



MEC
OPINION NO.

1999.09.111

STATE OF MISSOURI

MISSOURI ETHICS COMMISSION
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COPY

September 13, 1999

At the September 7, 1999 meeting of the Missouri Ethics Commission, your request for an opinion on a number of issues involving the scope and application of Section 105.454, RSMo, was addressed. The following are the Commission's responses to your questions:

1. *In the opinion of the Commission, do the prohibitions of Section 105.454(5) apply only to those departments, divisions or agencies of the state over which the Governor designated me as having supervisory authority during the year preceding my resignation?*

It is the opinion of the Commission that Section 105.454(5), RSMo does not appear to prohibit you from trying to influence departments, divisions or agencies of the state other than those over which the Governor designated you as having supervisory authority. While the Commission generally concurs with Attorney General Opinion 140-93 to the Missouri Ethics Commission of September 9, 1993 regarding other former state officials or employees, the legislature clearly was attempting to create an exception from the general requirements of subsection (5) for some members of the Governor's staff by the addition of the language about them in 1991.

2. *If an activity is excluded from lobbying under Section 105.470(1), can I assume that activity does not constitute "lobbying" or "attempt[ing] to influence" under Section 105.454(5)?*

It is the Commission's opinion that there is no necessary correlation between the definition of the term "lobbying" in Section 105.470(1) and the construction of the term "attempt to influence" in Section 105.454(5). The lobbyist portion of Chapter 105 is directed primarily at reporting requirements and not at specific acts of conflict of interest. Thus, a conflict of interest could occur through attempts to influence matters by activities other than those which constitute "lobbying" for purposes of those reports.

The word "influence" as defined by dictionaries and by case law (see, for example, *State v. Wren*, 62 S.W.2d 853, 855 (Mo. 1933)), includes the act or process or the power of producing

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an effect with apparent force or direct authority. The Commission believes that the broader construction of "attempting to influence" utilizing the ordinary meanings of those words would be applied by a court.

3. *In the opinion of the Commission, does [the] term "decision" under Section 105.454(6) have the same meaning as the activities of "decision-making public servants" (negotiation of contracts; voting on or adopting rules or regulations; and purchasing decisions) as defined under Section 105.450(6)?*

The phrase "decision-making public servants" does not appear in the conflict of interest portion of Sections 105.450 through 105.496, RSMo, but rather in the financial disclosure portion, suggesting once again that there is no necessary correlation in the definitions of these terms. The Commission believes that a court would look to the plain meaning of the word "decision" in construing it under subsection (6) of Section 105.454 in order to determine what matters a former official or employee should avoid, and that a court would not be likely to limit its application only to the types of decisions that would lead to financial interest reporting by current public employees.

4. *[I]n the opinion of the Commission, do the prohibitions of Section 105.454(5) relating to Departments and other entities over which you have "supervisory authority," apply to governmental entities which are precluded by law from being supervised?*

It is the opinion of the Commission that the prohibitions of subsection 5 would relate to all entities over which you were designated as having "supervisory authority," regardless of whether each of those entities was or was not actually subject to supervision by you or by the Governor's office. The exception made in this statute is not one of actual supervision or authority, but rather one of designation by the Governor. The Commission doubts that a court would find any reason to create an unstated exception within the express exception that would allow a member of the Governor's staff to seek to influence decisions by ostensibly "unsupervised" agencies within his or her supervised departments during the first year after leaving office.

5. *Assuming my recollection is correct, in the opinion of the Commission, would my representation of such a political subdivision [in a claim for compensation against the state under Article X of the Missouri Constitution, relating to unfunded mandates] violate Section 105.454(6)? In the opinion of the Commission, would such a demand and related proceedings qualify as an "adversary proceeding" under Section 105.454(5)?*

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The term "adversary proceeding" is specifically defined in Section 105.450(1), RSMo. Besides formal hearings before a judicial or administrative body, it includes "an investigative proceeding . . . which pertains to matters which, depending on the conclusion of the investigation, could lead to a judicial or administrative proceeding being initiated against the party by the official, department, division or agency." Therefore, if an agency is investigating something which could lead to a judicial or administrative proceeding, the former employee could become involved at some point before a formal judicial or administrative proceeding was instituted. However, that would appear to be the only statutory exception for a "pre-proceeding" involvement by the former employee; and since the legislature specifically included this one "pre-proceeding" exception, it did probably not intend to create any other "pre-proceeding" exception.

In addition, while a demand for money in conjunction with a dispute over the Hancock Amendment may be "adversarial" in nature, it would not yet be part of an "adversary proceeding" unless an "investigative proceeding" had begun. Just because there *might* be litigation of some type in the future if the parties do not agree does not warrant the creation of another exception to the "adversary proceeding" definition. For one thing, just about any attempted influence *might* lead to litigation if one of the parties does not like the result. Furthermore, if the former employee successfully influences his or her former agency, then there would simply not be any subsequent "adversary proceeding" to justify the earlier involvement. Therefore, it is the opinion of the Commission that a former officer or employee of the state should not become involved in activities prohibited by Section 105.454(5) unless or until an adversary proceeding is instituted or a public document filed. (This response assumes, of course, that you were not directly concerned with and did not personally participate in any case, decision, proceeding or application with respect to this matter while you were employed by the state. Only if that is true would you be able to participate in an adversary proceeding under the authority contained in subsection 5 of that section.)

Sincerely,



Charles G. Lamb, Ph.D.

Executive Director

NOTICE

Anyone examining this advisory opinion should be careful to note that an opinion of the Missouri Ethics Commission deals only with the specific request to which the opinion responded and only as to the law as it existed at the date of the response and cannot be relied upon for any other purpose or in any other manner.