



# STATE ETHICS COMMISSION BULLETIN

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## Legislation to Provide Commission with Limited Regulatory Authority Supported at Hearing

On September 29, 2003, the Joint Committee on State Administration held a hearing on House Bill 4113, "An Act Authorizing the State Ethics Commission to Provide Exemptions from the Conflict of Interest Law." The Committee, co-chaired by Sen. Diane Wilkerson of Boston and Rep. Geoffrey Hall of Westford, heard oral and written testimony in support of the bill from current and former Commissioners, Commission staff and representatives from a number of organizations. No one testified in opposition.

The Joint Committee heard testimony in support of the legislation from Commission Chairman Augustus F. Wagner, Jr., Vice-Chairman Christine M. Roach, Executive Director Peter Sturges, General Counsel Diane M. Meibaum, former Commissioner and Boston College Law School Professor R. Michael Cassidy, John Montgomery, an attorney at Ropes & Gray who served as the Chairman of the 1995 Special Legislative Commission on Ethics, James Toomey, President of the Massachusetts City Solicitors and Town Counsels Association, Leonard Kopelman, of Kopelman & Paige, Geoffrey Beckwith, Executive Director of the Massachusetts Municipal Association, Glenn Koocher, Executive Director of the Massachusetts Association of School Committees and Pamela Wilmot, Executive Director of Common Cause Massachusetts. In addition, written testimony in support of House Bill 4113 was submitted by Attorney General Thomas F. Reilly, City of Boston Corporation Counsel Merita A. Hopkins, and Massachusetts

Chiefs of Police Association Executive Director George J. DiBlasi.

If enacted, House Bill 4113 would allow the Ethics Commission to create regulations that would permit certain actions that may fall within the literal language of the conflict of interest law but that do not offend the purpose of the law.

The primary goal of the proposed legislation is to better enable people to comply with the law. This goal is consistent with the purpose of the conflict of interest law, which has been clearly articulated by the Legislature at least as far back as 1962 when a report to the legislature identified two basic objectives of a code of ethics:

- the ethical standards for the Commonwealth and its employees must be beyond reproach.
- government at all levels -- state, county and municipal -- must be in a position to obtain the personnel and information required to meet the demands of modern governmental activities.

According to Ethics Commission Executive Director Peter Sturges, the conflict of interest law has a broad sweep that may result in inadvertent violations by public officials and even prohibit actions that are in the public interest. The proposed legislation would allow the Commission flexibility to address conduct regulated by the conflict law more efficiently and fairly, provide an open and transparent process which will bring "sunlight" to the decision-making process and enhance respect for the conflict law.

## Governor Appoints Judge E. George Daher Chairman

Governor Mitt Romney appointed E. George Daher, retired Chief Justice of the Housing Court, as the sixth chairman of the State Ethics Commission. Judge Daher replaces Augustus F. Wagner, Jr. who was appointed chairman in 1998 by Governor A. Paul Cellucci.

Judge Daher served as chief justice of the State Housing Court from 1978 until his retirement in 2002. Before being named to the bench, Judge Daher was a trial lawyer for 13 years. More recently, he served as the hearing officer for the disciplinary proceedings against Superior Court Judge Maria I. Lopez. He is a graduate of Suffolk University Law School and a resident of Westwood.

The Governor appoints the Chairman and two Commissioners to five-year terms to the Ethics Commission. The Attorney General and the Secretary of State each appoint one Commissioner. Only three of the five members and only two of the governor's appointees may be of the same political party.

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From the Executive Director

**“Collaboration and Outreach”**

*While the Massachusetts State Ethics Commission is an independent agency, we have collaborative relationships with a number of agencies and organizations throughout the state.*

*The Massachusetts Association of School Committees provides legislatively-mandated training for school committee members. At sessions held at sites throughout the state several times each year, Ethics Commission representatives provide educational training.*

*The Massachusetts Chiefs of Police Association and the Municipal Police Institute recently produced an interactive learning CD, “Avoiding Conflicts of Interest.” It includes a video of an Ethics Commission training session.*

*The cover story of “The Advocate,” the Massachusetts Municipal Association’s quarterly magazine, (Vol. 20, No. 1) recently focused on the conflict of interest law and the role of the Ethics Commission in providing advice to municipal officials.*

*The Massachusetts Recreation and Parks Association, the Association of Town Finance Committees, the Massachusetts Association of School Superintendents and the Massachusetts Health Officers Association have each invited Ethics Commission representatives to provide educational training sessions at their meetings or conferences.*

*The Commission and its staff are committed to providing educational outreach to interested state agencies and professional groups. Contact us at 617-727-0060 for more information.*

*Peter Sturges*

## Commission Members Fall, 2003

E. George Daher, Chair  
Christine M. Roach, Vice-Chair  
Elizabeth J. Dolan  
J. Owen Todd  
Tracey Maclin

Carol Carson  
Editor

## Secretary of State William F. Galvin names Professor Tracey Maclin to Ethics Commission

Secretary of State William F. Galvin named Boston University School of Law Professor Tracey Maclin to complete a five-year term on the State Ethics Commission.

Maclin, a resident of Boston, is a graduate of Tufts University and Columbia School of Law. He has been a visiting professor of law at Cornell and Harvard law schools and was an as-

sistant professor of law at University of Kentucky College of Law. He has written and lectured extensively on constitutional law and criminal procedure, and has appeared frequently as counsel of record in cases before the Supreme Court of the United States.

Maclin’s term will expire in September 2007.

### New Phone Hours

The Commission office is open from 9:00 a.m. to 5:00 p.m. Monday through Friday. Due to budget cuts, phone coverage at 617-727-0060 has been curtailed. A receptionist is generally available to answer phone calls between the hours of 9:30 a.m. and 12:30 p.m. and 1:30 p.m. and 4:00 p.m. Please leave a message if you are unable to reach the receptionist; your call will be returned. The Commission hopes to be able to increase phone hours in the future. Stay tuned.

### Advisory Opinions

**EC-COI-03-1** Pursuant to G.L. c. 268A, §4, a probation officer may receive statutory fees (compensation) from a party other than the Commonwealth for services rendered as a constable in relation to litigation matters involving only non-state parties. A probation officer may not receive compensation as a constable for services rendered in connection with criminal proceedings or proceedings before a state court or agency where the Commonwealth or a state agency is a party

or has a direct and substantial interest. (This opinion modifies EC-COI-94-4.)

**EC-COI-03-2** Pursuant to G.L. c. 268A, §17, a City Councilor may not apply on behalf of and receive compensation from a private party to obtain a building, electrical, wiring, plumbing, gas fitting or septic system permit because the City Council regulates the activities of the permit-granting agency.

### Staff Notes

■ Budget cuts resulted in the layoff of two part-time receptionists in July 2003. At its August 14 meeting, the Commission expressed its gratitude to **Christine Leonard-Hooker** and **Carolyn Teehan** for their good and valuable service and also regret that they are no longer with the Commission.

■ **Carol Carson**, Chief of the Communication and Public Education Division of the Commission was named president of the Council on Governmental Ethics Laws at its 25th annual conference held in Austin, Texas in September 2003. COGEL, which was founded in 1978 and is based in Virginia, is a professional organization for government agencies, organizations,

and individuals with responsibilities or interests in governmental ethics, elections, campaign finance, lobby laws and freedom of information. Its nearly 200 members include U.S. federal agencies, such as the Federal Election Commission, the U.S. General Accounting Office and the U.S. Office of Government Ethics, as well as agencies at the state and local levels in the United States. COGEL’s membership also includes governmental entities in Canada, the United Kingdom and Australia.

COGEL’s next conference will be held December 2-5, 2004 in San Francisco. In 2005, the conference will be held December 4-7 in Boston, Massachusetts.

## Public Employees Do the Right Thing

In three recent enforcement cases, public employees have done the right thing by refusing to accept things offered to them.

In a matter involving an application to locate a convenience store and gas station in Wareham, Zoning Board of Appeals member David Boucher refused to accept a \$100 restaurant gift certificate from Wareham resident Donald P. Besso. Besso, whose property abutted property where Cumberland Farms was seeking to locate the store and gas station, offered the gift to Boucher to thank him for being courteous, for allowing Besso to interrupt his personal time and for providing Besso with general information about the permitting process.

In August 2003, the Commission found that Besso did not violate the gratuity section of the conflict of interest law by offering the gift certificate to Boucher.

"In its ruling, the Commission emphasized that it did not condone Besso's offer of the gift certificate and noted that Boucher did the right thing by refusing it," said Executive Director Peter Sturge. "While the Commission found Besso's defense credible in this case, it cautioned that such offers always involve a significant risk that they will violate the conflict of interest law."

In December, 2002, Division of Oc-

cupational Safety Field Supervisor Brian Wong, while administering a deleading license exam to Dorchester resident James Barnes, refused to accept a gratuity from him. When Barnes scored less than 70%, the passing grade, on a computerized exam, Wong offered to review Barnes' incorrect responses by hand. Barnes offered to give him money to thank him for his efforts. Wong refused. When Wong stepped away from the counter, Barnes placed \$100 in cash on a shelf beneath the counter. Wong discovered the cash after Barnes left. He reported the incident and turned the money over to his superiors.

In a Disposition Agreement, Barnes admitted the violation and paid a civil penalty of \$2,000.

In a third matter, Department of Medical Assistance Eligibility Worker Virginia M. Alper refused an offer of money from Quincy resident Michael Jovanovic.

Jovanovic was seeking financial assistance for his brother who was in a

nursing home. When Alper told Jovanovic that she was denying his application and that he could appeal the denial, Jovanovic offered her a half inch thick envelope of cash, stating, "No appeal." Alper, after tearing opening a corner of the envelope and seeing a \$50 bill, refused it, ended the meeting and reported the incident to her supervisor.

After an adjudicatory hearing before the Commission, Jovanovic was fined \$2,000 for the bribe attempt.



Division of Occupational Safety Field Supervisor Brian Wong (center) received kudos for refusing an illegal gratuity from Governor Mitt Romney and Ethics Commission Executive Director Peter Sturges.

State House News Service Photo

## Litigation Update

*The Executive Director, and by delegation, the Commission's Legal Division attorneys, have special assistant attorney general status. This status permits Legal Division attorneys to represent the Commission in court proceedings, under the oversight of the Office of the Attorney General. The Commission has recently been involved in two litigation matters.*

### **Vineyard Conservation Society, Inc. et. al. v. State Ethics Commission**

The Commission is defending a formal advisory opinion issued to Richard Toole, a member of the Martha's Vineyard Commission who wants to become a board member of the Vineyard Con-

servation Society, a private non-profit organization. Toole and the Society challenged the Commission's opinion in Suffolk Superior Court by means of a declaratory judgment action and writ of certiorari. In response, the Commission filed a motion to dismiss the action. The Court allowed in part the Commission's Motion by dismissing the claim for writ of certiorari and leaving only the claim for declaratory judgment. Toole and the Society have filed a Motion for Judgment on the Pleadings asking the Court to enter a judgment in their favor. The Com-

mission has filed an Opposition and requested either a judgment in its favor or alternatively, that the Court send the matter back to the Commission. Both parties have requested a hearing.

### **John Doe v. State Ethics Commission**

John Doe filed a civil action seeking to quash a subpoena issued by the Commission's Enforcement Division. Materials in this matter are impounded.

## Recent Enforcement Matters

*The Ethics Commission investigates numerous cases alleging violations of the conflict of interest and financial disclosure laws each year. While the Commission resolves most matters confidentially, it resolves certain cases publicly.*

*A decision and order concludes an adjudicatory proceeding or civil trial. The decision is a finding by the Commission that the law was or was not violated and the order determines the civil penalty or other remedy, if any. The Commission's decision may be appealed in Superior Court.*

*A disposition agreement is a voluntary written agreement entered into between the subject and the Commission in which the subject admits violating the law and agrees to pay a civil penalty. Disposition agreements are matters of public record once a case is concluded.*

*A public education letter (PEL) is issued where the Commission found reasonable cause to believe that the law was violated but chose to resolve the case with a PEL because it believes the public interest would best be served by doing so. A PEL does not require the subject to admit violating the law and is issued publicly with the subject's consent. (Prior to December 2002, these letters were referred to as Public Enforcement Letters.)*

*The Commission does not comment on any matter under investigation, nor does the office confirm or deny that it has received a specific complaint. The identity of any complainant is kept confidential.*

*Full texts of the Decisions and Orders, Disposition Agreements and Public Education Letters can be found on the Commission's website, [www.mass.gov/ethics](http://www.mass.gov/ethics).*

### Decision and Order

#### In the Matter of Donald P. Besso

The Commission issued a Decision and Order concluding the adjudicatory hearing of Wareham resident Donald P. Besso by finding that Besso did not violate M.G.L. c. 268A, §3(a), the state's conflict law, by, as the Enforcement Division alleged, offering a \$100 restaurant gift certificate to Wareham Zoning Board of Appeals member David Boucher. In 2001, Besso offered Boucher a \$100 restaurant gift certificate following a ZBA hearing on a Cumberland Farms application for a special permit to replace a store on property abutting Besso's property with a larger convenience store offering gasoline sales. In the

Decision and Order, the Commission stated that the Enforcement Division had not proved that Besso's motivation for offering the gift certificate was substantially, or in large part, to reward Boucher for an "official act." The Commission instead found that Besso offered the gift certificate because Boucher was courteous, allowed Besso to interrupt his personal time and provided him general information about the process. The Commission cautioned that, while the defense was found credible in this case, such offers always involve a significant risk that they will violate the conflict of interest law.

### Disposition Agreements

#### In the Matter of James Barnes

The Commission fined James Barnes of Dorchester \$2,000 for violating G.L. c. 268A, the state's conflict of interest law, by leaving \$100 for a state Division of Occupational Safety (DOS) employee who proctored an exam Barnes was taking to get licensed to perform deleading work. In July, 2003, the Commission alleged that Barnes and Canton resident David Rivera violated G.L. c. 268A by leaving the money for the DOS employee. In October, the

Commission dismissed the case involving Rivera and issued a Disposition Agreement in which Barnes admitted violating §3(a) of the conflict of interest law. According to the Disposition Agreement, after completing a required \$500 preparatory course, on December 4, 2002, Barnes took the deleading licensing test at the DOS office in Westborough. Barnes and Rivera were the only ones who took the exam at that time. Test-takers are given three chances to pass the exam with a score of at least 70% before they have to retake the \$500 preparatory course. Barnes scored less than 70% the first time he completed the test and asked DOS Field Supervisor Brian Wong if he could take it again. Rivera also scored less than 70% the first time and retook the test. Barnes finished his second exam with a score of 65%. Wong offered to review Barnes' incorrect responses by hand and to let him know the results at a later date. Rivera scored a 66% and Wong offered to review his answers by hand. While Wong stepped away from the counter to use the copy machine, Barnes reached over the counter and placed \$100 in cash on a shelf beneath the counter. According to the Disposition Agreement, "Barnes gave the money to Wong to thank him

### SECTION BY SECTION

#### THE CONFLICT OF INTEREST LAW, G. L. c. 268A

- Section 3 prohibits anyone from offering to a public employee anything of substantial value which is given for or because of an official act performed or to be performed by the public employee. Anything worth \$50 or more is considered to be "of substantial value" for purposes of the conflict law.
- Section 23(b)(2) prohibits a public employee from using his or her position to obtain for the employee or others an unwarranted privilege of substantial value not properly available to similarly situated individuals.
- Section 23(b)(3) prohibits a public employee from acting in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that anyone can improperly influence or unduly enjoy the public employee's favor in the performance of his or her official duties.

for his kindness in offering to review the incorrect answers by hand and to ensure that Wong would follow through on his offer.” After Rivera and Barnes left the office, Wong discovered the money; he reported the incident and turned the money over to his superiors.

### **In the Matter of Louis Cornacchioli**

The Commission fined Rutland Selectman Louis Cornacchioli \$2,000 for violating the state’s conflict of interest law by threatening to use his selectman’s position to retaliate against the police department if traffic citations against his son were not dismissed. According to a Disposition Agreement, Cornacchioli’s son, Michael, appealed four traffic citations issued by a Rutland police officer in September 2002. When the police officer who issued the citations was unable to attend an appeal hearing scheduled for January 7, 2003, the police chief notified the court and the judge rescheduled the hearing for January 9, 2003. After the hearing was rescheduled, Cornacchioli contacted the Rutland police chief on a recorded line. He was extremely upset and angry that Michael’s hearing was rescheduled instead of dismissed. He made it clear that he would “allow his personal dissatisfaction with the police department to factor into his decision-making.” He also made it clear that he wanted the officer not to show up at the January 9 hearing. In addition, Cornacchioli contacted the officer’s father-in-law and requested he ask the officer not to show up for the hearing. By threatening to use his position against the police department in order to seek actions that would result in the dismissal of his son’s traffic citations, Cornacchioli violated §23(b)(2).

### **In the Matter of Robert DeMarco**

MassHighway Highway Safety Team Director Robert DeMarco was fined \$2,000 for violating the state’s conflict of interest law by using his position to obtain donations for an organization he created to race a dragster competitively. According to a Disposition Agreement, in spring 2000, DeMarco purchased a dragster and created Crew Chief Racing, a sole proprietorship. In association with Crew Chief Racing, he developed the SMART safe-driving program to provide highway safety education to teenagers in high schools throughout the state. The state was not involved in Crew Chief Racing or the SMART program. DeMarco solicited businesses for donations in the amount of \$1,000 or more as well as in kind donations. During the solicitations, he gave solicitees his state business card, provided written materials citing his position as Director of the Highway Safety Team, mentioned his state position in conversations and/or drove to the solicitations in his state automobile, which has state government license plates. “Based on these actions by DeMarco, many solicitees believed that the state was involved in the SMART program and Crew Chief Racing,” the Disposition Agreement stated. DeMarco has not raced the dragster competitively and the SMART program has been presented in only two high schools. DeMarco has agreed to reimburse any individual or company that made a donation based on the impression

that the state was involved. By using his official position to influence solicitees to make donations to his race team, DeMarco violated §23(b)(2).

### **In the Matter of Michael Fredrickson**

Massachusetts Board of Bar Overseers General Counsel Michael Fredrickson was fined \$5,000 for violating the state’s conflict of interest law by using his office, office equipment and office time to write and prepare two novels for publication and by instructing subordinates to use their office hours to assist him. Fredrickson also paid a \$5,000 civil forfeiture to the BBO as reimbursement for the time he and his subordinates spent on his novels and the value of the equipment used. According to a Disposition Agreement, Fredrickson published two mystery novels: *A Cinderella Affidavit* in May 1999 and *Witness for the Dead* in May 2001. He spent substantial time during his regular BBO office hours writing and preparing his novels. He also asked his administrative assistants to perform novel-related tasks for him, including making photocopies, addressing correspondence, faxing documents, making phone calls and mailing items. Section 23(b)(2) of the conflict law prohibits a state employee from using or attempting to use his position to obtain for himself or others an unwarranted privilege of substantial value. By using state resources, other state employees and his own state-paid time for his novels, Fredrickson violated §23(b)(2).

### **Ethics Primers**

Periodically, the Bulletin will discuss a particular area of the conflict of interest law. The information provided is educational in nature and should not be considered legal advice. Primers are also posted on the Commission’s web site at [www.mass.gov/ethics/educational\\_materials.html](http://www.mass.gov/ethics/educational_materials.html). Persons

with questions about a specific situation should contact the Ethics Commission for free confidential advice. In the last edition, the Primer addressed Gifts and Gratuities (Part I - Giving). Gifts and Gratuities (Part II - Receiving) will appear in the next edition of the Bulletin.