

**MINUTES OF THE OPEN SESSION
OF THE RHODE ISLAND ETHICS COMMISSION**

December 2, 2008

The Rhode Island Ethics Commission held its 21st meeting of 2008 at 9:00 a.m. at the Rhode Island Ethics Commission conference room, located at 40 Fountain Street, 8th Floor, Providence, Rhode Island, on Tuesday, December 2, 2008, pursuant to the notice published at the Commission Headquarters and at the State House Library.

The following Commissioners were present:

Barbara R. Binder, Chair James V. Murray

Ross Cheit, Vice Chair Deborah M. Cerullo SSND

J. William W. Harsch, Secretary*

Also present were William J. Conley, Jr., Commission Legal Counsel; Kent A. Willever, Commission Executive Director; Katherine D'Arezzo, Senior Staff Attorney; Staff Attorneys Jason Gramitt, Dianne L. Leyden and Esme DeVault; and Commission Investigators Steven T. Cross, Peter J. Mancini and Steven Branch.

At 9:10 a.m., the Chair opened the meeting and announced that the Commission would handle non-voting matters until other members arrived. The first order of business was a report on the launch of the

new Commission website. Staff Attorney DeVault provided a laptop presentation and overview of the features of the new website, which she indicated would be live within 24 to 48 hours. She informed that the new site, which utilizes the ri.gov template, as other state agencies do, provides for ease of navigation and includes a “New and in the News” link, which will be updated after Commission meetings to reflect the actions that took place. Commissioner Cheit stated that he believes the feature is a great addition to the site. Staff Attorney DeVault noted that the site also provides links to the most recent financial statements filed by the general officers and legislators.

***Commissioner Harsch arrived at 9:18 a.m.**

Staff Attorney DeVault credited Administrative Officer Michelle Berg for the significant work she performed on the web design. In response to Commissioner Cheit, Staff Attorney DeVault indicated that the information on complaints has been entirely updated and provides a general help sheet. Commissioner Cheit voiced his support for the new site.

The next order of business was that of advisory opinions. The advisory opinions were based on draft advisory opinions prepared by the Commission Staff for review by the Commission and were scheduled as items on the Open Session Agenda for this date. The first advisory opinion was that of Sharon B. Rysk, a former social caseworker in the Long Term Care Unit within the Department of

Human Services. Staff Attorney Leyden presented the Commission Staff recommendation. The petitioner was present. The petitioner stated her understanding that, despite prior opinions, the prohibition now applies to the whole department, rather than individual divisions of the department. Staff Attorney Leyden advised that in 2003 the Commission clarified that the prohibition applies to representations before the entire agency.

Commissioner Cerullo inquired as to whether the Commission has limited representation to physically appearing before one's former agency as opposed to an attorney representing a client while sitting in an office. Staff Attorney Leyden cited to the Code's definition of "representing" as attempting to influence the judgment of the agency in one's favor. Commissioner Cerullo noted that, here, the situation is the next step removed, as the Petitioner is working for the attorney representing an applicant. Staff Attorney Leyden stated that the Petitioner has represented that she will not be going before her former agency, but rather will be using her expertise to assist the attorney with preparation of applications. In response to Commissioner Cheit, the Petitioner stated that the restriction on appearing before the entire agency does not make it more difficult for her to do what she had envisioned because she will only be assisting the attorney.

Upon motion made by Commission Murray and duly seconded by Commissioner Cheit to accept the Commission Staff

recommendation, there was further discussion. Commissioner Cerullo expressed that she is trying to reconcile the policy behind the regulation, avoiding undue influence, with the fact that there could be influence even if the Petitioner does not personally appear before the agency. Chair Binder indicated that the intent of the prohibition is to limit the goodwill former coworkers may have toward an individual. Commissioner Cerullo noted that former coworkers may know that the Petitioner is preparing the application if the attorney tells them. She noted that the Petitioner could inform applicants of the type of information the agency looks for on applications.

Commissioner Cheit suggested that such information would constitute using one's expertise as opposed to influence. He indicated his belief that it makes a difference when the person is not physically there at the agency and stated that the language regarding ministerial activities should speak to any concerns. Commissioner Cerullo stated that the Petitioner knows the individuals before whom the attorney will appear at a better level and would be aware of their proclivities. She indicated her belief that this is a close case, as to whether the Petitioner has expertise or an advantage that others do not. In response to Commissioner Cheit, the Petitioner stated that she has no reason to believe that the attorney would include her name in submitting the applications. Further, she indicated that the attorney has been doing this a long time. In response to Commissioner Harsch, the Petitioner stated that the attorney never appeared before her in her state employ. In response to

Commissioner Harsch, Staff Attorney Leyden indicated that the one year prohibition would apply until September 2009.

Commissioner Cerullo expressed that she is persuaded by the Petitioner's representations. Commissioner Harsch referenced a Commission publication on moonlighting and noted the issue of whether the outside employment would involve similar work. He associated himself with Commissioner Cerullo's comments on the issue and cautioned that it should be made clear that there be no direct contact with the agency. Staff Attorney Leyden noted that the draft opinion could be amended to so provide but questioned what would constitute ministerial activity. Commissioner Cheit indicated that phone calls could raise concerns about having a matter expedited. However, he stated that the Petitioner should be able to obtain photocopies. Commissioner Cerullo expressed that while filing and photocopying may be seen as ministerial tasks, filing lets internal people know that the Petitioner is working on the matter. She stated that she sees these tasks as problematic. Chair Binder suggested that there be a motion that there be no direct contact, except for these distinct ministerial functions. Upon amended motion made by Commissioner Murray and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To issue an advisory opinion, as amended, to Sharon B. Rysk, a former social caseworker in the Long Term Care Unit within the Department of Human Services.

The next advisory opinion was that of Steven N. Biron, a member of the North Smithfield Town Council. Staff Attorney Leyden presented the Commission Staff recommendation. The Petitioner was present. In response to Commissioner Murray, the Petitioner indicated that he was not part of the selection process for the Solicitor's position prior to being sworn in last night. He represented that the value of the contract would be approximately \$58,000 and that his wife has been an employee of the attorney for about eight years. In further response to Commissioner Murray, the Petitioner indicated that there are four attorneys in the firm, which employs two other clerical staff members besides his wife. He stated that his wife receives a holiday bonus and matching funds in her 401k. Commissioner Murray noted that the firm does not seem to have a history of municipal law practice. The Petitioner advised that the attorney served as an Assistant Solicitor in North Smithfield from 2004-2006.

Chair Binder noted her discomfort with the situation. Commissioner Harsch inquired why the Petitioner was the one to nominate the attorney. The Petitioner replied that the attorney expressed his interest in serving to another member of the Council, but he wanted to cover all bases and find out if he could nominate him. Staff Attorney Leyden noted that the Petitioner has represented that his spouse will not be directly financially impacted by reason of his nomination of and voting for this attorney. In response to Commissioner Harsch's inquiry regarding public notice of the

position, the Petitioner explained that new solicitors are generally appointed by the incoming Council every other December, along with the Assistant Solicitor and Probate Court Judge. He stated that he is unaware of the position being advertised in the newspaper. He noted that the Council received requests from eight or nine attorneys who wished to be considered for the positions.

In response to Commissioner Murray, the Petitioner clarified that the individual attorney, not the law firm, was chosen as Solicitor. Commissioner Cerullo inquired if the issue is moot. Chair Binder noted that the Petitioner received safe harbor for his actions. Legal Counsel Conley stated that while the Petitioner had safe harbor for last night's actions, he stated that it is reasonably foreseeable that there will be other issues of remuneration for the Solicitor on a going forward basis. In response to Commissioner Murray, Legal Counsel Conley indicated that additional court time could result in further issues coming before the Council. Chair Binder questioned whether the opinion should include language addressing what would happen if there were ever any evidence of a quid pro quo. Commissioner Cheit suggested that the language stating that there is no evidence it would affect the spouse, found in the first full paragraph on page four, would cover that situation.

Commissioner Cerullo voiced her opinion that it is reasonably foreseeable that the firm adding \$58,000 in income impacts its employee. She also noted that she has a problem with the

appearance of impropriety. She indicated that she sees the issue as being moot and any future issues would come back to the Commission for another opinion. Commissioner Murray expressed his discomfort with the appearance of impropriety. In response to Commissioner Murray, the Petitioner stated that it was a 3-2 vote. Chair Binder indicated that she would not vote to adopt the Staff recommendation. Commissioner Cerullo requested clarification on the issue of mootness. Chair Binder expressed that she is not sure that the Commission should find the matter to be moot, but rather it may want to make a statement that it is uncomfortable with the issue due to an appearance of impropriety and the reasonable foreseeability.

The Petitioner stated that he does not know if the Solicitor's pay will all go to the attorney himself or whether any of it will go to the firm. Commissioner Cheit indicated that he does not believe that it would matter. Legal Counsel Conley clarified that the Petitioner had safe harbor for last night's vote, but what might be reasonably foreseeable in the future could be difficult to discern. Chair Binder stated that in no way does this opinion represent any precedent. Upon motion made by Commissioner Murray and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To reject the Staff recommendation.

Commissioner Cheit stated that the Staff drafted the opinion required

by application of the Code. The Petitioner questioned what would happen if he had to recuse on an Executive Session Council vote and the Council voted 2-2 to approve the Solicitor's bill. Chair Binder stated that the Petitioner would have to come back before the Commission on any further issues. Staff Attorney Leyden noted the need for recusal.

The next advisory opinion was that of Colonel Brendan P. Doherty, Commissioner of Public Safety and Superintendent of State Police. Lisa Holly, Esq. and Maj. Stephen Bannon were present for the Petitioner. Staff Attorney DeVault presented the Commission Staff recommendation. Upon motion made by Commissioner Murray and duly seconded by Commissioner Harsch, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Colonel Brendan P. Doherty, Commissioner of Public Safety and Superintendent of State Police.

The next advisory opinion was that of Christopher Wilkens, a member of the Narragansett Town Council. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was not present. Commissioner Cheit expressed his concern regarding language relating to the class exception on page three. Staff Attorney DeVault replied that the Staff analysis is that it is problematic to apply the class exception with respect to real estate because each property is unique. She stated that the language was not conclusory, but only

a notation. Commissioner Cheit suggested that it would be better to state that the conclusion is based upon the facts presented, rather than to suggest that seventy could never constitute a class. Commissioner Murray concurred. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To issue an advisory opinion, as amended, to Christopher Wilkens, a member of the Narragansett Town Council.

The next advisory opinion was that of Charles W. More, a member of the Richmond Planning Board and the Richmond Rural Preservation Trust. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was not present. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Charles W. More, a member of the Richmond Planning Board and the Richmond Rural Preservation Trust.

The next advisory opinion was that of James F. Berard, former Assistant Director of Infrastructure and Operations in the Department of Administration, Division of Information Technology and former Associate Director of Management Information Systems in the Department of Corrections. Staff Attorney DeVault presented the

Commission Staff recommendation. The Petitioner was not present. In response to Chair Binder, Staff Attorney DeVault noted that someone in DOIT or DOA pressed for an advisory opinion. In further response, she stated that the Petitioner has not done any presentations up to this point. Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Murray, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to James F. Berard, former Assistant Director of Infrastructure and Operations in the Department of Administration, Division of Information Technology and former Associate Director of Management Information Systems in the Department of Corrections.

The next advisory opinion was that of Girard A. Galvin, Esq., the Assistant City Solicitor for the City of Newport. Staff Attorney Gramitt presented the Commission Staff recommendation. The Petitioner was not present. Commissioner Harsch noted that the opinion states that other members of the firm may appear before other agencies. He indicated that he does not want the opinion to inadvertently excuse actions taken by other attorneys which, based upon their other public positions, could violate the Code. Staff Attorney Gramitt replied that, based upon the facts represented by the Petitioner, there would be no violation of the Code. However, he noted that this opinion does not provide safe harbor if there are different facts, such as if an associate becomes legal counsel to another board. He expressed his opinion

that such a situation would be a material omission of fact.

In response to Commissioner Harsch, Staff Attorney Gramitt stated that the Petitioner did not state that none of his partners represent any other city agencies. He emphasized that the opinion would not provide safe harbor under any set of facts other than those presented. Chair Binder suggested adding language to the first full paragraph of page two, indicating that the response is based upon this set of facts. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To issue an advisory opinion, as amended, to Girard A. Galvin, Esq., the Assistant City Solicitor for the City of Newport

At approximately 10:30 a.m., upon motion made by Commissioner Murray and duly seconded by Commissioner Cerullo, it was unanimously,

VOTED: To go into Executive Session pursuant to R.I. Gen. Laws § 42-46-5(a)(2) and (4), to wit:

a.) Motion to approve minutes of Executive Session held on November 18, 2008.

**b.) In re: Edward J. Moy,
Complaint No. NF2008-12**

c.) William V. Irons v. Rhode Island Ethics Commission, Superior Court C.A. No. 07-6666

**d.) Jason E. Ferrell v. Frank Caprio, Jr., et al.,
U.S. District Court C.A. No.08-378S**

**e.) Joseph S. Larisa, Jr. v. Rhode Island Ethics Commission,
Superior Court C.A. No. 08-7325**

f.) Motion to return to Open Session.

The Commission returned to Open Session at approximately 10:45 a.m. The next order of business was a motion to seal minutes of the Executive Session held on December 2, 2008. Upon motion made by Commissioner Cerullo and duly seconded by Commissioner Murray, it was unanimously

VOTED: To seal minutes of the Executive Session held on December 2, 2008.

Chair Binder reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on November 18, 2008; 2) continued In re: Edward J. Moy, Complaint No. NF2008-12 to December 16, 2008; and 3) discussed the litigation matters of William V. Irons v. Rhode Island Ethics

Commission, Jason E. Ferrell v. Frank Caprio, Jr., et al., Joseph S. Larisa, Jr. v. Rhode Island Ethics Commission.

The next order of business was a motion to approve minutes of the Open Session held on November 18, 2008. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Cerullo, it was unanimously

VOTED: To approve minutes of the Open Session held on November 18, 2008.

ABSTENTION: James V. Murray.

The next order of business was discussion regarding Proposed Regulatory Actions. Chair Binder suggested that the Commission start tackling the issues in January. She noted the need to move the class exception to the bottom of the list for now, and she voiced her support for handling the Complainant's role as the first issue. Chair Binder expressed her belief that the issue is not just the role in settlement proceedings, but access to the entire process. Staff Attorney Gramitt advised that he previously prepared a draft regulation and the Commission received some public comment on the issue. He indicated that he would prepare a packet of said materials for the January review. Commissioner Murray expressed his support for this approach. Commissioner Cheit noted that he would like to see the "financial or otherwise" language on the list of

proposals as well. He voiced his agreement for waiting on the class exception until there is a decision in the Irons matter.

The next order of business was the Director's Report. Executive Director Willever advised that there are ten complaints pending, five of which are conflict matters and five of which are non-filing matters. He reported that there are seven advisory opinions pending and there have been no formal APRA requests since the last meeting. He expressed his appreciation to Staff Attorney DeVault and Administrative Officer Michelle Berg for all of their work on the new website. He noted that the web project was completed ahead of schedule and under budget. Chair Binder thanked the Staff for their efforts on the website. Director Willever stated that Staff Attorney Gramitt recently presented two public ethics officer training sessions at the Commission, both of which were well attended. He indicated that the Commission Staff recently hosted a State Department group of public officials from Slovakia.

In response to Commissioner Harsch, Director Willever stated that he would review the Commission's "Moonlighting" brochure with regard to currency and effect. He noted that the Staff is in the process of updating many Commission materials, beginning with the new website. Commissioner Harsch stated that he has concerns regarding the issue of moonlighting.

The next order of business was New Business. Commissioner Cheit

stated that at the last meeting Commissioner Harsch had raised the issue of a public comment period. He offered his view that such comment periods generally occur at elected bodies and those with general, rather than specific, jurisdiction, such as municipal councils and school committees. Commissioner Cheit noted that the Commission frequently is acting in a quasi-judicial capacity and it would be inappropriate for the public to comment on advisory opinions and complaints. He stated that when the Commission acts in a quasi-legislative role, it does provide more than what is required under the APA in terms of public comment. He indicated that if the Commission were to accept public comment, there is no mechanism to keep it from occurring where it would be inappropriate. Commissioner Harsch noted that Commissioner Cheit's observations were fair.

At approximately 10:55 a.m., upon motion made by Commissioner Cerullo and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch

Secretary