

CEO 06-12 -- August 2, 2006

CONFLICT OF INTEREST

STATE REPRESENTATIVE SERVING AS PRESIDENT OF FLORIDA ASSOCIATION OF REALTORS

To: Nancy Riley, (Candidate, Florida House of Representatives, District 50)

SUMMARY:

A prohibited conflict of interest would be created under Section 112.313(7), Florida Statutes, were a member of the Florida House of Representatives to serve as president of the Florida Association of Realtors.

QUESTION:

Would a conflict of interest exist were a member of the Florida House of Representatives to serve simultaneously as President of the Florida Association of Realtors?

Your question is answered in the affirmative.

In your letter of inquiry, additional materials supplied to this office, and telephone conversations between you and this office, you advise that you are a candidate for the Florida House of Representatives, District 50. You are also a licensed real estate agent, and President-Elect of the Florida Association of Realtors ("FAR" or "Association") and as such serve on the FAR board of directors. The FAR's website describes it as "the voice for real estate in Florida, provid[ing] programs, services, continuing education, research and legislative representation to more than 140,000 members in 68 boards/associations." You advise that the Association is a not-for-profit corporation organized under Section 501(c)(6)¹ of the Internal Revenue Code. Real estate agents are not required to belong to the FAR, but the term "Realtor" is trademarked by the organization and, pursuant to its by-laws, only members may identify themselves as "Realtors." To join, real estate agents must become dues paying members of their local board or association, which then pays a portion of the dues to the FAR. Dues for the FAR are currently \$100 "plus a \$10 political fund assessment."

You state that, as President of FAR, you will visit local associations, attend FAR's meetings and conventions, and serve as chair of FAR's executive committee and as an ex-officio member of all FAR's committees. The organization's by-laws establish a legislative committee, and you advise that "the President of FAR traditionally plays a significant role in developing FAR's legislative agenda," although you point out that FAR employs a number of registered

¹ 26 USC Sec. 501(c) lists organizations exempt from taxation. Subsection (6) exempts "business leagues, chambers of commerce, boards of trade, or professional football leagues" not organized for profit.

legislative lobbyists and your role could be reduced in order to be consistent with this opinion. You further state,

a portion of my duties will involve legislative activities on behalf of FAR. I will meet with legislators, Cabinet members, and agency heads to discuss issues relevant to FAR. I also will attend Legislative Days and committee meetings during the legislative session on behalf of FAR. During the year, I will travel the state and often will visit with legislators. Additionally, I will work with NAR (the National Association of Realtors) on campaign issues and choosing candidates to support. Finally, I will participate in the development of issues which will comprise FAR's platform for the year, including issues which FAR's lobbyists will undertake with the Florida Legislature.

You will not be compensated for your service as president, you relate, but you will receive reimbursement of all expenses, including office and entertaining expenses, incurred as a result of your service.

An initial draft response was prepared by staff advising you that a conflict would exist unless you could "separate yourself from the lobbying activities of the FAR." Prior to the opinion being considered by us, you requested that such consideration be delayed so that you could formulate more specific questions as to the scope of such separation. You subsequently submitted additional inquiries as follows:

1. Whether you will be able to participate in formulation of legislative issues up through the stage at which they are approved by the FAR Board of Directors.
2. Whether you will be able to participate in a Legislative Day issue briefing, which participation would essentially consist of opening and closing the briefing and a discussion of legislation significant to FAR with members "in order that they will subsequently be able to discuss these issues with their legislators."
3. Whether you will be able to participate in a Legislative Day Public Policy meeting at which issues may be formulated upon which the FAR Board of Directors may not be able to vote because of time constraints.
4. Whether you will be able to participate in the FAR Legislative Day luncheon which participation would include acting as emcee and introducing speakers, who may include members of the legislature or Governor, and who may speak about issues or legislation important to FAR.
5. Whether you will be able to participate in Legislative Day meetings with the Governor.
6. Whether, during a legislative session, you will be able to make decisions on behalf of the FAR as to whether the Association should support or oppose a particular piece of legislation.
7. Whether you would be able to lobby another member on a matter which may be of significance to FAR when the FAR has not personally contacted you and you have not participated in any FAR corporate activities leading to the FAR's decision to approach the Legislature concerning the issue.

8. Whether you may have contact with legislators through physical attendance at legislative meetings where you have not been lobbied by FAR, and you are not lobbying other legislators "as president of FAR."
9. Whether you are estopped from taking positions on legislation merely because the FAR has also taken a position.
10. Whether discussions with your constituents must be restricted if they pertain to matters that are also of importance to the FAR.
11. Whether other FAR members are prohibited from contacting you as a State Representative, and whether it would matter if those members are also your constituents.
12. Whether, if other legislators or legislative employees seek to discuss legislation with you, "as a State Representative and not as President of the FAR" you may discuss such matters with them, "even if it is a matter that [would] also be of significance to the FAR."
13. Whether you could travel "as president of FAR" and meet with other legislators in their own districts.

Section 112.313(7), Florida Statutes, provides:

CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.—(a) No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

The first part of Section 112.313(7) prohibits a public officer or employee from having a contractual relationship with any business entity regulated by or doing business with her agency. While actions taken by the Legislature will undoubtedly have an impact on FAR and its interests, we have said that this would not be prohibited by Section 112.313(7)(a) due to the language of Section 112.313(7)(a)2, Florida Statutes, which provides:

When the agency referred to is a legislative body and the regulatory power over the business entity resides in another agency, or when the regulatory power which the legislative body exercises over the business entity or agency is strictly through the enactment of laws or ordinances, then employment or a contractual relationship with such business entity by a public officer or

employee of a legislative body shall not be prohibited by this subsection or be deemed a conflict.

Accordingly, the first part of the statute is inapplicable here.

The second part of Section 112.313(7) prohibits a public officer from having any contractual relationship which would create a continuing or frequently recurring conflict between her private interests and the performance of her public duties, or that would impede the full and faithful discharge of her public duties. This provision establishes an objective standard which requires an examination of the nature and extent of the public officer's duties together with a review of her private interests to determine whether the two are compatible, separate and distinct, or whether they coincide to create a situation which "tempts dishonor." Zerweck v. Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982). We have not viewed Section 112.313(7)(a)(2) as applying to negate conflicts arising under this part of the statute. CEO 03-3.

To ascertain whether a conflict would be created, we must first determine whether your relationship with the FAR is contractual in nature. In CEO 91-31, we observed, "A 'contract' is defined as a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty, or as an agreement upon a sufficient consideration to do or refrain from doing a particular lawful thing. 11 Fla. Jur. 2d Contracts, Section 1." Typically, the consideration referred to takes the form of compensation to the individual performing the services. We have held that reimbursement of expenses does not constitute "compensation," (see, CEO 00-23, fn. 2, and CEO 90-4, question 4) and have found that persons serving as uncompensated directors of corporations had no contractual relationship with those organizations and, hence, no conflict under Section 112.313(7). See, CEO 80-46, CEO 80-47.

However, the lack of compensation flowing to the individual performing the services is not necessarily dispositive of the question of whether a contractual relationship exists. For example, we have recognized that "[m]embership in a voluntary, unincorporated association rests on contract; the constitution and by-laws of a voluntary association become a contract between each member and the association. 4 Fla. Jur. 2d Associations and Clubs, Sections 5 and 7." CEO 82-14. Thus, in that opinion, we found that an airport authority official had a contractual relationship with an association of tenants of the authority as a member of the association. Furthermore, we have ruled that while mere membership would not create a prohibited conflict, service as an officer would. CEO 90-18. Although we have not specifically addressed membership in a voluntary incorporated association in any of our opinions, we find that under the general law of contract, the same principal applies. "The constitution and by-laws of a voluntary association, when subscribed or assented to by the members, becomes a contract between each member and the association." (citation omitted). Elbadramany v. Stanley, 490 So. 2d 964, 966 (Fla. 5th DCA 1986).²

² In Elbadramany, both parties were real estate brokers involved in a dispute over a commission, and both were members of an incorporated local board of realtors and had agreed to the board's by-laws, which required arbitration to resolve disputes. The arbitration committee entered an award for the appellant, but it was vacated by the circuit court because there was no written agreement between the parties. The District Court of Appeals reversed the circuit court's judgment and remanded the case to confirm the arbitration award because the provision in the charter and by-laws of the board of realtors, which required that disputes between members be

Having established that your membership in the FAR constitutes a "contractual relationship,"³ we then turn to the issue of whether this relationship is one which would conflict with your public duties as a member of the Legislature. As previously mentioned, we have not viewed Section 112.313(7)(a)(2) as applying to negate conflicts arising under this part of the statute. CEO 03-3. Rather, we have examined the nature and duties of the legislator's private employment or endeavor to determine whether it would present a prohibited conflict of interest. CEO 93-24.

In examining questions regarding members of the Legislature under the second clause of Section 112.313(7)(a), we have repeatedly expressed our concern that a legislator's private endeavors not involve lobbying the Legislature, not encompass activities related to lobbying, and not arise out of or directly relate to issues that might be expected to come before him in his official capacity as a legislator. Accordingly, in CEO 90-8, we found that a State Representative could be employed as executive director of an organization founded to support issues of interest to private colleges and universities in the State, so long as his duties as an employee of the organization did not involve personally engaging in lobbying activities and did not encompass any activities related to lobbying. In that case, the Representative's proposed private duties included managing and operating the organization, representing the organization at professional meetings, and serving as a spokesman for private higher education to the extent that it would not conflict with his legislative duties. Similarly, in CEO 95-21, we found that a State Senator's service on a domestic insurance company's board of directors would not create a prohibited conflict of interest with his duties as a Senator and as Chairman of the Senate Banking and Insurance Committee, because the company was not doing business with the Legislature, because the company was subject to the Legislature's regulation only through legislation, and because his private duties did not involve personally engaging in lobbying activities and did not encompass any activities related to lobbying. Finally, in CEO 03-3, we found there would be no conflict were another attorney of a law firm with which a State Senator had an "of counsel" relationship to represent a client before the Legislature, provided certain conditions were adhered to, including his not lobbying other members of the Legislature in behalf of his firm or its clients, or in regard to matters of concern to the firm or its clients, not filing any legislation for the firm or its clients, and a prohibition in his employment agreement with the firm prohibiting members of the firm from lobbying him on behalf of any firm client.

We are mindful, and our opinions have recognized, that our elected representatives are expected to serve as citizen-legislators rather than as full-time public officials and that in some instances their employers will be represented before the Legislature. However, "we have insisted

submitted to arbitration, constituted a binding agreement between the appellant and the appellee as members of the voluntary association to submit future disputes to arbitration.

³ CEO 84-114, CEO 83-16, and CEO 80-41, referenced in your letter, do not require a different result. These opinions dealt with Article II, Section 8(e), which provides that "[n]o member of the legislature or statewide elected officer shall personally represent another person or entity for compensation before the government body or agency of which the individual was an officer or member for a period of two years following vacation of office." (emphasis supplied.) Hence, it addresses only a scenario where the public officer receives compensation. In contrast, Section 112.313(7) speaks to any contractual relationship, which would include situations where the compensation flowed from the public officer or employee to another, or where the consideration underlying the contract was something other than compensation or payment.

that 'a legislator's employment should be completely separated from the lobbying activities of his employer to avoid a violation of Section 112.313(7)(a).'" CEO 03-11. (e.s.)

Thus, in CEO 91-1, we found a prohibited conflict would be created were a State Senator to contract with a professional association which lobbied the Legislature to speak to its professional groups regarding legislative issues, contribute articles on legislative issues to the association's publications, and advise its executive committee and board of governors regarding legislative and political education activities of the association. We said:

We are of the opinion that the official duties of a legislator legitimately include efforts to educate groups of citizens on legislative policy issues affecting them, whether these issues arise from past legislative sessions or may be expected to occur in the future. There is certainly nothing inconsistent with the proper performance of legislative duties when a legislator meets with professional organizations and associations about legislative issues of interest to them. Moreover, where the legislator agrees with the positions espoused by the group as being the best public policy for his constituents and the State as a whole, there is nothing improper about the legislator's discussing upcoming lobbying priorities and strategies with the group. All these activities are properly part of politics and leadership in a representative form of government.

But we noted that

the subject matter of your proposed employment arises out of your public position and relates directly to issues that may be expected to come before you in your official capacity. Although you advise that you will not participate in the lobbying activities of the association, the content of your advice and presentations will be derived from information gained by virtue of your public position and will relate to issues upon which you will be called to act.

Here, although you are not an employee of the FAR, your relationship with the entity is contractual in nature, relates directly to issues that may be expected to come before you in your official capacity, and does call for you to engage in lobbying activities, thus leading us to the same conclusion reached in CEO 91-1. The question then becomes whether there would be any way for you to structure your activities so that your role as president is "completely separated" from the FAR's lobbying activities. In view of the scope of your role as president and the breadth of the issues in which the FAR has an interest, it does not appear to us that there would be any way to accomplish such separation.

In CEO 88-68, we addressed a question from a state representative considering employment as the executive director of a nonprofit corporation formed to represent the interests of landowners within an area of the district which he represented. While we found that there would be no violation, in discussing the restrictions of Article II, Section 8(e), Florida

Constitution, (which, as addressed in footnote 3, above, prohibits a legislator from representing, for compensation, an entity before any state agency other than judicial tribunals), we said:

The Sunshine Amendment's prohibition clearly was not intended to preclude a legislator from representing his constituents' interests through contacting State agencies, as it expressly prohibits only representations of another "for compensation." However, where a legislator is being compensated as an employee on an ongoing basis to represent his employer's interests before governmental agencies, we find it extremely difficult to draw a line distinguishing representation in a legislative capacity of these interests as being constituent matters, as there is at least the appearance of being compensated for contacts with State agencies regardless of whether the legislator formally indicates that he is acting in his legislative capacity. Therefore, we suggest if you accept employment as executive director of the nonprofit corporation, that you refrain from contacting State agencies regarding matters which would directly benefit members of the corporation, in which the corporation has expressed an interest, or about which you may be contacting local agencies as executive director.

Similarly here, it would be virtually impossible to draw a line distinguishing when you were acting "as a State Representative" as opposed to acting "as president of the FAR." Your questions themselves illustrate how, as a member of the Legislature, you would be faced on almost a daily basis with situations where your dual responsibilities would interface. Furthermore, when a member of the Legislature is the public "face" of the organization, indeed, its highest-ranking member, the potential exists for doubt to arise in the minds of the public as to whether the member's position is espoused because of his or her true belief in its benefit, or because the member has a responsibility to promote and advocate for the organization's philosophy. Accordingly, we find here, as we did in CEO 88-68, that such line-drawing is, as a practical matter, unachievable.

In addition, as you point out, the range of issues on which the FAR may take a position is extremely broad, and "may range, for example, from private property rights to taxes to homeowner's insurance to the environment to funding of the courts." Thus, it would be effectively impossible for you to isolate yourself from issues of import to the Association. This being the case, it seems it would not be possible for you to accomplish the "complete separation" from the FAR's lobbying activities that we have previously found is required.

Accordingly, we find that a conflict of interest would exist were you to serve as a member of the Florida Legislature while simultaneously serving as President-Elect of the Florida Association of Realtors.

ORDERED by the State of Florida Commission on Ethics meeting in public session on July 28, 2006 and **RENDERED** this 2nd day of August, 2006.

Norm M. Ostrau, *Chairman*