

**CONFLICT OF INTEREST OPINION
NO. EC-COI-84-61**

FACTS:

You are a member of the General Court and of a Committee (Committee) and are not a candidate for reelection. As a legislator, you participate in the debate and voting on bills which, if passed, become general or special legislation. Certain bills involving particular issues are initially reviewed by the Committee. The final recommendation that a bill should or should not pass generally comes from the Ways and Means Committee.

You wish to pursue some private business opportunities. One area which you would like to become involved with while still a member of the General Court is the marketing of "real estate/syndication/tax shelter

¹/Because your situation does not present a violation of §4 it is unnecessary to determine the extent to which the exemptions for members of the General Court would apply to you.

arrangements." You describe these arrangements as being the result of the ability of certain parties (real estate developers, for example), to sell for immediate gain financial losses which the purchaser may use for investment purposes. Generally, the individual or entity incurring the losses sells these losses outright to a syndication house which then will resell them to a brokerage firm. The brokerage firm then markets these to interested investors. The original seller has no interest in the losses after the initial role. You would be acting on a commission basis as a representative of the syndication house in the purchase and marketing of these losses.

You would also like to market and, in some cases, participate in these tax shelter arrangements after you leave the General Court. You wish to participate as a partner in real estate development, or to act as a consultant to or agent for real estate developers. Your representation of these developers as an agent and your employment as a consultant by them could involve appearances before state agencies or legislative committees. And, the real estate developments with which you may be involved, including some of those which will be generating losses for the tax shelter arrangement, may have been funded by programs administered by state agencies like the Massachusetts Housing Finance Agency (MHFA), the Massachusetts Industrial Finance Agency (MIFA) or the Government Land Bank. Neither the Committee nor the legislature generally makes decisions regarding the implementation of the various programs run by these agencies, nor do they appropriate funds for them. (These agencies are self-sustaining through the issuance of bonds.)

Finally, you also would like to act as a business agent in Massachusetts for out-of-state corporations, partnerships or other organizations.

QUESTION:

How does the conflict of interest law, G.L. c. 268A, affect your future employment opportunities?

ANSWER:

The conflict of interest law does not prohibit you from pursuing any of the activities described above, although under certain circumstances there may be some limitations.

DISCUSSION:

As a member of the General Court, you are a state employee as defined in the conflict of interest law G.L. c. 268A, §1 et seq., and, as a result, are subject to the provisions of that law.

While a State Employee

Section 4 of the conflict law provides that no member of the General Court shall personally appear before any state agency for any compensation other than his legislative salary unless:

- (1) the particular matter before the state agency is ministerial in nature; or
- (2) the appearance is before a court of the commonwealth; or
- (3) the appearance is in a quasi-judicial proceeding.

For the purposes of this paragraph, ministerial functions include, but are not limited to, the filing or amendment of: tax returns, applications for permits or licenses, incorporation papers, or other documents. For the purposes of this paragraph, a proceeding shall be considered quasi-judicial if:

- (1) the action of the state agency is adjudicatory in nature; and
- (2) the action of the state agency is appealable to the courts; and
- (3) both sides are entitled to representation by counsel and such counsel is neither the attorney general nor the counsel for the state agency conducting the proceeding.

The activities you propose to pursue while still in the legislature do not appear to require such appearances. You should, however, keep this restriction in mind should you be approached while still in the General Court for any of the types of representative activities you intend to pursue after leaving the General Court.

Section 6 of G.L. c. 268A prohibits a state employee from participating as such in any "particular matter"^{1/} in which he, a business organization by which he is employed, or an organization with which he is negotiating or already has an arrangement for prospective employment has a financial interest. The fact that state funds might be involved in some of the real estate developments generating the tax shelter arrangements might appear to bring the provisions of §6 into play because of your role as Committee member and as a legislator in the legislation regarding the programs and agencies from which the funds originate. That legislation, however, because it focuses on programs rather than specific projects within those programs, is general legislation, which is explicitly excluded from the definition of particular matter. Therefore, your financial

^{1/}For the purposes of G.L. c. 268A, "particular matter" is defined as 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. G.L. c. 268A, §1(k).

interest or that of a syndication house which might employ you would not implicate the prohibition against participation contained in §6 until the end of your term.^{2/}

Section 7 of the conflict law prohibits a state employee from having a financial interest in a contract made by a state agency. On the facts as you present them, you would not be considered to have a financial interest in funding agreements between state agencies and the developers with whom you will be dealing. If, however, the facts were to change (for example, you agreed with a developer at the outset of a state-funded development that you would be involved with marketing his losses) the result under this section might be different. You should feel free to seek another opinion from the commission in that event.

Section 23 prohibits a state employee from using or attempting to use his official position to secure unwarranted privileges for himself. It also proscribes conduct which gives reasonable basis for the impression that any person may improperly influence or unduly enjoy his favor in the performance of his official duties.

As a legislator and as a member of the Committee, you have authority over matters of particular interest to certain individuals. For example, certain employees of the legislature may be subject to your control, and certain individuals or entities might have a special interest in a particular piece of legislation pending in the legislature. The Commission has held in prior opinions that individuals who may be directly and significantly affected by the authority of a state employee at a given time should not be subjected to solicitations from that state employee. See EC-COI-82-64; 83-43. Their decisions might be affected by the potential impact, positive or negative, from the exercise of that authority. Therefore, §23 prohibits you from marketing these tax shelter arrangements to persons at a time when they have a specific interest in a piece of legislation before you, or to persons like legislative employees who may constantly be subject to your direct authority.

As a Former State Employee

Section 5(a) of the conflict law prohibits a former state employee from being compensated by, or acting as agent or attorney for, anyone other than the state in connection with any particular matter in which the state is a party or has a direct and substantial interest and in which he participated as a state employee. Section 5(b) prohibits a state employee for one year from appearing personally before any state agency on behalf of a non-state party in connection with any particular matter in which the state is a party or has a direct and substantial interest and which was within his official responsibility during the last two years of his state employment.

Based on the facts you have detailed, neither of these sections would limit your activities. Your compensation in the marketing of the tax shelter arrangements would be in return for those marketing services and not in connection with any particular matters in which you participated. Although as a partner in a state-funded real estate development you might have an interest in a state contract, your only participation in this regard would be in connection with the general legislation related to the program or the funding for the program. Since general legislation is not a particular matter, §§5(a) and 5(b) will not apply. For this same reason, your appearance on behalf of developers or firms before state agencies, boards and subdivisions other than the legislature would not be in connection with particular matters.

Section 5(e) of G.L. c. 268A prohibits a former member of the General Court from acting as a legislative agent^{3/} for anyone other than the state before the governmental body with which he has been associated within one year after leaving that body. The prohibition applies to you in connection with actions as a legislative agent before both branches of the General Court. See EC-COI-81-80.

DATE AUTHORIZED: May 8, 1984

^{2/}Section 6A of the conflict law applies only to persons who hold a position for which they are nominated at a state primary or chosen at a state election. The section requires that whenever in the discharge of his official duties such an official is required knowingly to take an action which would substantially affect his financial interest, unless that effect is no greater than the effect on the general public, that official must file a written description of the action and the potential conflict of interest with the Ethics Commission. This section is distinguishable from §6 because its application is not limited to particular matters and it does not prohibit the official from taking the action. Although the question you ask does not specifically implicate the provisions of §6A, you should be aware of its terms and should comply with its conditions should appropriate fact situations arise.

^{3/}For the purposes of G.L. c. 268A, §5(e), "legislative agent" is defined as "any person who for compensation or reward does any act to promote, oppose, or influence legislation, or to promote, oppose, or influence the governor's approval or veto thereof or to influence the decision of any member of the Executive branch where such decision concerns legislation or the adoption, defeat, or postponement of a standard, rate, rule or regulation pursuant thereto. The term shall include persons who, as any part of their regular and usual employment and not simply incidental thereto, attempt to promote, oppose, or influence legislation or the governor's approval or veto thereof, whether or not any compensation in addition to the salary for such employment is received for such services."

"Legislation," is defined as "all bills, resolutions, and all proposals of every kind, character or description considered by the general court, any committee thereof, or the governor."