

COMMISSION ADVISORY NO. 94-02

AGENCY

PART C: COUNTY EMPLOYEES ACTING AS AGENT⁽¹⁾

INTRODUCTION

Massachusetts General Laws Chapter 268A §11 prohibits county employees, including elected officials, from acting as agent (or attorney) for anyone other than the County on any matter in which the County is a party or has a direct and substantial interest. This provision is intended to prevent divided loyalties which would result if county employees attempted to "serve two masters" -- i.e., the County and a second party -- with different or conflicting interests. Section 11 is based on the principle that public employees should be loyal to the government, and where their loyalty to the government conflicts with their loyalty to a private party or employer, the government's interest must win out.

For instance, on matters involving their County, county employees are prohibited from acting as agents for other individuals, corporations, municipal governments, advocacy groups, business partnerships, trusts, associations, charitable organizations, and the like. Types of activities prohibited by §11 include: submitting applications or supporting documentation; preparing documents that require a professional seal; contacting other people, groups or agencies; writing letters; serving as attorney; and serving as spokesperson.

Note that §11 not only prohibits county officials from representing private parties before their own board or agency, but also prohibits them from representing anyone:

- before other County boards and agencies
- before municipal or federal agencies
- to private business or charitable organizations, or
- to private individuals
- in any instance where the County a party to, or has a direct and substantial interest in, the matter.

The purpose of this advisory is to assist county employees and officials to recognize those situations where they are prohibited from acting as the representative for another, and to enumerate exceptions to the law where they exist. Examples in this advisory are for the purposes of illustration only. Whether or not §4 is triggered will depend on the specific facts of the situation.

MATTERS IN WHICH THE COUNTY HAS A "DIRECT AND SUBSTANTIAL INTEREST"

Before acting in a private capacity in connection with a particular matter, county employees should first determine if the County is a party to or has a "direct and substantial interest" in the matter. Examples of these situations include:

- any matter pending before, under the official jurisdiction of, or involving action by a county agency, board, commission, authority or other body;
- any effort to change county regulations, policies or procedures;
- any contract, court case or other legal matter to which the County is a party, or otherwise has a direct and substantial interest; or
- any ruling or other action by a federal, county, regional or municipal agency involving matters which are subject

to regulation by the County.

If the County is not a party to and does not have a "direct and substantial interest" in the matter, the restrictions of §11 will not be triggered, and the county employee may act as agent, representative or attorney.

PROHIBITION ON ACTING AS AGENT FOR ANOTHER

If the County does have a "direct and substantial interest" in the matter, the county employee must also determine whether an activity would constitute "acting as agent". Section 11(c) prohibits a county employee from acting as agent in connection with such matters -- even if the employee is not paid for his or her actions.

An agent is anyone who represents another person or organization in their dealings with a third party. Almost any instance where the county employee is acting on behalf of someone else by:

- contacting or communicating with a third party;
- acting as a liaison with a third party;
- providing documents to a third party; or
- serving as spokesperson before a third party
- can be considered "acting as agent".

Note that the restrictions of §11(c) are not triggered if the county employee is not representing someone before a third party. A county employee may offer advice to others and may help plan strategies, as long as his or her activity does not reach the level of "acting as agent". (Note, however, that the County employee may violate §11(a) if he or she accepts pay or other compensation for such activities.)

For example, a county employee may not submit a grant application to a county agency on behalf of his neighbor because he is more familiar with the application procedures than she is; this action would constitute acting as an agent, even if it is done merely as a favor and for free. However, the employee may advise his neighbor on the application procedures and the content of the application.

A county employee may not sign and send letters on behalf of a grassroots organization advocating a change in county regulations, even if the letters are addressed to private individuals. The employee may participate in committee discussions to plan the mailing, as long as the letter is signed and sent by some other member of the organization.

A employee may not attend a community meeting and speak on behalf of a private company, if the County is a party to or has a direct and substantial interest in the matter being discussed at the meeting. However, the employee may help the company's officials develop a strategy to mitigate the community's concerns.

There are several specific exceptions to the general prohibition that county employees may not act as an agent in matters of concern to their County.

PERMITTED CONSTITUENCY WORK

County employees may generally act as agents for others if their county jobs authorize it. This applies to both appointed and elected officials performing constituency work.

Certain county jobs authorize employees to act as the agent for private parties concerning matters of interest to the County. For example, a County Housing Authority employee's responsibility may include advocating on behalf of low-income citizens to increase the number of affordable housing units. This kind of constituency work is not only expected but demanded in the employee's job description. Accordingly, it is permissible for the employee to act as the agent for the private party (in this case, the low-income citizen).

The following guidelines should be used to help determine what is permissible constituency work and what is a prohibited act of agency. Generally, a county employee who acts on behalf of a private citizen will be considered to be performing constituency work if:

- the actions are within the scope of the county employee's job responsibilities;
- the county employee receives no compensation beyond his or her regular salary;
- the county employee has no financial interest in the matter;
- the constituent is not a relative or a business associate, or a partner, trustee, officer or director of an organization with which the county employee is associated;
- the county employee is not taking action as the constituent's attorney; and
- the constituent lives or does business within the county.

On the other hand, if a county employee represents a relative, his or her employer or a business associate before county agencies, is paid a fee by the constituent for the action taken or has a personal financial stake in the matter, these actions will not be considered legitimate constituency work and are prohibited.

Remember that allowable constituency work includes only those activities "within the proper discharge of official duties." An economic development specialist would not be performing permissible constituency work if she called the County Sheriff's Office regarding a criminal investigation, since the investigation has nothing to do with the development specialist's official duties. Alternatively, if a county Housing Authority pursues a resident's complaint against a maintenance contractor, this is a permissible constituency service since the contractor is hired and ultimately supervised by the Housing Authority.

The Ethics Commission has stated in a prior advisory opinion that a public employee's appointing authority has "some latitude ... to determine what constitute[s] the proper discharge of official duties ... " EC-COI-83-137. Therefore, if an employee's appointing authority makes a decision that a particular activity is "in the proper discharge of the [employee's] official duties," the Commission will ordinarily defer to this judgment. However, the Commission will review an appointing official's determination of what is in the proper discharge of official duties if that determination "far exceed[s] the customary job requirements for an employee [so] as to frustrate the purposes of the [conflict of interest law] ... " Id.

If the employee is unsure whether his or her action on behalf of a constituent is in "the proper discharge of official duties," the employee should seek legal advice from his or her agency's legal counsel or the Legal Division of the State Ethics Commission.

SPECIAL COUNTY EMPLOYEES

"Special county employees" may generally act as agents before county agencies other than their own. A county employee is considered a "special county employee" if:

- he is not paid or otherwise compensated for his county position; or
- he holds an appointed position which, by terms of the employment contract or the position classification, permits personal or private employment during normal working hours (a disclosure of this permission or classification must be filed with the Ethics Commission and the appropriate Office of the County Commissioners before the employee begins such "outside" employment); or
- he holds an appointed position and has not been compensated by the County for more than 800 hours of work during the previous 365 days.

If a county employee holds a job that qualifies as a "special county employee" position, the employee may represent private parties on matters of direct and substantial interest to the County if:

- the employee has not participated at any time as a county employee or special county employee in the matter;
- the matter is not and has not been the subject of the employee's official responsibility; and
- the matter is not pending in the county agency or board for which the employee works.

There is one narrow instance where a special county employee may represent a private party before the board he or she works for -- the special county employee may not be a member of the board, must work fewer than 60 days in any 365-day period, and must have neither participated in the matter nor had official responsibility for it.

Also, "special county employees" may generally assist with work under a contract with the County, if their appointing authority certifies in writing that the interest of the County requires such aid or assistance (a copy of this certification must be filed with the State Ethics Commission).

Note that the terms "participation" and "official responsibility" are broadly defined in the statute. "Participation" includes: giving advice or making recommendations; drafting or revising; approving or disapproving; declining to act; delegating; investigating; and otherwise personally affecting a matter. "Official responsibility" is defined as the ability or opportunity to approve, disapprove or otherwise direct an action, and includes: instances where the employee is an intermediate decision-maker; instances where the employee is the final authority; and instances where the authority is not exercised personally, but rather through subordinates. A matter may be under an employee's "official responsibility" even if he or she abstains from participating in it.

For more information about this exemption, contact your agency legal counsel or the Legal Division of the State Ethics Commission.

ASSISTING SUBJECTS OF DISCIPLINARY PROCEEDINGS

Section 11 also allows county employees to assist someone who is the subject of disciplinary or other personnel proceedings, provided that they are not paid for the representation.

ASSISTING IMMEDIATE FAMILY MEMBERS

In many instances, appointed county employees may act as agents for members of their immediate families, or for anyone with whom they have a "fiduciary" relationship, if they first get permission from their appointing authority. This exemption is not available to elected officials; nor is it available for matters in which the employees have participated, or which are under their official responsibility.

The conflict of interest law recognizes that county employees may be asked to assist members of their immediate families in dealing with county matters. "Immediate family" includes the employee, the employee's spouse, and both of their parents, brothers, sisters and children. The conflict law permits an appointed county employee to act as the paid or unpaid agent for members of his or her immediate family or for any person for whom the employee serves as guardian, executor, administrator or other personal fiduciary, as long as the employee has received prior permission from his or her appointing authority and does not participate in (nor have responsibility for) the matter involved.

A county employee must meet the following criteria to be allowed to represent an immediate family member (or one with whom the employee has a fiduciary relationship):

- the county employee must be appointed (not elected);
- the county employee must be representing a family member or one for whom the employee is a fiduciary on a matter in which the employee did not participate (as a county official), and for which the employee did not have official responsibility; and
- the county employee must receive written permission from the official who appointed the employee to his or her position before the action occurs.

TESTIMONY UNDER OATH

County employees are generally allowed to give testimony under oath; however, they should contact the Ethics Commission's Legal Division before serving as a paid witness.

HOLDING MUNICIPAL POSITIONS

County employees may also hold elected and appointed municipal positions, but are prohibited from acting (in their municipal positions) on any matter within the official jurisdiction of their own county agency.

MATTERS OF GENERAL LEGISLATION

County employees may represent others on matters of general legislation and certain home-rule petitions. For example, county employees may represent advocacy groups or other parties in order to draft, promote or oppose general legislation, or legislation related to a municipality's governmental organization, powers, duties, finances or property. Note that matters involving other types of "special legislation", regulations or administrative policies are not eligible for this exemption.

For more information about this exemption, or for a determination as to whether a bill is "general legislation" or "special legislation", contact your agency's legal counsel or the Legal Division of the State Ethics Commission.

REPRESENTING ONE'S OWN INTERESTS AND PERSONAL POINTS OF VIEW

Since acting on one's own behalf is not considered acting as agent, a county employee may always represent his or her own interests or points of view. For instance, a county employee may file her own grant application, or represent himself before the County Commissioners.

Note, however, that in matters involving their County, a county employee may not act on behalf of his or her own business partnership; representing the partnership would, by definition, involve acting as an agent.

County employees may represent themselves before their own agencies, although they may not take any type of official action on the matter that affects themselves. In this situation, the employees should make every effort to clarify that they are acting on their own behalf, including:

- stating, in all written correspondence, that they are acting on their own behalf, and in their personal capacities rather than their official role;
- sitting in the audience before speaking at a hearing or public meeting, rather than sitting with other officials or staff members;
- making a public declaration, to be included in the minutes of the meeting, that they are acting on their own behalf, and in their personal capacities rather than their official role; and
- leaving the room during any Executive Session deliberations on the matter.

County employees may also express their personal points of view concerning a matter pending before county agencies. However, in such a case, the employee should clarify the situation by explaining that his or her comments constitute a personal opinion, and are not made on behalf of any group, organization, business or other individual. Without such a clarifying statement, the circumstances surrounding the employee's comments could be interpreted to constitute acting as an agent.

Note that when representing themselves or expressing personal points of view, county employees must also observe §13 of the conflict law, which prohibits county employees from taking any type of official action on matters which affect their own financial interests, or the financial interests of their immediate families, businesses or other organizations with which they are closely associated.

CONCLUSION

It is important to keep in mind that this advisory is general in nature and is not an exhaustive review of the conflict law. For specific questions, public officials and employees should contact their agency counsel or the Legal Division of the State Ethics Commission at (617) 371-9500.

AUTHORIZED: July 12, 1994

FOOTNOTE

1. Advisory No. 88-01 covers Municipal employees; Advisory No. 94-01 covers State employees.

