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JAMES E. TIERNEY
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

June 10, 1983

Honorable John L. Martin
Speaker of the House
State House, Station #2
Augusta, ME 04333

Dear Speaker Martin:

In your capacity as presiding officer of the House of Representatives you have requested an opinion from this Office as to whether an advisory opinion issued by the Commission on Governmental Ethics and Election Practices on May 31, 1983, in response to a request from Representative Elizabeth H. Mitchell, is incorrect as a matter of law. For the reasons discussed below, it is the opinion of this Office that Representative Mitchell would not be involved in a conflict of interest, within the meaning of 1 M.R.S.A. § 1014(1)(A), should she vote on Legislative Document 1353.

Prior to addressing your specific inquiry, it is important to emphasize that the opinions of both the Commission and this Office are advisory only, and that ultimately it is for the particular member of the Legislature in question to determine whether to be bound by either opinion.

Factual Background

In a letter dated May 17, 1983, Representative Mitchell requested the Commission on Governmental Ethics and Election Practices to issue an advisory opinion, pursuant to 1 M.R.S.A. § 1013(2)(A), as to whether her vote on L.D. 1353 (AN ACT to Limit Future Increases in the Cost of Hospital Care in Maine)

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would constitute a conflict of interest in view of the fact that her husband, an attorney, provides legal representation to the Maine-Dartmouth Family Practice Residency, an association of physicians affiliated with the Kennebec Valley Medical Center. The facts, as outlined in Representative Mitchell's letter to the Commission, are reprinted in their entirety below:

The facts are as follows: My husband, James Mitchell, Esq., maintains a private law practice. For the past several years Jim has provided legal advice and counsel for the Maine-Dartmouth Family Practice Residency in Augusta, Maine, an association of doctors that provide medical services to the general public. The Residency is affiliated with the Kennebec Valley Medical Center. As part of his ongoing relationship with the Residency, which provides less than 10% of his total income, Jim has been asked to provide and has provided legal advice, interpretation and counsel concerning the hospital cost containment bill (L.D. 1353) pending before this session of the Legislature. At the Residency's request, he has advised them as to the potential impact of the bill and has drafted certain amendments which the Residency may use in communicating with various legislators concerning the bill. He has not engaged in "lobbying" as that term is defined in 3 M.R.S.A. § 312 (8).

In short, the facts as presented by Representative Mitchell reveal that her husband provides legal services to the Family Practice Residency, including advice on L.D. 1353, and is compensated therefor.

On May 31, 1983, four^{1/} members of the Commission concluded that "[b]ased on the information contained in your letter, it is the opinion of the Commission that your voting on L.D. 1353 would constitute a conflict of interest pursuant to M.R.S.A. § 1014(1)(A)." It is our understanding that the House of Representatives voted on L.D. 1353 on June 9, 1983 and that Representative Mitchell abstained. The Commission did not

^{1/} Two members of the Commission recused themselves because of conflicts of interest on the question and one member was absent.

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explain the basis of its opinion other than to state that a vote by Representative Mitchell on L.D. 1353 would violate 1 M.R.S.A. § 1014(1)(A).

The Statutory Framework

By virtue of Chapter 621 of the Public Laws of 1975, the Legislature has established the Commission on Governmental Ethics and Election Practices consisting of seven members who may not be members of the Legislature. 1 M.R.S.A. § 1002. The Commission is specifically authorized to issue advisory opinions to Legislators "on problems or questions involving possible conflicts of interest in matters under consideration by, or pertaining to, the Legislature." 1 M.R.S.A. § 1013(1)(A). In enacting P.L. 1975, c. 621, the Legislature clearly articulated the "statement of purpose" underlying the statutes governing legislative ethics. In particular, the Legislature recognized that being a Legislator in Maine "is not a full-time occupation. . . ." and that "[m]ost Legislators must look to income from private sources, not their public salaries, for their sustenance and support for their families. . . ." 1 M.R.S.A. § 1011. In view of this fact, the Legislature intentionally adopted "broader standards of ethics for Legislators" because, as a practical matter, "the resolution of ethical problems must indeed rest largely in the individual conscience." Id. Nevertheless, for the purpose of providing "helpful advice and guidance," the Legislature recognized the need to statutorily "define ethical standards, . . . to chart the area of real or apparent impropriety." Id.

Accordingly, the Legislature, in 1 M.R.S.A. § 1014, has set forth a description of those situations in which a Legislator may be involved in a conflict of interest. Subsections 1(A)-(F) deal specifically with the subject of legislative conflicts of interest.^{2/} For purposes of this Opinion, we need only consider subsections 1(A), 1(E), and 1(F), which are the provisions of law which have direct relevance to Representative Mitchell's situation.

1 M.R.S.A. § 1014(1)(A) provides in its entirety as follows:

1. A conflict of interest shall include the following:

^{2/} Subsections 2 and 3 deal with the issues of "undue influence" and "abuse of office" and have no relevance for purposes of this Opinion.

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A. Where a Legislator or a member of his immediate family has or acquires a direct substantial personal financial interest, distinct from that of the general public, in an enterprise which would be financially benefited by proposed legislation, or derives a direct substantial personal financial benefit from close economic association with a person known by the Legislator to have a direct financial interest in an enterprise affected by proposed legislation. (emphasis added)

1 M.R.S.A. § 1014(1)(E) provides, in pertinent part, that a conflict of interest exists

E. Where a Legislator or a member of his immediate family accepts or engages in employment which could impair the Legislator's judgment, . . . or where the Legislator or a member of his immediate family stands to derive a personal private gain or loss from employment, because of legislative action, distinct from the gain or loss of other employees or the general community.

Finally, 1 M.R.S.A. § 1014(1)(F) provides that a conflict of interest arises

F. Where a Legislator or a member of his immediate family has an interest in legislation relating to a profession, trade, business or employment in which the Legislator or a member of his immediate family is engaged, where the benefit derived by the Legislator or a member of his immediate family member is unique and distinct from that of the general public or persons engaged in similar professions, trades, businesses or employment.

In concluding that Representative Mitchell's vote on L.D. 1353 would create a conflict of interest, the Commission relied exclusively on 1 M.R.S.A. § 1014(1)(A). However, it is obvious from a reading of that statute that the first clause of subsection (1)(A) has no application to the situation presented by Representative Mitchell since neither she nor her husband have "a direct substantial financial interest, distinct from

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that of the general public in an enterprise which would be financially benefited by proposed legislation." Based upon the facts as recited by Representative Mitchell, her husband does not have a financial interest in the Family Practice Residency, but is simply providing legal services to a client for which he is compensated. Moreover, it is apparent that the Family Practice Residency, even assuming it is an "enterprise," although affected, will not receive a direct financial benefit which is foreseeable from either the passage or defeat of L.D. 1353.

Consequently, in determining whether the Commission correctly opined that Representative Mitchell would be involved in a conflict of interest, it is necessary to focus on the second clause of subsection (1)(A), which provides that a conflict of interest exists "[w]here a legislator or a member of his immediate family . . . derives a direct substantial personal financial benefit from close economic association with a person known by the Legislator to have a direct financial interest in an enterprise affected by proposed legislation."

In addressing this question, we are guided by the fact that a Legislator's "immediate family" is statutorily defined to include her spouse, (1 M.R.S.A. § 1012(2)), and that the phrase "close economic association includes the employers, employees, partners or clients of the Legislator or a member of his immediate family." (1 M.R.S.A. § 1012(1)). Thus, the issue becomes (1) whether Representative Mitchell's spouse derives a direct substantial personal financial benefit by virtue of the fact that he provides legal services, for a fee, to a client and (2) whether that benefit will derive from a client who has a direct financial interest in an enterprise affected by L.D. 1353. Based on the facts as presented by Representative Mitchell, it is the opinion of this Office that no violation of 1 M.R.S.A. § 1014(1)(A) exists.

In view of the lengthy legislative history of P.L. 1975, c. 621, it is clear that the Legislature never intended that a member of either House must be disqualified from voting on a proposal merely because she or a member of her immediate family is compensated for work performed for an employer or a client who might be affected by the legislation. The "direct substantial personal financial benefit" referred to in 1 M.R.S.A. § 1014(1)(A) must involve a financial reward separate and distinct from the remuneration one receives as an employee or agent for services rendered. This was made abundantly clear by several members of the 106th Legislature which enacted the precursor of 1 M.R.S.A. § 1014(1)(A). See P.L. 1974, c. 773, codified at 3 M.R.S.A. § 382, repealed and

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replaced by P.L. 1975, c. 621. The Senate Chairman of the State Government Committee and at least two House members of that Committee, which reported out favorably the original legislative ethics bill, clearly stated that a Legislator would not be involved in a conflict of interest simply because she or her spouse is an employee or attorney for a person with a financial interest in proposed legislation. See 2 Legis. Rec. 2206 (1974) (statement of Senator Speers); 2 Legis. Rec. 2227 (1974) (statement of Representative Curtis); 2 Legis. Rec. 2458 (1974) (statement of Representative Gahagan). Rather, the financial benefit to the Legislator or her immediate family member must be directly related to and derived from the proposed legislation which affects the enterprise in which the employer or client has a direct financial interest.

In short, § 1014(1) (A) does not prevent a Legislator from voting on a measure unless she or a member of her immediate family will receive a financial benefit either directly or through a third party, by virtue of the proposed legislation. To suggest otherwise, leads to the conclusion, clearly not contemplated by the Legislature, that any Legislator employed in the private sector must abstain from voting on legislative matters which affect the profession or business in which the Legislator is employed. Such a view conflicts with the plain meaning of the statute and its legislative history and would render subsections 1(E) and 1(F) superfluous.

In view of the foregoing, it is apparent that Representative Mitchell's husband does not fall within the ambit of § 1014(1) (A). He will not derive a personal financial benefit from either passage or defeat of L.D. 1353. On the contrary, he is simply being compensated for providing legal representation to a client.

Accordingly, it is the opinion of this Office that the Commission on Governmental Ethics and Election Practices was incorrect as a matter of law in its interpretation of 1 M.R.S.A. § 1014(1) (A) and its conclusion that Representative Mitchell would be in a conflict of interest had she voted on L.D. 1353. In reaching this conclusion, of course, we recognize, as the Legislature has, that "the resolution of ethics problems must indeed rest largely in the individual conscience" (1 M.R.S.A. § 1011) and that a Legislator may, as a matter of individual choice, abstain from voting on proposed legislation notwithstanding the fact that she is not required by law to do so.

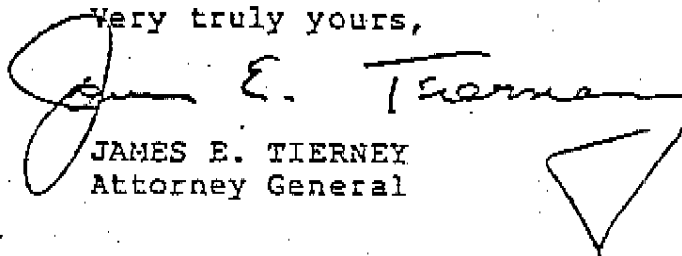
Finally, the Legislature has repeatedly recognized and endorsed the concept of a part-time Legislator. This opinion, therefore, should be read broadly to include, not only an

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attorney who represents a hospital, but also direct employees of health care institutions and trustees of not-for-profit institutions on the same theory outlined in this opinion. This opinion holds that the purpose of the conflict of interest statute is to prohibit the use of legislative office for private gain. Indeed, there is affirmative legislative history supporting the view that the conflict of interest laws were not designed to frustrate the legitimate attempts by publicly elected officials to use their personal experience in attempting to solve the problems of our State.

I hope this information is helpful to you. Please feel free to call upon this Office if we can be of further assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read "James E. Tierney". The signature is written in a cursive style with a large initial "J". To the right of the signature is a large, hand-drawn triangle pointing downwards.

JAMES E. TIERNEY
Attorney General

JET:mfe