-93-14*; *Commonwealth v. Famigletti*, 4 Mass.App.Ct. 584, 587 (1976); *Commission Advisory No. 8*.