

MINUTES
LEGISLATIVE ETHICS COMMITTEE
NOVEMBER 18, 2008 MEETING
{Approved: March 23, 2009}

The Legislative Ethics Committee (RSA 14-B:2) met on Tuesday, November 18, 2008, at 10:00 a.m. in Room 103 of the State House. The following members were present: Representative Janet G. Wall, Vice Chairman, Senator Sheila Roberge, Representative Eric Anderson, Attorney Kimon S. Zachos, and Attorney Martin L. Gross. Vice Chairman Wall chaired the meeting. The Committee's Executive Administrator, Richard M. Lambert, and House Legal Counsel, Attorney David Frydman, were also present. The Committee's meeting consisted of the following items:

ITEM #1

Consideration of the draft *Minutes* from the Committee's meeting held on May 28, 2008. Following review, Representative Anderson moved to adopt the *Minutes* as drafted. Attorney Gross seconded the motion and the Committee voted 5 to 0 in favor of the motion.

ITEM #2

Consideration of a request for an Advisory Opinion from Representative Michael B. O'Brien, Sr.

The Committee reviewed a letter dated November 7, 2008, from Representative Michael B. O'Brien, Sr. (Hills/26) requesting an Advisory Opinion regarding: 1) the propriety of a member of the General Court writing a letter of recommendation for a constituent seeking college enrollment; and 2) whether a member can write the letter of recommendation using General Court letterhead or any other letterhead that indicates membership in the General Court.

Attorney Gross referenced the advisory opinion regarding use of letterhead from the Executive Branch Ethics Committee (EBEC) that had been distributed to the Committee in their packet and said that the EBEC ruling involved an interpretation of RSA 21-G:23, a statute which does not apply to the legislative branch. He said that when he reviews an advisory opinion question he looks at the Committee's rules to see if there is a prohibition, either explicit or implicit, and, in this case, he did not find any explicit prohibition. He said he looked at *Ethics Guidelines* Section 4, Prohibited Activities, Paragraph III {"Legislators shall not use their public position or office to obtain anything of value for the private benefit of the legislator or the legislator's immediate family."} and noted that the constituent is not the legislator or not apparently a member of the legislator's immediate family. He said that if, for example, the legislator were writing a recommendation on legislative letterhead to get his daughter into college, then that might be a problem.

Attorney Zachos said he disagreed with that last point.

Attorney Gross said that, as he did not see an explicit prohibition, where he would come down is "this is essentially an innocent activity." He suggested a response to Representative O'Brien that says: "We don't see any prohibition in the statutes or *Guidelines* that prevent you from doing this -- so long as you don't get anything for it."

Attorney Zachos said: "So moved."

Mr. Lambert reminded Attorney Gross that Attorney Gross and he had discussed the application of *Ethics Guidelines* Section 4, Paragraph VII(d) and whether it provided an "implicit blessing" for Representative O'Brien's proposed activity.

Attorney Gross read the section aloud {"VII. Nothing in this section on prohibited activities should be construed to prohibit the following: ... (d) Submission by a legislator of recommendations or references on behalf of a candidate for state employment when the legislator believes the candidate is qualified to be a suitable public employee."} and said that, while Section 4, VII(d) was not on point regarding Representative O'Brien's question because his is not about a recommendation for employment by the state, if the *Guidelines* permitted the writing of a letter of recommendation for a state position, "which is a full lot more than this," it suggests "implicit support" for Representative O'Brien's proposed activity.

Vice Chairman Wall said that she has often been asked to write letters of recommendation for students going to college and might not have been asked had she not been a legislator. She said that writing such letters "is not done to influence in any way, but just because of a particular position and having a particular role." She said that she remembered when she first received a request for a letter of recommendation before the *Ethics Guidelines* existed and going to the Speaker of the House and the House Clerk asking if it was all right. She said they said it was alright and "within our capacity as legislators to perform that kind of duty."

Attorney Gross moved that the Committee advise Representative O'Brien that "we find nothing in the statute or the *Guidelines* that would prohibit him from doing this as long as it does not accrue to his personal benefit."

Senator Roberge seconded the motion and the Committee voted 5 to 0 in favor.

Vice Chairman Wall asked Attorney Gross and Mr. Lambert to draft a letter of response and to circulate it for the Committee's review.

ITEM #3

Discussion of joint publication of educational brochures on ethics with the Executive Branch Ethics Committee.

Vice Chairman Wall asked Attorney Gross to report on the work that he and Mr. Lambert had done as a subcommittee on the EBEC brochures.

Attorney Gross said that he and Mr. Lambert had met during the prior week to review the EBEC's 4 brochures on ethics. He then briefly went over each one. He said that the subcommittee did not see anything that needed changing in the brochures labeled, "Why Ethics Training?" and "Frequent Flyer Miles." He said that the brochure labeled "Prohibition on Gifts" needed some substantive changes to reflect changes to RSA 15-B. He then listed them: 1) the reference to a gift as being anything worth more than \$10 should be changed to \$25; 2) under "What are Exceptions?", he said, there are now 14 exceptions, not 13; 3) the dollar amount for allowed acceptance of a ceremonial award should be changed from \$50 to \$150; and 4) the fourteenth exception to gifts should be added. He said that the brochure labeled "Use of Letterhead" contained a couple of typos: a missing letter "G" in a reference to RSA 21-G:23 and a missing "or" in a phrase that should read: "personal benefit or for financial gain."

The Committee then held a brief discussion regarding whether the Committee's name should be added to the brochures. Attorney Zachos and Attorney Gross both said that the Committee should not join in publishing the brochures at the current time as it could lead to confusion, but should wait until the issues regarding the *Ethics Guidelines* are resolved.

Attorney Gross moved that the Committee endorse transmitting a corrective letter to the chair of the EBEC and take no further action.

Representative Anderson seconded the motion and the Committee voted 5 to 0 in favor.

ITEM #4

Discussion of possible amendments to the ethics laws and *Ethics Guidelines*.

Attorney Gross summarized the Committee's efforts to bring the *Guidelines* amendments into consistency with the statutory provisions of Senate Bill 206. He recalled that the Committee's proposed amendments were never presented to the bodies and, therefore, not adopted. He observed that the *Guidelines* that are in effect "diverge from statute in a number of ways" and suggested that "somebody has got to do something about that." He said that he and Mr. Lambert during their subcommittee meeting to review the EBEC brochures also discussed "what to do to move off dead center." He said: "Rich said that he had heard from some different folks that a way forward might well be in the next session for legislation to be prepared that would essentially embody in legislation the *Guidelines* and the statutory prohibitions on gifts, the point being to create a legislative code of conduct in statute, that does not exist right now -- it exists for the executive branch under 21-G -- but it does not exist in that form for the legislative branch, and conceptually, what this would do would be to take the *Guidelines* as we have manicured them and enact them into law so that they would stand side-by-side with the gift provisions of 15-B. There's some suggestion that the 15-B gift provisions actually be re-enacted in 14-B -- a concept that I'm still scratching my head about because, if you enact it in one place, why enact it in two places?, and the answer I got to that was 'well, that means legislators wouldn't have to look in two places,' and I suppose that's okay if everybody wants it that way -- but that's the concept, in other words, for us to stop struggling to get the legislature to adopt our amended *Guidelines* as such, instead endorse a process where the legislature would essentially enact the amended *Guidelines* into statute and those would remain statutory unless or until another legislature got around to changing them."

Vice Chairman Wall asked Mr. Lambert if that was "what we discussed with (House Speaker) Terie (Norelli) as well as Senate President Sylvia Larsen last June."

Mr. Lambert said that it was.

Attorney Gross said "the only thing I want to mention at this point (is) Rich and I did go through his draft a bit and he sent his draft to me in e-file -- which I'm prepared to look over -- but I have to say not until there's a green light that comes from somebody that says this is a reasonable idea that should be pursued."

Vice Chairman Wall said "that is why the groundwork was laid last June, but apparently members have forgotten that happened. I was told by the Speaker that it was a good idea and the Senate President agreed."

Attorney Gross suggested taking a consensus of the Committee to see if the members agreed it was a good idea so that if the matter is pursued with leadership it could be presented to them that the Committee thinks it makes sense.

Senator Roberge pointed out that the Committee membership could change substantially when the appointments for the next biennium are made.

Attorney Gross said the Committee did not have a record vote last June endorsing the concept and repeated his suggestion that if Committee members thought it to be a good approach it vote to endorse the concept so anyone who goes to see leadership can say the Committee was in favor.

Vice Chairman Wall agreed, saying that the Committee had a discussion but not a formal endorsement. She asked Attorney Gross if he was proposing that as a motion.

Attorney Gross said "yes."

Attorney Zachos said he had "a kind of innate feeling that trying to put the *Guidelines* into statute really doesn't solve the problem." He said that as he understood what Attorney Gross was proposing "it was that someone would read the statute and that the statute would answer any question that he might come up with, and I don't think that's going to happen."

Attorney Gross said he agreed "but that's not what my understanding of this was." He then provided the following brief history of the *Ethics Guidelines* and a summary of what legislative changes might involve: "The present set-up for ethical guidelines is what I would call 'non-standard.' You have a situation in which the original legislative committee that passed the original statute was not prepared for one reason or another to come up with detailed standards, so they punted. They got the legislature to adopt legislation which created this Committee and said to this Committee 'do the substantive guidelines and report back to us and, if we like them, we'll adopt them.' So, essentially, the first stage of legislation was in this Committee, which is non-standard. Since then, this Committee has had essentially 3 major functions: one is to propose guidelines, which are the substantive rules; second is to provide interpretations of the guidelines and the statute; and the third is to issue advisory opinions. Now, what the new concept I'm discussing right now comes to is this: this Committee would retain the last 2 of those functions: advisory opinions and interpretative rulings -- and complaints. What this Committee would no longer do would be to propose guidelines. And so, I'm not in any way suggesting that this Committee go out of business in helping legislators understand what the rules are because the interpretative ruling and the advisory opinion function would remain, as well as the complaint function. The only function that would go away would be the function of proposing guidelines because they would no longer be needed. The *Guidelines* would have been enacted into law. This Committee would still continue to exist and continue to perform the functions that we most frequently perform: interpretive rulings, advisory opinions, and processing complaints."

Senator Roberge asked Attorney Gross if he was "really sure" he wanted to put the *Guidelines* into law because "that's pretty inflexible (and) maybe this Committee should be a little more flexible."

Attorney Gross responded: "that's what concerns me, our flexibility has really come to naught, as we've seen the last 2 years, and it really isn't there anymore because when it comes to enunciating *Guidelines*, they don't take effect until both house of the legislature agree to them."

Senator Roberge observed that it would be much harder to put the *Guidelines* into law as the bill would have to go through the legislative process, including hearings in the House and Senate.

Attorney Gross said that as an alternative "we could stay where we are, but what we're sort of casting about: "how can we get this thing off dead center?"

Vice Chairman Wall asked if the problem began when Senate Bill 206 was passed.

Attorney Gross responded that Senate Bill 206 did 2 major things. "One, was to enact a code of ethics for the executive branch. That was the original intent. And then what got hung onto it was a whole set of a definition of gift and exceptions, and what that did for the first time was enact into statute these ethical requirements."

After further discussion, Attorney Zachos stated that he thought that Attorney Gross and Mr. Lambert "should not do any more work on drafting legislation until we get an unequivocal signal from 2 people: the Speaker of the House and the President of the Senate."

Vice Chairman Wall asked Attorney David Frydman, House Legal Counsel, if he could shed any light on the process that occurred at the end of the 2008 session regarding consideration of the *Guidelines*.

Attorney Frydman said that his sense from the House side was that "the House was prepared to move forward on the *Guidelines* but, when they were pulled or returned to you from the Senate and it required both bodies to pass them, there was a decision made that it wasn't worthwhile to move forward in the House because it was apparent that the Senate wasn't prepared to move forward with the *Guidelines*."

After further discussion, Vice Chairman Wall reminded the Committee that there was a motion on the floor.

Attorney Gross said his motion was to endorse the concept of embodying the *Guidelines* in legislation "and now I'm not so sure because (Senator Sheila Roberge) made an excellent point."

Vice Chairman Wall asked Attorney Gross if he wanted to withdraw his motion.

Attorney Gross said he did.

Vice Chairman Wall asked the Committee members if they wanted there to be further discussion on the question with the Speaker and Senate President.

Attorney Gross said he thought there should be but after the new Committee is formed.

Representative Anderson asked if it would still be timely to discuss submitting legislation when the Committee is reconstituted as bill introduction deadlines will have passed.

Vice Chairman Wall said that the Senate Rules Committee could allow it, especially if the legislation had the support of leadership.

The Committee's meeting adjourned at approximately 11:15 a.m. The Committee's next meeting will be at the call of the chair.

{Prepared by: Richard M. Lambert, Executive Administrator}