

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

February 10, 2009

The Rhode Island Ethics Commission held its 2nd meeting of 2009 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, February 10, 2009, 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 Frederick K. Butler
J. William W. Harsch, Secretary Edward A. Magro**

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 and Peter J. Mancini.**

At 9:00 a.m., the Chair opened the meeting. The first order of business was a motion to approve minutes of the Open Session held on January 13, 2009. Commissioner Cheit noted a correction on page

one with respect to the opinion issued to Dwight T. Farrar. Upon motion made and duly seconded, it was unanimously

VOTED: To approve minutes of the Open Session held on January 13, 2009, as amended.

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 Lawrence G. Anderson, the Town Moderator for the Town of Little Compton. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was present.

***Legal Counsel Conley arrived at 9:02 a.m.**

In response to Commissioner Cheit, the Petitioner stated that the Sakonnet Preservation Association and the Tiverton Land Trust received funding from the Rhode Island Foundation to hire a consultant. He represented that he had previously served as a volunteer Board Member of the Preservation Association. He advised that he does some freelance consulting, but he has always been involved in conservation. In further response to Commissioner Cheit, the Petitioner stated that he disclosed his position as Town Moderator and also expressed his view that he likely was hired in

spite of, rather than because of, his position. In response to Chair Binder's inquiry as to how often Land Trust matters come up at the Financial Town Meeting, the Petitioner indicated that, while it is possible that a private entity could seek to place a warrant on the agenda to seek funding, it would not be likely. Upon motion made by Commissioner Magro and duly seconded by Commissioner Murray, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, Lawrence G. Anderson, the Town Moderator for the Town of Little Compton.

The next advisory opinion was that of Mary Eva Tudino, a staff attorney with the Rhode Island Family Court, Office of the Court Appointed Special Advocate. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was present. The Petitioner referenced prior advisory opinions which differentiated between divisions in very large agencies, and she noted that the Family Court has many divisions. She represented that she would not be acting as an attorney, as a mediator is not an attorney, but would be acting more as a consultant. The Petitioner advised that she would not take on clients if there were allegations of child abuse and would perform all work outside of state hours and off the premises. She referenced 5(e)'s language regarding "representing" another person and stated that she would not be "representing" her mediation clients. She also advised that anyone "could" be subpoenaed to testify.

The Petitioner referenced Advisory Opinions Nos. 2000-94, 2005-52 and 95-82 as being on point. She noted that Magistrate Patricia K. Asquith is on the court provided list of mediators, despite her position. In response to Commissioner Cheit, Staff Attorney DeVault indicated that the Petitioner's name being on the report is a key factor in the analysis, but it is not the only factor. In response to Commissioner Cheit, the Petitioner indicated that she does not have to put her name on the report, which the parties' attorneys may take and turn it into a settlement agreement. Commissioner Cheit inquired whether, in her CASA practice, the Petitioner ever appears on the divorce side of proceedings. The Petitioner represented that she only appears before the juvenile judges, but she noted that the judges rotate assignments every two years.

Staff Attorney DeVault explained that Advisory Opinion 2003-51 changed the way the Commission treats large departments with different divisions for the purpose of applying the revolving door prohibitions. In response to Commissioner Cheit, Staff Attorney DeVault expressed that, even if her name were not on the memorandum, the Petitioner would still be engaging in very substantive work before her own agency, rather than ministerial activity. The Petitioner stated that she does not represent the parties and is not an expert witness. Chair Binder inquired if the nature of the judiciary would be different from other agencies, as a CASA attorney would be just one voice to be weighed by the judge. Staff

Attorney DeVault replied that it boils down to the fact that the Petitioner is an employee of the Family Court.

The Petitioner stated that, more than likely, she would never be called as a witness. Commissioner Cheit asked what interest presents a conflict. Staff Attorney DeVault replied that the child's interest could conflict with that of the parents. The Petitioner stated that she would conflict herself out if CASA were involved. Commissioner Murray inquired whether the judge could order a mediator from the list provided to the parties. The Petitioner stated that the court would use court mediators and she could not be appointed at that point. In response to Commissioner Murray, the Petitioner stated that there is mediator confidentiality and that she could not be compelled to testify. Chair Binder asked Legal Counsel Conley whether the Commission applies a strict standard or uses the totality of circumstances.

Legal Counsel Conley advised that on this matter the Commission probably would not apply a totality standard. However, he indicated that it would be a close call because, in his opinion, there is a difference between the pre-divorce mediation that the Petitioner does and what happens during the divorce case. He noted that the Petitioner's mediation, which is non-legal in nature, is a specialized process to create a memorandum of understanding, which is taken to the individual legal counsel for representation. He advised that the critical issue is whether or not the Petitioner's work product is likely

to end up before a judge as her work product, and he indicated that the answer is no. Legal Counsel Conley stated that the memorandum is really a tool for the parties to use to arrive at a settlement.

Commissioner Magro noted, though, that the substance of the work performed would appear before the Family Court. Chair Binder commented that there is nothing nefarious about it. Commissioner Magro agreed and indicated that perhaps there would have to be an exception. Commissioner Cheit suggested holding this matter over for a meeting and allowing the Petitioner to prepare some written or formal arguments.

**** Senior Staff Attorney D'Arezzo arrived at 9:50 a.m.**

In response to Commissioner Harsch, the Petitioner informed that her case is unique. Commissioner Harsch inquired whether the Petitioner ever asked the judges if it would be appropriate. The Petitioner replied that she had not, but the judges could have said something. Commissioner Harsch asked if there were any way to draw a bright line without creating an exception. Staff Attorney DeVault noted that the advisory opinion process is not an adversarial proceeding. Chair Binder indicated that she needs more information because it does not seem like the Petitioner is going before her agency. Commissioner Butler also expressed that he would like more information. Commissioner Cheit agreed with Staff Attorney DeVault that this is not an adversarial proceeding and it should only be held

over if there is more information to be had. Commissioner Harsch commented that he does not like the idea of holding over the matter to change the complexion of the Commission. Commissioner Cheit agreed and stated that he is not in favor of holding a matter over for that reason.

Legal Counsel Conley advised that the Commission can ask the Petitioner to provide further information. Commissioner Cheit requested information as to advisory opinions issued in the judicial context, as well as any precedent on the issue of whether the Petitioner is really “appearing” or “representing.” Chair Binder echoed that she would find more information on the “representing” component to be helpful. Upon motion made by Chair Binder and duly seconded by Commissioner Butler, it was unanimously

VOTED: To hold over the advisory opinion for deliberation and more information.

The next advisory opinion was that of Maxine Cavanagh, a member of the Smithfield Town Council. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was present along with the Town Solicitor, Edmund L. Alves, Jr. Staff Attorney DeVault noted that the next three advisory opinions on the agenda involve the same set of facts. Commissioner Cheit referenced the Barrington advisory opinion cited to in the draft opinion and stated his recollection that the subject housing development had a few

affordable units. Upon motion made by Commissioner Murray and duly seconded by Commissioner Cheit, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Maxine Cavanagh, a member of the Smithfield Town Council.

The next advisory opinion was that of Barbara Rich, a member of the Smithfield Land 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 Magro, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Barbara Rich, a member of the Smithfield Land Trust.

The next advisory opinion was that of Cheryl Bowes Iannotti, a member of the Smithfield Land Trust. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was not present. Upon motion made by Commissioner Cheit and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Cheryl Bowes Iannotti, a member of the Smithfield Land Trust.

Commissioner Harsch commented that the foregoing opinions are an illustration of how important these complex issues can become in

small towns. He complimented the Town for seeking guidance from the Commission.

The next advisory opinion was that of M. Theresa Santos, a member of the Middletown Town Council. Staff Attorney DeVault presented the Commission Staff recommendation. The Petitioner was present. The Petitioner advised that the Historical Society does not have a lot of money, most of which comes from its membership. She noted that it has been an important year for the Society, which completely refurbished the only eight vane windmill in Rhode Island through grants and donations. She pointed out that Town Council members who have spouses employed as school teachers do not recuse themselves when voting on the school budget. The Petitioner stated that she would like to fight for the Society and that she is only one vote on a seven member Council. Commissioner Cheit expressed that the school committee situation is different and noted that the opinion does not prevent the Petitioner from voting on bottom line issues. The Petitioner advised that she does not receive any financial benefit from the Society and questioned how a Council member with a family member in the school department can vote. Commissioner Cheit indicated that the Petitioner could approve a bottom line budget as well. Upon motion made by Commissioner Magro and duly seconded by Commissioner Murray, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to M. Theresa Santos, a Middletown Town Council member.

The next advisory opinion was that of Judge F. Monroe Allen, the Town of Smithfield Probate Court Judge. Staff Attorney Leyden presented the Commission Staff recommendation. The Petitioner was present. Upon motion made by Commissioner Harsch and duly seconded by Commissioner Butler, it was unanimously

VOTED: To issue an advisory opinion, attached hereto, to Judge F. Monroe Allen, the Town of Smithfield Probate Court Judge.

At approximately 10:23 a.m., upon motion made and duly seconded, 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 January 13, 2009.

**b.) In re: Frank Hyde,
Complaint No. 2008-5**

**c.) In re: Patrick Sullivan,
Complaint No. 2008-8**

d.) William V. Irons v. The Rhode Island Ethics Commission,

No. 2008-335-M.P. and 2009-01-M.P.

e.) Jason E. Ferrell v. Frank Caprio, Jr., et al.,

U.S. District Court C.A. No.08-378S

f.) Motion to return to Open Session.

The Commission returned to Open Session at approximately 10:50 a.m., at which time Commissioner Murray left the meeting.

The next order of business was a motion to seal minutes of the Executive Session held on February 10, 2009. Upon motion made by Commissioner Magro and duly seconded by Commissioner Harsch, it was unanimously

VOTED: To seal minutes of the Executive Session held on February 10, 2009.

Chair Binder reported that the Commission took the following actions in Executive Session: 1) approved minutes of the Executive Session held on January 13, 2009; 2) found that probable cause exists in the matter of In re: Frank Hyde, Complaint No. 2008-5; 3) approved an Informal Resolution & Settlement in the matter of In re: Patrick Sullivan, Complaint No. 2008-8; and 4) received updates on the litigation matters of William V. Irons v. Rhode Island Ethics Commission and Jason E. Ferrell v. Frank Caprio, Jr.

The next order of business was a Legislative Update. Staff Attorney Gramitt informed that three bills have been introduced to the General Assembly which impact the Commission. He stated that Representative Pollard contacted him before submitting House Bill 5257, which would require the Commission to issue an advisory opinion within thirty days of the request. Staff Attorney Gramitt noted that, based upon 2008 statistics, the average time between receipt of a request and issuance of a draft opinion was fourteen days. He explained that in those exceeding thirty days some involved complex questions requiring more drafting time and others required more information from the petitioners. He advised that there was a hearing on the bill last week, but due to short notice he was unable to attend and did not have direction from the Commission. He reported that John Marion, Executive Director of Common Cause, attended the hearing and opposed the bill.

Staff Attorney Gramitt informed that House Bill 5257 would be held for further study. He recommended that the Commission authorize him to attend any further hearing and provide information regarding Commission procedures and statistics. The consensus was to have Staff Attorney Gramitt attend any further hearing. In response to Commissioner Harsch, Staff Attorney Gramitt indicated that the Representative had a friend, who he has not identified, who had requested an advisory opinion and did not receive it for a few months. Executive Director Willever advised that the Staff does

provide guidance to individuals who need it on short notice, with the caveat that it is not binding on the Commission. He commented that such legislation, if passed, takes jurisdiction of certain matters away from the Commission. He cautioned against the legislature telling the Commission, an executive agency, that it must do something within thirty days or they get to take action. He noted that the bill's passage would implicate funding, staffing and meeting scheduling for the Commission.

Commissioner Cheit inquired for which problem would the bill provide a solution. Commissioner Butler asked whether there had been any meeting where the Commission could not achieve a quorum. Chair Binder expressed that the petitioner would still have the safe harbor of the draft opinion. Staff Attorney Gramitt replied that he does not believe the House Judiciary Committee knows about the safe harbor process. He estimated that ninety percent of opinions receive safe harbor letters. Commissioner Butler suggested that perhaps a petitioner could receive a temporary safe harbor letter if they do not receive an opinion within thirty days.

Staff Attorney Gramitt reported that Senate Bills 148 and 150 were both introduced last year and did not receive hearing; he indicated that they would not likely receive hearing this year. Senate Bill 150 would expand the Code's jurisdiction to include those who have contracts with the state, such as Raytheon and GTECH, for example. He indicated that if the bill were called for hearing, he would like to

attend and get more information. Staff Attorney Gramitt advised that Senate Bill 148 would require all general officers to disclose any income identified in their IRS returns for purposes of financial disclosure. He indicated that it is a good idea, but it is poorly drafted.

As drafted, he noted that it would require all filers to disclose the financial information reported on their tax returns on their financial disclosure statements. He stated that if the bill is noticed for hearing, he requests permission to attend and talk and work with its sponsors.

The next order of business was an Education Update. Staff Attorney Gramitt reported that the amount of training provided by the Education Program for FY 2009 increased by 45%. He advised that the Staff now provides training to the municipal police training academy, as well as the Providence Police Academy. He stated that he recently provided a full day of training to all Resource Recovery Corporation employees. Staff Attorney Gramitt informed that the House and Senate both recently received training, in addition to that previously provided to all newly elected legislators. He noted that Senator Paiva Weed invited the Commission back for training, the last such training before the Senate having been in 2004. He stated that the Staff is looking into online training for FY 2010, particularly for new public officials. Chair Binder commented on correspondence received from House Speaker Murphy regarding the program presented by Staff Attorney Gramitt.

The next order of business was the Director's Report. Executive

Director Willever advised that there are four complaints and six advisory opinions pending. He stated that there are no pending preliminary investigations and one formal APRA request was granted since the last meeting. Director Willever informed that, despite the hiring freeze, the Commission recently was notified that it is authorized to fill the vacant administrative position, which has now been posted. He further informed that the Commission has submitted a request to fill the newly vacant investigator position. He advised that he, Senior Staff Attorney D'Arezzo and Chief Investigator Cross would appear before the Personnel Review Committee on February 12th. Director Willever indicated that budget hearings will be scheduled soon. Although he does not anticipate the Commission to be in dire straits, he stated that there will be a paucity of travel funds and no money for a new laptop computer.

The next order of business was New Business. Chair Binder stated that she wants to keep the Commission's consideration of the complainant's role in the process as a high priority, notwithstanding the briefing schedule in Irons. Director Willever replied that a policy paper addressing the pros and cons will be ready for the next meeting and the matter will remain on the agenda.

At approximately 11:10 a.m., upon motion made by Commissioner Butler and duly seconded by Commissioner Magro, it was unanimously

VOTED: To adjourn.

Respectfully submitted,

J. William W. Harsch

Secretary