



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-98-7

### FACTS:

You are employed as an attorney by the Massachusetts state agency XYZ (“XYZ State Agency” or “XYZ”). Your XYZ job responsibilities include your representing XYZ in discrimination proceedings filed with the Massachusetts Commission Against Discrimination (“MCAD”) by XYZ employees against XYZ.

Outside your work hours for XYZ State Agency, you engage in the private practice of law. In your law practice, you wish to represent private clients in their claims of unlawful employment discrimination against their private (not public agency) employers. As discussed in more detail below, such claims must be filed with the MCAD.

### QUESTION:

Does G.L. c. 268A permit you, during your own time, to engage in the private practice of law representing private clients in their claims of unlawful employment discrimination against their private (not public agency) employers filed and pending with the MCAD (hereinafter, Cases) while you are also a full-time employee of XYZ State Agency?

### ANSWER:

No, because the MCAD has a direct and substantial interest in such Cases.<sup>1/</sup>

### DISCUSSION:

#### A. Overview of MCAD Process

The MCAD, established by G.L. c. 6, §56, is composed of three, full-time Commissioners and their staff members. The MCAD’s jurisdiction includes discrimination based on race, color, religious creed, national origin, ancestry, age, sex, sexual orientation, handicap and, to a limited extent, the status of having a criminal record. G.L. c. 151B, §4. In this overview, we will focus, in particular, on the MCAD’s process as it relates to Cases such as those you wish to undertake in which complainants are represented by their own attorneys.<sup>2/</sup>

The MCAD is authorized, pursuant to G.L. c. 151B (sometimes, “Statute”) and its implement-ing regulations, 804 CMR §1.00 (“Regulations”),<sup>3/</sup> to receive, investigate, issue investigative dispositions, conduct hearings about and adjudicate complaints of unlawful discrimination and to order a broad range of remedies therefor. G.L. c. 151B, §§3, 5; 804 CMR §§1.03(2), 1.08, 1.10, 1.11, 1.13-1.16. At any stage while a matter is pending before the MCAD, the MCAD may seek injunctive relief. G. L. c. 151B, §5.<sup>4/</sup>

Among those who may file complaints with the MCAD are: persons aggrieved or their duly authorized representatives, the Attorney General, the MCAD, employers whose employees refuse to cooperate with the provisions of c. 151B, and organizations whose purposes include

the elimination of discrimination, some of whose members are aggrieved. G.L. c. 151B, §5; 804 CMR §1.03(1). Complainants, not their attorneys, must sign and verify their complaints, G.L. c. 151B, §5; 804 CMR §1.03(3); their attorneys must file appearances. G. Napolitano, *An Introduction to the MCAD Case Processing System*, Meet the MCAD '97 - Trends, Tips and Practical Advice from Staff of the MCAD §2.3, MCLE Publication No. 97-15.03 (1997). Complaints must be filed with the MCAD within six months of the unlawful conduct. G.L. c. 151B, §5; 804 CMR §1.03(2).

The Statute “creates a parallel judicial and administrative enforcement scheme.” 45 S. Moriearty, J. Adkins & S. Lipsitz, *Employment Law, Massachusetts Practice*, §8.38 (1995). Although complaints of discrimination must be filed with the MCAD as a prerequisite to a filing with the superior court, after filing, the complainant may elect to withdraw the matter from the MCAD by filing a civil action with the superior court pursuant to G.L. c. 151B, §9.<sup>5/</sup> If such election is made, the MCAD is required to dismiss the administrative proceeding.<sup>6/</sup> G.L. c. 151B, §9; 804 CMR §1.13(2)(d). If the matter is not removed to superior court, it generally proceeds through the MCAD, as described below.

### **Investigation and Initial Determination**

After a complaint is filed, the MCAD’s Investigative Unit screens it to assure that it meets minimal jurisdictional requirements. Napolitano, *supra*, §§2.1-2.3. An Investigating Commissioner is assigned to the Case and notifies the respondent of the complaint. 804 CMR §1.03(6). The respondent has 21 days to serve an answer on the MCAD and the complainant. 804 CMR §1.03(7).

The Investigative Unit then undertakes its investigation, whose purpose is to enable the Investigating Commissioner to determine whether or not “probable cause” exists, *i.e.*, whether there is “sufficient evidence upon which a fact-finder could form a reasonable belief that the respondent committed an unlawful practice.” 804 CMR §1.13(7)(a). During its investigation, the MCAD has a wide range of powers to gather information. MCAD investigators may conduct initial investigative conferences with the parties; conduct on-site visits; interview witnesses and request documents; issue subpoenas to compel attendance of persons and production of documents; issue interrogatories;<sup>7/</sup> when necessary to preserve evidence, depose witnesses; and conduct informal fact-finding conferences, at which there are no stenographic records or sworn statements. 804 CMR §§1.08, 1.10, 1.11.

You characterize as “limited” the role of private attorneys prior to the MCAD’s public hearing of a Case. For example, during the investigation, the parties have very limited rights to conduct their own discovery.<sup>8/</sup> Even at fact-finding conferences, the role of the parties’ attorneys is limited. L. Girton, *Pursuing Claims at the Massachusetts Commission Against Discrimination*, 75 Mass. L. Rev. at 152, 158-159 (1990). While they may make opening and closing statements and propose questions and lines of inquiry to the MCAD’s investigator, they may not ask questions of the witnesses. 804 CMR § 1.08(2), (3); Girton, *Id.*

At the culmination of the investigation, the MCAD investigator recommends an investigative disposition of the Case to the Investigating Commissioner, who then issues a determination as to probable cause (PC) or lack of probable cause (LOPC) or some other disposition, *e.g.*, lack of jurisdiction. The complainant has limited rights to seek reconsideration of an LOPC determination through a “preliminary hearing” before the Investigating Commissioner. G.L. c. 151B, §5; 804 CMR §§1.13(7)(c), (7)(d); Girton, *supra* at 159. The

complainant has no right to appeal any such LOPC determination to the other two Commissioners or to court under G.L. c. 30A. However, if not time-barred, the complainant may commence a civil action for damages and/or injunctive relief in superior court under G.L. c. 151B, §9.

### **Conciliation**

If there is a PC determination, the MCAD is first required to “endeavor to eliminate the unlawful practice complained of . . . by conference, conciliation and persuasion” (collectively, “conciliation”). G.L. c. 151B, §5; 804 CMR §1.13(8)(a). The Investigating Commissioner or, more typically, his or her designee/MCAD attorney conducts the conciliation session(s). Napolitano, *supra* at 36, §§3.1. If conciliation efforts result in a settlement agreement, the MCAD dismisses the complaint, and the agreement constitutes a final MCAD order, which can be judicially enforced. 804 CMR §1.13(6).<sup>9/</sup>

### **Public Hearing, Decision and Remedies**

If conciliation efforts fail, the Investigating Commissioner certifies the Case for public hearing, and the respondent must answer the complaint, as it may have been amended, within 15 days. G.L. c. 151B, §5; 804 CMR §1.15(2)(a). A Commissioner (who had no prior involvement with the matter) is assigned as the Hearing Commissioner and conducts the public or adjudicatory hearing in accordance with G.L. c. 30A. G.L. c. 151B, §3, Subsection 6.

This stage of the MCAD proceedings has been described as “administrative litigation.” Napolitano, *supra* at 39, §4.0. The parties may engage in discovery, including serving interrogatories, serving subpoenas requiring the attendance and testimony of witnesses and the production of documents and taking depositions; the Hearing Commissioner may conduct pre-hearing conferences and issue pre-hearing orders; and the parties’ attorneys present their cases at the public hearing, during which they may cross-examine witnesses.<sup>10/</sup> 804 CMR §§1.09(2), 1.10(1), 1.15(3); 45 Moriearty, Adkins & Lipsitz, *supra*, §8.46; Napolitano, *supra* at 39, §4.0. The Investigating Commissioner may participate in the public hearing, but only as a witness. G.L. c. 151B, § 5. See *East Chop Tennis Club v. Massachusetts Comm’n Against Discrimination*, 364 Mass. 444, 447 (1986). The MCAD is not bound by the rules of evidence, except for the rules of privilege. G.L. c. 151B, §5; 804 CMR §1.15(14).

After the public hearing, the Hearing Commissioner issues a written decision, which may include orders. 804 CMR §1.15(20). If the complainant prevails, the MCAD can order “broad and comprehensive remedies,” including back pay and benefits, damages for emotional distress, injunctive relief, other make-whole relief and compliance reporting. 45 Moriearty, Adkins & Lipsitz, *supra*, §8.51. Those remedies may redress and/or correct the specific harm to the complainant and provide broader, prophylactic relief for those similarly situated. See, e.g., *Katz v. Massachusetts Comm’n Against Discrimination*, 365 Mass. 357, 365-366 (order requiring equal opportunity advertising); *McKinley v. Boston Harbor Hotel*, 14 Mass. Discrim. L. Rep. 1226, 1246 (1992) (order requiring training program, including civil rights and AIDS awareness).

### **Appeal**

The losing party may appeal the decision and order(s) to the other MCAD Commissioners<sup>11/</sup> and, thereafter, to superior court under the standards of G.L. c. 30A, §14(7).

G.L. c. 151B, §§3(6), 6; 804 CMR §§1.16(1), 1.17.<sup>12/</sup> On appeal to the superior court, the MCAD is named as defendant. If the prevailing party is not also named, that party may intervene as a defendant.” *Massachusetts Practice, supra* at 398, §8.47. Although the MCAD may designate the prevailing party’s attorney as its agent for purposes of defending its decisions and any orders, we are informed that it rarely does so. 804CMR §1.17(2).

### **Judicial Enforcement**

As noted above, either party to an MCAD consent order, a pre-determination settlement effected through conciliation (or otherwise) or an MCAD final decision and order(s) may file a complaint with the MCAD alleging violations thereof, and the MCAD is required “to proceed to obtain enforcement by filing a petition in the appropriate state court” through one of its own attorneys or by designating counsel for the party aggrieved as its agent. G.L. c. 151B, §6; 804 CMR §1.18(2).<sup>13/</sup>

### **B. Application of G.L. c. 268A**

As an XYZ employee, you are a state employee for purposes of G.L. c. 268A. As such, your conduct is regulated by G.L. c. 268A, the conflict of interest law. In particular, §4 is relevant to your request.

Section 4 contains two distinct operative provisions that generally regulate what a state employee may “do on the side.” Section 4(a) provides that “no state employee shall otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receive or request compensation from anyone other than the commonwealth or a state agency, in relation to any particular matter<sup>14/</sup> in which the commonwealth or a state agency is a party or has a direct and substantial interest.” Section 4(c) provides that “no state employee shall, otherwise than in the proper discharge of his official duties, act as agent or attorney for anyone other than the commonwealth or a state agency for prosecuting any claim against the commonwealth or a state agency, or as agent or attorney for anyone in connection with any particular matter in which the commonwealth or a state agency is a party or has a direct and substantial interest.”

Section 4 broadly and uniformly restricts all regular (as distinguished from “special”)<sup>15/</sup> state employees (other than legislators). Accordingly, if any state agency has a direct and substantial interest in or is a party to a particular matter, then §4’s prohibitions apply; it makes no difference whether it is the regular state employee’s own state agency or another state agency that has the interest or is a party.<sup>16/</sup>

MCAD proceedings and the concomitant submissions, determinations and decisions are particular matters. You seek to be compensated by and act as attorney for private parties in connection with such particular matters.

The critical question here is whether the MCAD is a party to or has a “direct and substantial interest” in employment discrimination Cases. For the reasons discussed below, we conclude that the MCAD has a direct and substantial interest in such Cases (and may, at some stage, become a party) and that, therefore, you may not receive compensation from or act as attorney for complainants in connection with such Cases.

As we wrote in *EC-COI-97-2*, discussed below:

When construing statutory language, we begin with the plain meaning of the statute. *Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 292 Mass. 811, 813 (1984); *O'Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984). The relevant dictionary definition of "interest" from Webster's Third New International Dictionary (unabridged) is "right, title or legal share in something; something in which one has a share of ownership or control." In legal parlance, the term "interest" is "the most general term that can be employed to denote a right, claim, title, or legal share in something." Black's Law Dictionary. Within the context of G.L. c. 268A, §4, interests of the Commonwealth would include proceedings affecting the Commonwealth's legal rights or liabilities, pecuniary interests, property interests or proceedings where the Commonwealth would have a stake in the proceedings. See *EC-COI-91-10* (Commonwealth has interest if outcome would require expenditure of public funds, exposure to liability, implicate government's rights and responsibilities); . . . . (Emphasis added.)

While merely remote, tenuous or inconsequential interests will not make the Commonwealth's interest "direct and substantial," the Commonwealth "may have a significant interest in a matter even when that interest is not financial or proprietary." Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L. Rev. 299, 330-332 (1965).<sup>17/</sup> It is that type of intangible, but significant, interest that can vest the Commonwealth and/or a state agency with a "stake" in proceedings before such agency sufficient to render the interest direct and substantial even though no legal rights or liabilities or pecuniary or property interests of the Commonwealth or such agency are affected and even though neither the Commonwealth nor such state agency is a party to the proceeding.

Since 1978, when the Commission was created and charged as the primary civil enforcement agency under G.L. c. 268A, see G.L. c. 268B, §3(i), we have engaged in a case-by-case approach when determining whether §4 applies. When undertaking such analyses, we have in mind the two actual or potential ills targeted by Section 4: divided loyalty and influence peddling. *Commonwealth v. Cola*, 18 Mass. App. Ct. 598, 610 (1984), citing *Commonwealth v. Canon*, 373 Mass. 494, 504 (1977) (Liacos, J. dissenting); *Edgartown v. State Ethics Commission*, 391 Mass. 83, 89 (1984); Buss, *supra* at 323.

This section [municipal counterpart to §4] of the statute reflects the old maxim that 'a man cannot serve two masters.' It seeks to preclude circumstances leading to a conflict of loyalties by a public employee. As such, it does not require a showing of any attempt to influence - by action or inaction - official decisions.

*Canon* case, *supra* at 504. (Emphasis added.) See also, *EC-COI-92-36*.

When reviewing litigation pending before state courts, we have found that the Commonwealth is a party to and has a direct and substantial interest in all criminal matters and in civil matters in which the Commonwealth is named as a party. See *EC-COI-89-31; 81-77*. Conversely, we have found that the Commonwealth would not ordinarily have a direct and substantial interest in a civil lawsuit between private parties merely because the litigation was before a state court, *i.e.*, absent some showing that the Commonwealth would be directly affected by the outcome. See *EC-COI-91-10; 82-132; 80-54*.

By contrast, when reviewing or discussing various types of administrative proceedings, until our decision in *EC-COI-97-2*, we have generally determined that such proceedings are or may be of direct and substantial interest to the subject administrative agency.<sup>18/</sup> With that decision, we signaled our intention, when presented with administrative proceedings before state agencies involving disputes between private parties, to review them in greater depth to determine whether the Commonwealth or the subject state agency has a direct and substantial interest.

In *EC-COI-97-2*, we concluded that a state employee who was also a private attorney “on the side” was permitted to represent clients who were not state employees at workmen’s compensation proceedings before the Massachusetts Division of Industrial Accidents (DIA) involving private parties (the employee/claimant and the insurer) seeking to resolve a contested claim and entailing one or more phases. Those phases are: (i) informal attempted conciliation before a DIA conciliator; (ii) a conference before an administrative law judge who (based on the parties’ identifying of the issues, summarizing the anticipated testimony, making oral arguments and submitting documents, such as medical reports, wage statements and affidavits from witnesses) decides whether and to what extent relief should be granted and issues a conference order embodying that decision; (iii) adjudicatory hearing, where the rules of evidence apply and sworn testimony is taken, before the same administrative law judge who presided at the conference; and (iv) appeal to a 3-member Industrial Accident Review Board and finally to the Appeals Court.<sup>19/</sup> A party in interest may also seek judicial enforcement of an administrative law judge’s order. G.L. c. 152, §§10, 10A, 11, 11(C) and 12; *EC-COI-97-2*.

The MCAD proceedings under consideration here are similar to, but distinguishable from, those DIA proceedings.<sup>20/</sup> The MCAD proceedings also consist of one or more phases, depending on various variables, e.g., whether and when the Case is removed to state court or settled; whether there is a PC or LOPC determination; what is the MCAD’s decision and order(s); whether an appeal is instituted; and whether, at any stage, judicial enforcement is sought. For ease of reference, we have characterized those phases as the Investigative Phase (consisting of Investigation and Initial Determination), the Conciliation Phase, the Public Hearing Phase, the Appeal Phase (first internal and thereafter to superior court) and the Judicial Enforcement Phase as described in Part A above. As reflected by the discussion below, it appears to us that the character and extent of involvement of MCAD personnel in the various Phases is more extensive and MCAD’s “stake” in such proceedings is more significant than that of a court or DIA, whose role is only “to provide an objective and impartial forum” for private parties.

First and, perhaps most telling, in an appeal to court of an MCAD decision and order(s), the MCAD is a necessary and active party. The MCAD’s being the party required to be named in such appeal reflects the significance and breadth of the MCAD’s role in such proceedings even though, in practice, if the aggrieved party fails to name the prevailing party in such an appeal, the MCAD “file[s] a motion to dismiss for failure to name an essential party,” G. Napolitano, *supra* at 48, § 4.10. By contrast, in DIA proceedings, the DIA is not a required party if there is an appeal to court of a decision of the Industrial Accident Review Board pursuant to G.L. c. 152, §12(2) and G.L. c. 30A, §14.<sup>21/</sup>

Second, the degree and kind of involvement by MCAD personnel in the Investigative Phase of a Case may be so extensive that it could be likened more to the role played by other agencies (including law enforcement agencies) having investigative, adjudicatory and enforcement powers. After a complaint is filed, MCAD investigators begin their investigation

and continue their involvement until the Investigating Commissioner reaches and issues a PC, LOPC or other determination and any “appeals” therefrom or reconsideration thereof have been concluded. During the Investigative Phase, MCAD personnel are authorized and/or required to play a significant, affirmative role in a Case while private attorneys play a limited role. Girton, *supra* at 158. Those MCAD activities include conducting investigative and fact-finding conferences and on-site visits; interviewing witnesses and reviewing documents; by subpoena, compelling attendance of persons and production of documents; preparing and issuing interrogatories; and, when necessary, deposing witnesses.

By contrast, in the DIA proceedings, the administrative law judge who makes the initial determination about granting relief relies on presentations and submissions made by the parties. DIA personnel do not engage in independent investigation (as do MCAD personnel during the Investigative Phase of a Case) to reach their initial determinations.

Third, MCAD personnel may or must play other affirmative (rather than neutral) roles during the Investigative and other Phases. The MCAD’s fashioning of broad and comprehensive range of remedies, especially those aimed at eliminating an employer’s unlawful discriminatory practices generally, not just those affecting the complainant, reflects the MCAD’s performance of its broader remedial charge to minimize or eliminate unlawful discrimination, even in proceedings (such as the Cases you wish to undertake) between two private parties. The MCAD’s Investigating Commissioner is authorized to seek “appropriate injunctive relief,” G.L. c. 151B, §5, “to enjoin ongoing sexual, racial or other unlawful harassment.” Girton, *supra* at 157. If the Investigating Commissioner issues a PC determination, he or she is required to endeavor to use the conciliation process “to eliminate the unlawful practice,” thus playing a proactive, remedial role. The MCAD may be required to enforce a consent order or a settlement agreement reached between the parties to a Case. 804 CMR §1.18(2). Also, as discussed above, the Regulations authorize the MCAD to designate as its agent for various purposes private attorneys representing the parties.

By contrast, DIA personnel adjudicate only the rights and obligations of the parties before them and do not fashion remedies to address a broader spectrum of concerns. Also, the party in interest, not DIA, must enforce a DIA orders.

The extent of MCAD’s investment in matters pending before it is also evidenced by the character and extent of involvement of its personnel in connection with its administrative proceedings, other than Cases in which complainants are represented by their own attorneys. For example, MCAD personnel assist *pro se* complainants in drafting and filing their complaints. Napolitano, *supra* at 4-7, §§2.2, 2.3, and, if there is a PC determination, the MCAD assigns an attorney to represent *pro se* complainants during the Conciliation/Public Hearing Phase. G.L. c. 151B, §5; Girton, *supra* at 160-161.<sup>22/</sup> The MCAD’s authority to initiate its own proceedings to eradicate and remedy the effects of unlawful discrimination also evidences the breadth of its charge and that of its personnel. G.L. c. 151B, §5; 804 CMR §1.03(1).

As the foregoing review amply demonstrates, the MCAD proceedings under review here are distinguishable from the DIA proceeding addressed in *EC-COI-97-2*, where the DIA was only to “provide an objective and impartial forum” akin to a court, in adjudicating disputes between a private claimant against a private insurer or employer. In short, in light of the considerations above as well as the MCAD’s extensive regulatory scheme, we conclude that the MCAD has a sufficient stake in proceedings before it to vest it with a direct and substantial interest within the meaning of §4. We also take this occasion to clarify that a state agency may

have a “stake” in proceedings before it that is not financial or proprietary and that, thus far, it is only in the singular circumstances presented in *EC-COI-97-2* that we concluded that an administrative agency would not have a direct and substantial interest in proceedings before it.

Our conclusion is consistent with the plain language of §4 and the principles on which it is based as well as the weight of our precedent. In particular, it is §4’s prophylactic purposes, seeking to preclude circumstances having the potentiality (not just the actuality) of placing a state employee in divided loyalty or influence peddling situations, that would give rise to concern were you to represent complainants in such Cases.<sup>23/</sup> As §4 targets potential as well as actual ills, it will restrict you, as a full-time, regular state employee, from working “on the side” representing private clients in connection with Cases just as it would restrict a regular MCAD employee or a regular state employee of any other state agency (including someone who never has official dealings with the MCAD). In point of fact, because, in your XYZ position, you regularly practice before the MCAD, the potential of your using inside influence on MCAD employees for the benefit of your private clients is more than theoretical. As we wrote in *EC-COI-93-5*, n. 2:

In seeking to effectuate this statutory purpose [of §4], we find it useful to determine the likelihood that a public employee will have an opportunity to have dealings with government officials on behalf of a private party. Where we find such likelihood, we will apply the restrictions of §4.

Given our conclusion, we advise you that, in your private law practice, you will be prohibited by §4 from representing clients in connection with such Cases during their pendency with the MCAD, during any injunctive or enforcement proceedings brought by the MCAD and/or during any appeal of MCAD’s decisions.<sup>24/</sup>

We point out that, §4 would not restrict you from representing clients such as those you seek to represent in connection with actions brought in superior or federal court where the MCAD is not a party and over which it has no jurisdiction. We also point out that, if you were a “special state employee”<sup>25/</sup> of XYZ State Agency, rather than a regular state employee, §4 might permit you to work “on the side” on Cases before MCAD as you have proposed.

**DATE AUTHORIZED:** September 23, 1998

<sup>1/</sup>In addition, under G.L. 268A, §4, discussed below, you may not represent a state employee in such claims against his or her state agency-employers as they would be parties to or have a direct and substantial interest in such proceedings.

<sup>2/</sup>Our overview is based on the sources cited and discussions with MCAD personnel about the agency’s practice and procedures. We do not, for example, address MCAD housing discrimination proceedings or, except as specifically noted for purposes of comparison, MCAD proceedings initiated by the MCAD or those involving *pro se* complainants.

<sup>3/</sup>This opinion does not reflect proposed revisions to the Regulations that have been circulated for public comment but have not yet been promulgated.

4/To prevent irreparable injury, complainants' attorneys may also seek temporary injunctive relief "during the pendency of or prior to the filing of a complaint with" the MCAD. G.L. c. 151B, §9.

5/A complainant may remove the matter within 90 days after filing the complaint only with the consent of the Investigating Commissioner; thereafter, the complainant may remove the matter as a matter of right. G.L. c. 151B, §9. In *Lavelle v. Massachusetts Comm'n Against Discrimination*, 426 Mass. 332 (1997), the court held that, in certain types of cases, respondents may seek *de novo* judicial relief in the form of a jury trial, but only after having fully exhausted the MCAD's administrative remedies.

6/Superior court actions must be filed within three years of the unlawful conduct. G.L. c. 151B, §9. The MCAD has taken the position in *Alves v. Town of Freetown*, 17 Mass. Discrim. L. Rep. 1627 (1995) that, if complainants file their actions in federal court, that may result in the MCAD's dismissal of the correlative MCAD matter. See also *Christo v. Edward G. Boyle Ins. Agency*, 402 Mass. 815 (1988).

7/The parties or their attorneys may assist by drafting interrogatories for submission to the adverse party.

8/A party may be permitted to conduct discovery "upon a showing that a witness or evidence may become unavailable." 804 CMR §1.09(1)(a).

9/Under MCAD Policy No. 96-1, the agency also recognizes privately arranged alternative dispute resolution through mediation or arbitration. Napolitano, *supra* at 37, §3.2.

10/We note that the Regulations provide that the complainant's counsel may be designated as the MCAD's agent "for purposes including conciliation, presentation of the case at public hearing, or enforcement of a pre-determination settlement, consent order, or final order of the [MCAD]" if, upon motion of the complainant's counsel, the MCAD determines that the interests of the complainant and the MCAD "are without conflict." 804 CMR §1.07(5)(b). We are informed that currently this agent-designation procedure is rarely, if ever, used during internal MCAD proceedings but that it is sometimes used to enforce MCAD orders in court. See also 804 CMR §§1.17(2) and 1.18(2), discussed below, also authorizing the MCAD to so designate private attorneys as its agents during and after the conclusion of its proceedings.

11/The Hearing Commissioner who heard a Case does not sit on such appeal, but the Investigating Commissioner does.

12/In certain circumstances, the respondent may also seek a *de novo* jury trial. See n. 5.

13/Ordinarily prevailing complainants may also file such judicial enforcement actions without MCAD involvement. Napolitano, *supra* at 48, §4.1.

14/"Particular matter," 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, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.” G.L. c. 268A, §1(k).

15/“Special state employee,’ a state employee: (1) who is performing service or holding office, position, employment or membership for which no compensation is provided, or (2) who is not an elected official and (a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or (b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. . . .” G.L. c. 268A, §1(o).

16/By contrast, §4 applies less restrictively to special state employees.

17/See also Braucher, Conflict of Interest in Massachusetts, in Perspectives of Law: Essays for Austin Wakeman Scott 3, 16 (Pound, Griswold & Sutherland 1964), discussing §17, the municipal counterpart to §4: “It is hard to hypothesize a ‘particular matter’ involving municipal action in which it can be said with assurance that the municipal interest is indirect and insubstantial. But the [direct and substantial] requirement does prevent coverage of private transactions in which the municipal interest is remote or inconsequential.”

18/See, e.g., *EC-COI-82-82* (§4 generally prohibits state employees from representing private clients in proceedings before state agencies); *82-50* (special state employee of the MCAD prohibited from representing private clients in proceedings pending before agency); *83-12* (state employee would be prohibited from representing client/insured driver in a surcharge appeal proceeding against the insurer before the Merit Rating Board were it not for §4’s exemption for representation of immediate family members); *84-9* (submissions and applications to and determinations of Appellate Tax Board); *83-12* (state employee prohibited from representing client/property owner contesting municipal tax assessment in proceedings before Appellate Tax Board); *91-10* (proceedings before the Department of Industrial Accidents, other than those addressed in *97-2*); *79-83* (proceedings before state agency); *82-33* (regulatory or adjudicatory proceedings before state agencies); *89-12*, *85-17*, *83-59*, *81-77* (applications for licenses, permits, approvals, etc.); *93-5*, *90-13* (submissions of reports).

19/We are informed by DIA legal counsel that such court appeals are not commonly instituted.

20/Here and in the following discussion, when referring to DIA proceedings, we mean the type of proceeding reviewed in *EC-COI-97-2*.

21/The DIA receives notice of such appeals, but, by way of an answer, must only accumulate and file with the court its record of the proceedings under review. G.L. c. 152, §§14(2) and (4).

22/At the Appeal Phase, the MCAD no longer provides an attorney for the *pro se* litigant.

23/In discussing the counterpart sections of the federal conflict of interest statute, currently codified as 18 U.S.C. §§203 and 205, on which §§4(a) and (c) were modeled, one commentator wrote that they were based on the principle that “public officials should not in general be

permitted to step out of their official roles to assist private entities or persons in their dealings with government.” Perkins, *The New Federal Conflict Law*, 76 Harv. L. Rev. 1113, 1120 (1963).

24/While recognizing that G. L. c. 268A will bar you, in your private practice of law, from representing employees in proceedings against their employers filed with the MCAD, a necessary prerequisite to their commencing judicial civil proceedings under the Statute, we do not agree with your suggestion that your being so barred denies your prospective private clients any constitutional rights or remedies. They can engage other attorneys or, if they choose, act *pro se*, in which event, the MCAD will assign them an MCAD attorney for the Conciliation/Public Hearing Phase.

25/See n. 15.