



# STATE ETHICS COMMISSION BULLETIN

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## Commission Issues Advisory on Lobbying

**A** new formal advisory opinion, [EC-COI-05-3](#), requested by a person affiliated with the Legislature, comprehensively sets forth the restrictions on lobbying activity for former state employees under the one-year cooling off provision. The opinion, which is consistent with prior Commission rulings, concludes that direct and strategic lobbying are prohibited by G.L. c. 268A, § 5(e), but that grassroots lobbying is permissible.

“Direct lobbying” consists of any activity before a former state employee’s governmental body, including directly communicating with or contacting a member or employee of their former governmental body, whether in person, by telephone, or in writing, or authorizing a third party to use their name in connection with lobbying acts or personally introduce an employee of their private organization or a citizen activist to a member of their former governmental body.

“Strategic lobbying” takes place when former state employees direct, advise,

or strategize with a member or other closely connected individual within their private organization, such as a client, another employee of their organization, or a lobbying associate, who will in turn take the information provided and lobby members or employees of the former employee’s governmental body.

Unlike direct or strategic lobbying, “grassroots lobbying” seeks to influence public opinion on a piece of legislation through public advocacy and education rather than directly influencing a former state employee’s governmental body. Former state employees, however, may not conduct grassroots lobbying on the grounds of their former governmental body.

The purpose of the lobbying restrictions is to ensure that former state employees do not use their public office for private gain. The Commission concluded that grassroots public advocacy is fundamentally distinct from direct or strategic advocacy and does not provide the former state employee with the kind of access and influence that they have with direct and strategic lobbying.

## Commission Welcomes Two New Commissioners, Bids One Goodbye

**G**overnor Mitt Romney appointed Boston attorney Matthew N. Kane to the State Ethics Commission in September 2005. Kane replaces Christopher Moore who left before his term was completed to chair the Judicial Nominating Committee.

Commissioner Kane is an attorney with the law firm Donnelly, Conroy & Gelhaar LLP, where he specializes in commercial disputes, intellectual property and white collar criminal defense. He served on the State Ballot Law Commission from 1999-2005. Kane is a graduate of Harvard College and Boston University School of Law.

In October 2005, Attorney General Thomas Reilly appointed Jeanne M. Kempthorne to the State Ethics Commission.

Citing her impressive legal career and background prosecuting public corruption cases, AG Reilly chose Kempthorne to replace Christine M. Roach who served from 2000-2005.

Commissioner Kempthorne is

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## Ethics Primer: Former State Employees

*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. Persons with questions about a specific situation should contact the Ethics Commission for free confidential legal advice.*

**M**assachusetts General Law c. 268A, the state’s conflict of interest law, which governs the conduct of public officials, continues to apply to state employees,

and in some cases their partners, even after the employees leave public service. In general, §5 of the conflict law is designed to ensure undivided loyalty from former state employees. Further, the law is intended to prevent state employees from making official judgments with an eye toward their personal future interests, or from profiting by their participation in particular decisions or controversies

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From the Executive Director

*“Operating at Full Speed”*

The FY 06 budget adopted by the Legislature and signed by the Governor has had a positive impact on the Commission’s ability to ensure fair and timely administration of the conflict of interest and financial disclosure laws. Due to a budgetary increase, three additional staff members were hired: an attorney, an intake investigator and a part-time receptionist.

The attorney, who is assigned to the Commission’s Legal Division, has joined four other attorneys who provide advice to public officials at the state, county and municipal level who are facing potential conflicts of interest. Last year, the Commission provided such advice to over 3,700 individuals.

The intake investigator is joining four other investigators in the Enforcement Division and will allow the Division to process complaints, averaging greater than 900 each year, more efficiently and to conduct investigations more expeditiously.

For the first time in three years, the part-time receptionist has made it possible for us to answer the Commission’s phone throughout the business day from 9 a.m. to 5 p.m.

In order for the Commission to operate at full speed the Commission seeks a \$90,000 increase in its FY07 budget for two additional positions: a full-time education specialist to provide educational seminars to public officials across the Commonwealth and an additional attorney in the Enforcement Division to allow the Commission to handle investigations in a more timely manner.

The addition of the positions added this fall with these two additional positions will enable the Commission to provide a higher quality of justice and service to public employees and the people of the Commonwealth.

Peter Sturges

**Commission Members  
Fall, 2005**

- E. George Daher, Chair
- J. Owen Todd, Vice-Chair
- Tracey Maclin
- Matthew N. Kane
- Jeanne M. Kempthorne

Carol Carson

**Virtually All State Employees and Officials File Statements of Financial Interests on Time**

Nearly all of the 4,386 officials and high ranking employees of state and county government required to file a 2004 Statement of Financial Interests met the filing requirements of the financial disclosure law, G.L. c. 268B.

Under the law, employees designated to be in major policy making positions were required to file their Statements by May 1, 2005. Elected officials and candidates for those positions were required to file their Statements by May 31, 2005. Those who did not were sent a formal notice of delinquency requiring them to file within ten days or face civil penalties.

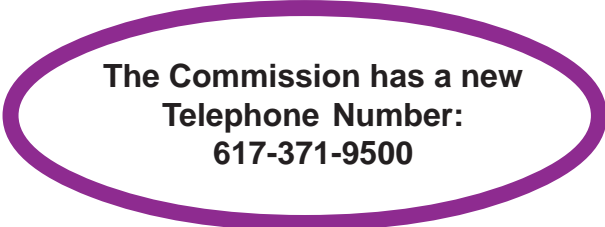
Civil penalties for failing to file within 10 days of receiving a formal delinquency notice are imposed

according to the following schedule:	
1-10 days delinquent:	\$ 50
11-21 days delinquent:	\$100
21-30 days delinquent:	\$200
31 days or more:	\$500
Failure to file:	\$2,000

Additionally, the financial disclosure law provides that no public employee shall be allowed to continue in his duties or to receive compensation from public funds unless he has filed a statement of financial interests.

A total of 158 filers did not meet the deadline. Many of these late filers paid fines ranging from \$50 and \$500.

Statements are available upon the written request of any individual for public inspection and copying at the Commission’s office, Room 619, One Ashburton Place, Boston.



**Commission Co-Hosts Council on Governmental Ethics Laws Conference**

The Council on Governmental Ethics Laws (COGEL) is holding its 27th Annual Conference in Boston on December 4-7, 2005. The Commission is co-hosting the conference with the Massachusetts Office of Campaign and Political Finance.

COGEL 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. Each year, COGEL holds an annual conference with individuals representing all levels of government within the United States as well as Europe, Australia, Canada and Latin America. Recent annual conferences have attracted

over 300 participants.

The conference features an array of topnotch speakers, including Jimmy Tingle who, for two years, provided the closing thoughts on *60 Minutes II*. Also speaking in a plenary session are Vermont Governor Jim Douglas, a former officer of COGEL; Scott Harshbarger, former president of Common Cause and former Massachusetts Attorney General; and Justice Johann Kriegler of South Africa, chairperson of the Independent Electoral Commission, whose task it was to deliver South Africa’s first elections based on universal adult suffrage.

The conference is being held at the Fairmont Copley Plaza Hotel. Registration information is available at [www.COGEL.org](http://www.COGEL.org).

## 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 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.*

*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 Disposition Agreements can be found on the Commission's website, [www.mass.gov/ethics](http://www.mass.gov/ethics).*

### In the Matter of James Byrne

The Commission issued a Disposition Agreement in which James Byrne, president and co-owner of Whitman-based Construction Monitoring Services, Inc. (CMS), admitted violating the conflict of interest law by offering a ski trip to an Old Rochester Regional School District employee to influence

the employee's reports regarding CMS. Byrne paid a \$2,000 civil penalty.

According to the Disposition Agreement, CMS planned a ski outing in winter 2002 for its employees that included weekend accommodations, lift tickets and ski lessons. Byrne offered to pay for Steven Shiraka, facilities and grounds manager of the school district, and his family to go on the ski weekend. The cost of the weekend was approximately \$500. As facilities and grounds manager, Shiraka was responsible for overseeing CMS work. He had also made at least two negative reports to the superintendent regarding CMS' performance on a project to expand the junior-senior high school of the district. In offering the ski trip, Byrne intended to influence Shiraka as to the tenor and substance of Shiraka's future reports as to CMS' job performance. Shiraka rejected the offer.

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currently a private attorney whose practice is in Salem. She is a member of both Federal and Essex County Superior Court conciliation panels. Her current practice focuses on the areas of alternative dispute resolution, criminal defense and appellate practice in the state and federal courts in Massachusetts. She resigned as a board member of Common Cause to avoid any appearance of a conflict of interest while serving as a Commissioner.

Christine M. Roach, who served as vice-chair of the Commission, concluded her five-year term in September 2005.

Chairman E. George Daher expressed his and the Commission's appreciation for the service that Commissioner Roach provided to the Commission.

Commissioner Roach, a Boston resident, is a partner in the Boston law firm of Roach & Carpenter, PC.

The non-partisan Commission consists of five members appointed to staggered, five year terms. Three Commissioners are selected by the governor, one by the Secretary of State and one by the Attorney General. No more than two of the gubernatorial appointments and no more than three members of the commission as a whole may be from the same political party. Kane is currently unenrolled and Kempthorne is a registered Democrat.

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

- Section 3 prohibits anyone from offering anything of substantial value to any public employee for or because of any official act performed or to be performed by the public employee or act within his official responsibility.
- Section 19 prohibits a municipal employee from officially participating in matters in which he has a financial interest.

## Staff Notes

**Amy Bressler Nee** joined the Legal Division of the Commission. An Arlington resident, she served as a law clerk for U.S. District Court Senior District Judge A. David Mazzone. Ms. Nee also served concurrently as the administrator of the Alternative Dispute Resolution Program while working at the U.S. District Court. She served as the co-chair of the Court ADR Committee and the National Conference on Court ADR of the American Bar Association Section on Dispute Resolution and she serves as a volunteer

mediator at the Community Dispute Settlement Center in Cambridge. She earned a B.A. from Yale University and a J.D. from Boston College Law School.

**Katherine Gallant**, a graduate of Assumption College, is a former police officer who worked as an investigator at the Commission during the 1980s. She is a resident of West Roxbury and is working in the Enforcement Division as the intake investigator.

**Mayerlin Fana**, a Dorchester resident, has joined the Commission as a part-time receptionist. Ms. Fana is seeking a bachelor's degree in Latin American Studies from the University of Massachusetts in Boston and also works part time as a real estate agent.

**Brooke Travis**, a second year law student at New England School of Law is working as an intern as part of an administrative law clinic. She is a native of Long Island, New York and a graduate of the University of Michigan.

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after they leave state service. In addition, the law keeps former employees from misusing their past friendships and associations within government to derive an unfair advantage for themselves or others. The law does not prohibit former employees from using general expertise gained while employed by the state.

In certain instances the law also prohibits the business partners of former employees from working on particular matters that the former employee is prohibited from handling.

### **Restriction Regarding Particular Matters in which the Employee Participated**

Section 5(a) prohibits former state employees from acting as agents or attorneys for, or directly or indirectly receiving compensation from, anyone other than the Commonwealth in connection with any particular matter that is of concern to the Commonwealth **and** in which they participated as state employees. Thus, if you participated in a matter, you can never become involved in that same matter after you leave state service for anyone other than the state.

For this section to affect former state employees, they must have participated personally and substantially, as state employees in a particular matter by approving disapproving, making a decision or recommendation, giving advice, investigating or otherwise. If you participated in the particular matter, your current private employment may not involve working on that same particular matter.

For example, a former state employee who made recommendations about regulations enacted in her state agency is prohibited from working for a private organization to challenge to the validity of those regulations. A former state employee may not represent a potential contractor who is bidding on the same contract the state employee helped to create. A former state attorney is prohibited from representing a private client in new litigation where the parties, facts, and controversy are identical to a lawsuit

in which she participated as a state attorney.

### **One Year Restriction on Appearance Involving Matters over which Former Employees had Official Responsibility**

Section 5(b) focuses on matters over which former state employees could have exercised authority. Section 5(b) prohibits former state employees, for one year, from personally appearing before any state agency as an agent, or attorney, for anyone other than the state in connection with a particular matter that concerns the state if the matter was under their official responsibility within two years prior to their termination from state service. This section operates prospectively as a one year ban on former state employees' personal appearances in connection with matters under their authority for the two years prior to their leaving state service.

State employees' official responsibilities would include particular matters handled by a subordinate, as well as matters for which they had responsibility but from which they abstained. A personal appearance includes not only the making of physical appearances of former state employees before their former boards or agencies, but also includes making telephone calls, writing or other communications, such as email, to their former state agencies on behalf of any private client.

For example, the commissioner of a state agency had official responsibility for numerous particular matters pending in her agency when she left in November 2005. She is prohibited through November 2006 from making phone calls, writing or appearing on behalf of any private party in connection with any of those particular matters, because they were under her official responsibility within two years of her leaving public service.

### **Restrictions on the Partners of Former State Employees**

Sections 5(c) extends certain prohibitions of § 5 to the partners of former state employees. This section prohibits a partner of a former state

employee, for one year after the employee has left her state position, from knowingly engaging in any activity the former state employee is prohibited from doing under §5 (a). In other words, if a former state employee is prohibited from engaging in certain activity under §5 (a), then his partner is similarly prohibited for one year from engaging in the same activity.

The Commission has interpreted the term "partner," for the purposes of §5, to include a member of a group of lawyers who conduct their law practice as a partnership. The term "partner" is not restricted to those who enter into formal partnership agreements: it may also apply to individuals who join formally or informally in a common business venture. In determining whether a partnership arrangement exists, the Commission looks to the substance of the individuals' relationship rather than the term used to describe that arrangement.

For example, a former general counsel joins a private law firm as a partner. The law firm partners may not, for one year, represent any private clients in connection with a lawsuit which the former general counsel litigated as a state employee.

[Note that Section 23(c) prohibits former state employees from accepting employment or engaging in professional activity that will require them to disclose confidential information that they learned in their state jobs; and improperly disclosing such non-public information to further their personal interests.]

### **Restrictions on Lobbying**

Section 5(e) prohibits state employees, including former legislators, from acting as legislative agents for anyone other than the state before the governmental body with which the state employees were associated for one year after they leave that body.

There may be exceptions which would apply to particular situations. Please contact the Ethics Commission's Legal Division at (617) 371-9500.