

**CONFLICT OF INTEREST OPINION
EC-COI-90-8**

FACTS:

You are currently employed on a full-time basis as counsel to a state agency ABC. Your office is located at ABC and your office hours are 8:30 a.m. to 4:30 p.m. Monday through Friday, although additional hours are often required.

Outside of your ABC work schedule, you also serve as the Town Counsel to a town (Town). In that capacity, you interpret statutes, regulations, court decisions and opinions concerning various aspects of municipal government. You prepare opinions, reports and advisories, usually upon the request of a Town official. You also receive all civil litigation served upon the Town. Usually, since the Town is covered by various insurance policies, the insurance company hires an outside counsel to handle the civil matters.

In the few remaining cases where no money damages are sought, you handle preliminary work. You usually prepare civil litigation in which the Town is plaintiff, and again, handle the preliminary work. Whether the Town is plaintiff or defendant, if the case is to go to trial, you hire an outside attorney to handle the matter. You do not handle any criminal matters. Depending upon the issues and/or lawsuits which arise,

you generally work an average of ten hours per week in your capacity as Town Counsel. Since you no longer maintain a private office outside of your home, your work is usually done at home, although you have access to Town Hall and the secretary to the Board of Selectmen, as needed.

QUESTION:

Does G.L. c. 268A permit you to maintain your Town Counsel position while also serving as ABC Counsel?

ANSWER:

Yes, subject to certain conditions.

DISCUSSION:

In your capacity as ABC Counsel, you are considered a state employee for the purposes of G.L. c. 268A. The principal section of c. 268A which regulates the after-hours activities of state employees is G.L. c. 268A, §4. Under §4, a state employee is prohibited from either representing or receiving compensation from a non-state party in connection with any application, permit, contract, controversy or other particular matter^{1/} in which the Commonwealth or any state agency is either a party or has a direct and substantial interest. Where a state employee holds employment with a municipality, however, the prohibition of §4 is less restrictive. Specifically, a 1980 amendment to §4 provides that

This section shall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties of or receiving compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility.

In practical terms, you may continue to serve as Town Counsel except in matters which fall within the jurisdiction of ABC. For example, you may not act as Town Counsel on Town matters relating to permits or the use of Town resources by ABC. Because you indicate that the Town handles relatively few legal matters which involve ABC the exemption conditions of §4 should not unduly restrict your Town Counsel activities.

Your retention of your Town Counsel position

results in certain restrictions on you in your ABC capacity. Specifically, G.L. c. 268A, §6 prohibits your participation as ABC Counsel in any particular matter in which affects the financial interests of a business organization which employs you. Because the Town is considered a business organization for G.L. c. 268A purposes, EC-COI-88-4, you must abstain from participating^{2/} as ABC Counsel in any particular matter in which the Town has a reasonably foreseeable financial interest. EC-COI-84-96. Should a matter affecting the Town's financial interest be assigned to you, you must abstain and notify your ABC appointing official and the Commission of the nature and circumstances of the particular matter and financial interest involved. Your appointing authority may thereafter exercise certain options, one of which could permit your participation pursuant to the standards of G.L. c. 268A, §6(3). Unless and until you receive written permission pursuant to §6(3), you must continue to abstain from ABC participation in matters affecting the Town's financial interest.

Aside from §6, you are also subject to certain limitations under §23(b)(2), which prohibits you from using your official ABC position to secure unwarranted privileges or exemptions of substantial value for you or the Town. To comply with §23(b)(2), you must continue to conduct your Town Counsel activities entirely outside of your ABC work schedule and refrain from using ABC resources such as telephones, word processors, copy machines and mailing privileges^{3/} in connection with your Town Counsel activities.

DATE AUTHORIZED: June 27, 1990

^{1/}"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.

^{2/}"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

^{3/}While §23(b)(1) prohibits you from accepting employment whose responsibilities are inherently incompatible with your ABC responsibilities, nothing in the facts which you have presented would lead to a

conclusion that your Town Counsel and ABC responsibilities are inherently incompatible. See, EC-COI-89-30.