

MINUTES  
LEGISLATIVE ETHICS COMMITTEE  
OCTOBER 28, 2024, MEETING  
{Approved: November 18, 2024}

The Legislative Ethics Committee (RSA 14-B:2) met on Monday, October 28, 2024, at 9:00 A.M. in Room 103 of the State House.

The following committee members were present: the Honorable Edward M. Gordon, Chairman, the Honorable Donna Sytek, Vice Chairman, Senator Cindy Rosenwald, Senator Ruth Ward, Representative Janet G. Wall, Representative Bob Lynn, and the Honorable David H. Hess. Also participating was Richard M. Lambert, Executive Administrator.

The Committee's meeting consisted of the following agenda items:

ITEM #1

Consideration of the draft *Minutes* from the Committee's meeting held on October 14, 2024. Following review, Senator Rosenwald moved to adopt the Minutes as presented. Representative Lynn seconded the motion, and the Committee voted 5 to 0 in favor of the motion.

ITEM #2

Continuation of the Initial Review of *Complaint 2024-8*. (Nonpublic Session)

Senator Rosenwald moved to enter nonpublic session, pursuant to RSA 14-B:3, I(d), to continue the initial review of *Complaint 2024-8*. Representative Wall seconded the motion, and the Committee voted as follows:

Mr. Hess		(not yet present)
Representative Lynn	Yea	
Representative Wall	Yea	
Senator Rosenwald	Yea	
Chairman Gordon	Yea	
Senator Ward	Yea	
Vice Chairman Sytek		(not yet present)
{MOTION ADOPTED}		

{NONPUBLIC SESSION}

Representative Lynn moved to exit nonpublic session. Mr. Hess seconded the motion, and the Committee voted as follows:

Mr. Hess	Yea
Representative Lynn	Yea
Representative Wall	Yea
Senator Rosenwald	Yea
Chairman Gordon	Yea
Senator Ward	Yea
Vice Chairman Sytek	Yea
{MOTION ADOPTED}	

Chairman Gordon stated: “We just came out of nonpublic session. During that nonpublic session, we continued our initial review of *Complaint 2024-8*. As a result of that review, the Committee voted to conduct a preliminary investigation of *Complaint 2024-8*.”

### ITEM #3

Further Discussion of HB 1388.

The Committee discussed a draft by Chairman Gordon, “Analysis of HB 1388 in light of current legislative recusal standards,” which had been circulated to them.

Mr. Hess: “I believe that the Chair’s draft was appropriate in terms of comparing the previous decisions of the Committee in the context of the new recusal provisions of (HB) 1388. My thoughts with respect to recusal may be contrary to some other thoughts in the Committee in that, I think, because of the nature of our legislative body, the demographics of the House, in particular, with 400 members and \$100 a year, that recusal should require exceptional and extraordinary conditions or criteria, and should be narrowly confined and defined, rather than expansively. So, I don’t have specific language to suggest with respect to that subject, but I think that is the approach that I would take from a policy perspective. The other suggestion I would make in the elaboration that you drafted would be to state that these are just general statements of interpretation, and they are not intended to be exclusive and are not definitive of all potential conflicts that require recusal.”

Chairman Gordon: “I fully agree with you that it should be narrowly construed, and I think that was the legislative intent. I think there are 2 parts that require recusal. One has to do with employment-related recusal, which I think is, in (HB) 1388, pretty consistent with our rulings already, so I think we could take our rulings as our guideline as to how that should be applied. Our prior rulings with regard to *Ley (Complaint 2019-2)* and *Murray (Advisory Opinion 2023-3)*. And I think the more difficult one is when you have an individual conflict, not an employment related conflict. But I think it should be very narrowly construed and the one example that came up time and time again in the hearings was the FRM (Financial Resources Mortgage, Inc.) issue, where somebody puts in a piece of legislation that specifically, and they may end up getting a direct and substantial remuneration as a result of it. And I think it was intended to be very narrowly construed because we are a citizen’s legislature. We expect people to have expertise from their past lives, and whatever else, and their employment. I think the one thing that wasn’t included and ought to be included is – and I think the point was well taken the other day – we shouldn’t be looking at this and trying to interpret it in advance, as Representative Lynn pointed out, is we should be making individual decisions as cases are brought to our attention and defining the legislation that way. And just thinking in terms of Orientation, what we should tell people is, if the statute is ambiguous and people can’t understand it, we can’t hold people accountable. They at least need to disclose. And as long as they make the effort to disclose their conflicts as they are required to do today, in good faith, that they are not going to find themselves in circumstances where they are going to be sanctioned for doing that. So, and then we’ll have the opportunity over time as cases come to us to be able to more broadly define the statute, which makes more sense to me.”

Representative Wall: “I agree with what you’ve just said because everything keeps going back to disclosure and as long as someone discloses and doesn’t appear to be over emphasizing a particular position it says to me that the person is at least aware that there could be a conflict and perhaps be more careful about what they say and how they conduct themselves by saying, by disclosing, that someone has a particular interest in something it puts other people on alert that,

‘Okay, this person knows a lot, or has a concern a lot,’ but at the same time, knows there’s a line he must not cross. That’s as far as I can go with it.”

Vice Chairman Sytek, referring to HB 1388: “I think it’s pretty clear how members should act in an employment-related situation. That was spelled out in great detail in here. What isn’t clear, and I’m not sure about the personal conflict of interest, and the way the bill is drafted it’s ‘Recusal for Conflicts of Interest,’ and Roman Numeral I was for the personal conflicts and Roman Numeral II was for the employment related conflict of interest. So, you’ve got II and, in contrast to the extensive treatment of the employment-related conflicts, you don’t have much with regard to the personal conflict except that ‘(b) (the member) can reasonably be expected to incur a direct and substantial financial benefit or detriment as a result of the outcome of the legislative activity.’ I think that’s broader than just the FRM. I think that, if you were voting on a retirement benefit that you didn’t have before, that’s a direct and substantial personal benefit and I think you should recuse yourself. The restoration of the Interests & Dividends Tax, that’s going to potentially affect a lot of people personally. We got a letter from (Representative) Susan Almy asking for an interpretation on this. I would think that if you’re affected by that you should recuse yourself, not just disclose. So, I view it more broadly, I believe, than you do.”

Representative Lynn: “I agree with you (Chairman Gordon) that I think we should do it on a case-by-case basis. But, at the same time, my inclination is that Speaker Sytek is correct in that I don’t think it would be limited to the FRM situation... just as an example, you (Chairman Gordon) and I both collect from the Judicial Retirement Fund. If there was a bill to increase the level of benefits, my inclination is that I would not vote...or lobby on that bill, even though it wouldn’t just be me, it would be all judges, presumably, that would get it, or all retired judges. So, I’m more inclined to think that it’s broader than FRM.

The other thing that I think is very important to understand, is that the way (HB) 1388 is worded is, even if you’re talking about a conflict that might arise out of ... an employment situation, you still have to analyze whether recusal is required under both Section Roman Numeral I and Section II. In other words, Section I is not inapplicable to employment situations, it could still apply to employment situations.”

Mr. Hess: “I think both of the concepts are mutually consistent. Doing it on a case-by-case basis. To cite Representative Lynn’s example, if there was a bill to change the Judicial Retirement Plan that resulted in an increase of only \$5 a year, that would be direct but not substantial. But if there would be one that would result in a \$5000 a year increase, then you’re talking about possibly substantial. I think that a case-by-case approach is beneficial to help us as a committee define what is substantial in the absence of doing it in ether.”

Representative Wall: “Our big issue this term is going to be the Interest & Dividends Tax and there will be questions about whether a person should recuse. ... Some people will feel it’s important to recuse because they pay the Interest & Dividends Tax, but there are other people who earn a substantial living from that sort of thing. People will be asking, I’m sure, at what level must they recuse because some people, again, receive very little income from interest and dividends, but others essentially live on it. How are we going to answer that?”

Chairman Gordon: “I guess that gets down to that case-by-case basis, but I think my biggest concern right now is November (19<sup>th</sup> and 20<sup>th</sup>) when we have Orientation for new legislators and what we’re going to tell those new legislators. And I’m fine in saying what we’re going to do is

we're going to define this as cases are brought before the Committee, but that's not going to be satisfying to them. I'd like to see us say you should continue under the current Guidelines and even if you were potentially to run afoul of the new legislation, as long as you complied with the disclosure requirements before you end up in the Committee, we are not going to impose sanctions on you. But you do need to comply with the current disclosure requirements."

Paul Smith, Clerk of the NH House suggested that in "black and white cases, as defined by the new statute, you can say with a certain clarity 'if this happens, please recuse.' So, I think, maybe putting off some of those on a case-by-case basis might not help some of our more easily answered things ... but even an FAQ on the Legislative Ethics Committee website, 'if this, then this,' I think, would be helpful."

Senator Rosenwald referred to Representative Lynn's hypothetical example of recusing from participation in bills increasing his Judicial Retirement Plan benefits and said, "We value the background and expertise of our members, and it seems to me that someone who had been a judge has insight into what it takes to interest people in being a judge that the rest of us don't have ... and so that kind of expertise from someone who's lived that life I think would be helpful. But ... if we make people recuse themselves from all sorts of issues, it's just a temptation to cram more stuff into HB2, which (HB 1388) specifically says you don't have to recuse yourself from voting on the state budget..."

Representative Lynn: "Part of what (HB) 1388 was about, I think, is the public perception situation. And even though I don't disagree factually with what you're saying, I think probably in that situation I would bring some expertise, as could Judge Gordon, but to me probably the answer to that is there are a lot of other people who are not legislators who could bring that same perspective and would, presumably do that if there was something that was affecting the Judicial Retirement Plan, and it might be better from a public perception circumstance if they were the ones that did that and I and Judge Gordon were to recuse ourselves in that situation. ... Suppose it was a fairly significant increase in retirement benefits for judges, you know, it was to be \$5000 or \$10,000 a year, I would be very concerned about the headlines saying, 'Lynn delivers a speech in favor of increasing his pension benefit by \$10,000 a year.'"

Senator Rosenwald: "If I can respond. There's nothing that prevents you from declaring a conflict and saying you're not going to participate..."

Representative Lynn: "Right. But I guess the question would be, suppose in that example there was some judge who said it's perfectly fine for me to vote on that. I guess the question is would the legislature want to have that circumstance occur where some judge could say, 'Yeah. I'm going to get a \$10,000 raise and, damn right, I'm voting on it' and that would be okay as long as they made a disclosure? I'm troubled by that."

Senator Rosenwald: "You're elected by your constituents for your judgment. If you did something like that, then the voters have a chance 2 years later to reconsider their choice."

Chairman Gordon: "I think it comes down to the idea of what's the definition of 'direct' and the definition of 'substantial.' 'Direct' implies going directly to them as opposed to through another organization, it would seem to me. 'Substantial' means more than a pittance. So, I don't know how we want to define that. Maybe we can at least go forward and do that."

Vice Chairman Sytek: "How is this going to work? If we wait for a complaint to come in, it's too late. If we get members so aware of this that they have a lot of requests for advisory opinions and interpretive rulings, the Committee is going to have to be meeting every week. Mechanically, how is this going to work? How are we going to build up a body of opinions to guide their behavior, because they'll just go on like they have in the past when members of (NH Retirement System) Group II get up and make a speech on the floor that's going to benefit just them. They do that and nobody made a complaint."

Chairman Gordon: "Well, I agree with you, but the Committee decided not to do any interpretive rulings."

Vice Chairman Sytek: "On a specific question. But we could do hypothetical examples as we have in the past on things like the Interest & Dividends Tax, EFAs, there's going to be a move to take the cap off of that. That would affect a lot of people. ... But I think it would be helpful to do some hypothetical examples of things that we know are being questioned."

Chairman Gordon: "And so, how would you propose we come up with these hypothetical examples?"

Vice Chairman Sytek: "How did we do it last time?"

Mr. Lambert: "Literally? You and I spent many hours drafting it in LOB 104 and we brought it to the Committee, and they tweaked it and made changes and the Committee issued it. They're in the back of the (Ethics) Booklet."

Vice Chairman Sytek: "I think that would be helpful."

Mr. Lambert: "And it goes back further, too. When the checklist (Section II on the Financial Disclosure Form) was first adopted, the chairman of this Committee was Jeb Bradley and he did a similar advisory opinion with hypothetical examples, about 9 of them, about when you have to use the Declaration of Intent form and what you had to put on your checklist. And so, there's precedent going back to the late '90s for that sort of ruling self-generated by the Committee."

After further discussion of the possibility of issuing an interpretive ruling with hypotheticals, Representative Lynn said: "I guess I'm skeptical about the idea of doing that. ...As I understand it, the way the system operates now is at the beginning of the year you make the general disclosure of things that you have where you might have some financial interest, like I always put down the practice of law and I put down the retirement system. And that's because some legislation that would affect that, legislation having to do with that, might have a greater effect on me than it would have on the general public. So, that's sort of one level. As I understand it, the need for filling the notice of intent is if... the group that I'm comparing it with narrows now... whether I have to file a notice of intent is not 'Is my interest greater than the public, but is my interest greater than anybody else that might be affected by it?' So, for the retirement system as an example, if everybody in the judicial retirement system is going to get a 5% raise, then I'm not affected differently than anybody else. And where I think (HB) 1388 sort of changes that is, it says 'Well, okay if everybody in the judicial retirement system is going to get some raise, you're not going to get a special raise, then a notice of intent would be enough and you could still either

participate or not participate, as you choose.’ But (HB) 1388 would go on to say, ‘But if you’re going to get a direct and substantial benefit, that’s where... if it’s \$5 a year or maybe \$100 a year that’s one thing, but if it’s \$5000 or \$10,000 a year, even if all the other judges, are going to get \$5000 or \$10,000 a year, maybe that does qualify as something that should require me to recuse myself. And I’m kind of concerned about what we would use as the examples and whether we would all be agreed, like the Interest & Dividends Tax. I’m not sure that I would agree with, I think, where you would be on that, but I don’t know.’”

Chairman Gordon: “And this comes from what I believe my understanding was attending the hearings with regard to HB 1388, and that was going not to the issue of substantial, but the issue of direct, and it was something other than what’s passing through some other entity, like the retirement system. That’s not direct. FRM is direct. Something that’s coming to you from the state. Where, as opposed to the retirement system, or current use, or those other types of benefits, that’s why the word direct was put in there, it was to avoid doing that. That would be requiring disclosure only. And that was my understanding of the bill and of the legislative intent at the time.”

After further discussion, Chairman Gordon asked the Committee members if they thought they could reach an agreement on hypotheticals. He then said: “Let me just ask a question: Are we all in agreement as to how this statute applies to retirement benefits? Do you have to recuse yourself if there’s a bill providing for a cost-of-living increase for retirees? Should a retiree in the legislature, and there are lots of them, state retirees, should they have to recuse themselves? Just in terms of a hypothetical, can we agree on that?”

Representative Lynn: “This is the thing I’m not clear on... let’s say the FRM, as one example, so a group of particular individuals are going to get a check from the state for a certain amount of money. I have no question that that should be. But what I’m not sure of is, is it really that much different than if I get a check from the state’s agent who administers the judicial retirement and if it’s going to be 10% higher? I’m not sure why one is direct and the other one isn’t.”

Mr. Hess: “The fact that we cannot come to an agreement on such a simple hypothetical after we have studied this issue for hours and hours and received testimony on it, I think, emphasizes the fact that we have to be very careful of developing hypotheticals without a factual basis. We also have to recognize that if we have trouble with this, can you imagine what the typical legislator will encounter in terms of exercising his or her judgment about recusal. So, I don’t know if we’d open a Pandora’s Box by attempting to create hypotheticals. But I’m just pointing out, if we can’t agree among the 7 of us about a given hypothetical, then we’re going to have a lot of interesting work ahead of us.”

Chairman Gordon: “I would like at least, only because I’m going to be in the hot seat (at Orientation), to be able to put people in a position where they don’t feel that they’re going to find themselves in circumstances where they could be sanctioned under the provisions of (HB) 1388 because we can’t provide adequate guidance as to what they should or shouldn’t be able to do. A bright line. So, I would like to be able to at least say, ‘You need to follow the current Guidelines with regard to disclosure, in any event, and as long as you do that in good faith, until there’s better determination of the standards, that you’re not going to get sanctioned for doing that.’”

Representative Lynn: “I think that makes a lot of sense. Absolutely. I’m clear with that.”

Senator Ward: “If I could just mention something. We’re talking about retirement benefits. Say that this bill comes up for a 5% increase. I am part of that group, but I’m also representing all the other people who are going to benefit from it. So, it seems to me that I have a responsibility to that other part of the group to vote for what’s best for them, even though I am part of that group, and I will benefit, but I’m not benefiting any more than anybody else. That’s how I look at these things.”

Chairman Gordon: “How’s the public look at it? That’s the other issue. How’s the public look at it? Would the public look at that and say, ‘She’s representing other people,’ or does the public look at it and say, ‘Hey, she’s voting to give herself a raise’?”

After further discussion, Mr. Hess noted that there were people in attendance who are involved in Orientation and asked them if they thought Chairman Gordon’s suggested statement for Orientation would be helpful.

Paul Smith: “As a member of the Orientation Committee, I would say the more the better. Now, I understand the trepidation of specifics, but I still think the more the better. Representative (Greg) Hill had indicated that he was working on a decision tree. I have not seen that decision tree. I don’t know if any of you have. I don’t know if that might be a place to start from. It’s just from the point of view of the sponsor. I understand the desire to have more case law, as it were, for you to base some opinions on and that sort of thing. But I do think more is better, specifically with respect to answering some questions...”

Aaron Goulette, House Chief of Staff: “I echo Paul’s sentiments about more is better. More clarity is better, even if it’s in incremental steps. But I just wanted to point out, and it’s a perspective I haven’t necessarily heard discussed here yet and, of course, obviously we’d love for people to be able to have the judgment to be able to say, ‘Okay, I feel like I should recuse myself from this, and therefore I will,’ but I think that what we run into, at least on the House side, is other people judging other members as to whether they should recuse themselves or not, and I do not want to say it could be weaponized, I think that’s a strong term, but I think that it could, especially if we’re as closely a divided body like we are now where every vote counts. There may be a competition to see how many people you can disqualify on any given vote. And if there’s a gray area, it’s going to amount to some confusion. However, if we have specific examples or guidance, that would help people in their judgment process. That would be better. But it would need to come from an authoritative source, not just somebody from the outside who claims they’re an expert on these matters, and that’s why it comes down to the work of this Committee to help us in those types of instances.”

Vice Chairman Sytek suggested that the Committee look at Representative Hill’s decision tree to see if that might be helpful. Copies were distributed to the Committee. After careful review, there was consensus that the decision tree would not be particularly helpful for providing guidance to legislators for understanding when they must recuse or not.

Chairman Gordon: “So how do you want to just end this? Go forward? Okay to go to Orientation and let them know that if they think they should recuse, they ought to recuse. They can interpret the legislation themselves but, in any event, they should follow both the existing legislation and at least disclose. As long as they properly disclose, we’re not going to sanction people.” These was consensus in support of that.

ITEM #4

Discussion of proposed amendments to the *Ethics Guidelines*.

The Committee reviewed a draft amendment. Representative Lynn proposed some revisions. Following discussion, Representative Lynn offered to circulate his revisions to the Committee and the Committee agreed to further consider the amendment at their next meeting.

ITEM #5

New/Other Business.

There was no new or other business.

ITEM #6

Scheduling of the next meeting.

The Committee scheduled its next meeting on November 18, 2024, at 1:00 P.M.

The Committee's meeting adjourned at approximately 11:35 A.M.

{Prepared by Richard M. Lambert, Executive Administrator}