

Long-term Care Ombudsman Council, conflict of interest

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Mr. Steven Rachin
State Ombudsman
Long-Term Care Ombudsman Program
600 South Calhoun Street, Suite 270
Tallahassee, Florida 32301

Dear Mr. Rachin:

On behalf of the State Long-Term Care Ombudsman Council, you ask whether section 400.0069, Florida Statutes, or any other provision of law prohibits a tort litigation attorney who might represent a long-term care facility resident from serving as an ombudsman on a district long-term care ombudsman council. Attorney General Butterworth has asked me to respond to your inquiry.

Based on the discussion that follows, it appears that section 400.0069, Florida Statutes, as implemented by Chapter 58L, Florida Administrative Code, would not prohibit an attorney from serving in such a capacity. Any question as to whether a conflict arises under the provisions of Part III, Chapter 112, Florida Statutes, the Code of Ethics for Public Officers and Employees, should be referred to the Florida Commission on Ethics, while questions concerning such an individual's conduct as an attorney should be referred to The Florida Bar.

Section 400.0069(1), Florida Statutes, provides that "[t]here shall be at least one long-term care ombudsman council in each of the planning and service areas of the Department of Elderly Affairs, which shall function under the direction of the state ombudsman council." The duties of the district councils are set forth in section 400.069(2), Florida Statutes, and include serving "[a]s a third-party mechanism for protecting the health, safety, welfare, and civil and human rights of residents of a long-term care facility."

Section 400.069(10), Florida Statutes, provides:

"No officer, employee, or representative of a district long-term care ombudsman council, nor any member of the immediate family of such officer, employee, or representative, may have a conflict of interest. The Department of Elderly Affairs, in consultation with the ombudsman, shall adopt rules to identify and remove conflicts of interest."

Section 400.0069(4), Florida Statutes, in prescribing the composition of the district ombudsman council which must include an attorney,[1] requires that each member of the council certify that neither the council member nor any member of the council member's immediate family has any conflict of interest pursuant to subsection (10).

While section 400.0069, Florida Statutes, does not specify what constitutes a conflict of interest

other than to state that the Department of Elderly Affairs shall adopt rules identifying conflicts of interest, section 400.0065(3), Florida Statutes, establishes what constitutes a conflict of interest for the State Long-Term Care Ombudsman. The statute provides that the ombudsman shall not:

- "(a) Have a direct involvement in the licensing or certification of, or an ownership or investment interest in, a long-term care facility or a provider of a long-term care service.
- (b) Be employed by, or participate in the management of, a long-term care facility.
- (c) Receive, or have a right to receive, directly or indirectly, remuneration, in cash or in kind, under a compensation agreement with the owner or operator of a long-term care facility."

The Department of Elderly Affairs shall adopt rules to establish procedures to identify and eliminate conflicts of interest as described in this subsection.

An examination of the rules adopted by the Department of Elderly Affairs indicates that the department has similarly defined the term "conflict of interest" for purposes of Chapter 58L, Florida Administrative Code. Rule 58L-2.001(3), Florida Administrative Code, provides:

"'Conflict of Interest' as used in this chapter means

- (a) having a direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service;
- (b) having an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility or a long-term care service;
- (c) employed by, or participating in the management of, a long-term care facility; or
- (d) receiving, or having the right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility."

The above definition in Rule 58L-2.001(3), Florida Administrative Code, applies to the rules contained in Chapter 58L relating to conflicts of interest.[2] Thus, the provisions of Chapter 58L addressing conflicts of interest for state and district ombudsman councils are referring to the type of conduct defined in Rule 58L-2.001(3). Accordingly, section 400.0069, Florida Statutes, as implemented by Chapter 58L, Florida Administrative Code, would not appear to prohibit a tort litigation attorney who might represent a long-term care facility resident from serving on a district ombudsman council.

Part III, Chapter 112, Florida Statutes, establishes a code of ethics for public officers and employees, including provisions relating to conflict of interest. For example, section 112.313(6) and (8), Florida Statutes, respectively provide:

"(6) Misuse of public position.--No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. 104.31.

* * *

(8) Disclosure or use of certain information.--No public officer, employee of an agency, or local government attorney shall disclose or use information not available to members of the general public and gained by reason of his or her official position for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity."

Any question involving the applicability of Part III, Chapter 112, however, should be referred to the Florida Commission on Ethics which has been charged by the Legislature with the responsibility of investigating complaints regarding violations of the code. In addition, section 112.322(3), Florida Statutes, authorizes the commission to issue advisory opinions to public officials and employees who are in doubt about the applicability and interpretation of the code.

I would note that the conduct of attorneys within this state is regulated by the Code of Professional Conduct adopted by the Supreme Court of Florida.[3] The Florida Bar, as an official arm of the Court, has been authorized by the Court to investigate alleged violations of the code and to provide its members with advisory ethics opinions about their contemplated professional conduct. Therefore, questions regarding any possible conflict of interest under the Code of Professional Conduct should be referred to The Florida Bar.

I trust that the above informal comments may be of assistance to the council in this matter.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

[1] See s. 400.0069(4), Fla. Stat., which provides that

"[e]ach district ombudsman council shall be composed of no less than 15 members nor more than 30 members from the district, to include the following: one medical or osteopathic physician whose practice includes or has included a substantial number of geriatric patients and who may have limited practice in a long-term care facility; one registered nurse who has geriatric experience, if possible; one licensed pharmacist; one registered dietitian; at least six nursing home residents or representative consumer advocates for nursing home residents; at least three residents of assisted living facilities or adult family-care homes or three representative consumer advocates for long-term care facility residents; one attorney; and one professional social worker."

[2] *Cf. Ervin v. Capital Weekly Post*, 97 So. 2d 464 (Fla. 1957) (a statutory definition of a word is controlling and will be followed by the courts); *Vocelle v. Knight Brothers Paper Company*, 118 So. 2d 664 (Fla. 1st DCA 1960).

[3] See Art. V, s. 15, Fla. Const., stating that the Supreme Court has exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.