

CONFLICT OF INTEREST ISSUES PERTAINING TO JOINT LEGAL REPRESENTATION



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PURPOSE OF PRESENTATION

❖ The purpose of this presentation is to provide the Cape Light Compact (the “Compact”) with background information regarding the Compact’s current legal counsel status, its shared counsel bylaw, and an overview of applicable Massachusetts law on the subject.

FREEDOM TO CHOOSE LEGAL COUNSEL

- ❖ The Conflicts of Interest Law, G.L. c. 268A, does not prohibit public entities from engaging the same law firm as legal counsel. Many Massachusetts municipalities use the same law firms. Several of the Compact members use the same law firm.
- ❖ The Towns of Aquinnah, Chilmark, Edgartown and West Tisbury are represented by Ronald Rappaport.
- ❖ The Towns of Dennis, Eastham, Harwich, Provincetown, Sandwich, Tisbury and Wellfleet are represented by Kopelman & Paige, P.C.
- ❖ In addition to the seven Compact member towns, Kopelman & Paige, P.C. represents over 100 Massachusetts municipalities.

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THE CONFLICTS OF INTEREST LAW, G.L. c. 268A

- ❖ The Conflicts of Interest Law, G.L. c. 268A, does limit the Compact's counsel from representing anyone other than the Compact in relation to any particular matter in which the Compact has a direct and substantial interest, even if the parties' interests are substantially aligned.
- ❖ Joint representation on a particular matter is permitted if such representation is provided for by law for the proper discharge of official duties.
- ❖ The Compact has a bylaw permitting counsel to jointly work for other public entities on matters where the entities have mutual interests, provided certain conditions are met. This is called the shared legal representation bylaw and it was adopted in accordance with G.L. c. 268A.

CAPE LIGHT COMPACT BYLAW

Bylaw 1. Shared Legal Representation Involving Members or Other Public Entities; Official Duties of Compact Counsel.

The purpose of this bylaw is to allow the Compact from time to time to retain counsel who may also represent its Members or other public entities in matters in which the Compact has a direct or substantial interest without violating G.L. c. 268A, Section 11(a) and (c). Such dual or common representation allows the Compact to pool resources for a common purpose, develop mutual interests, and preserve scarce Compact funds. Pursuant to this bylaw, the official duties of Compact counsel include, but are not limited to, representing Members or other public entities in: (i) administrative and judicial proceedings in which the Compact is also a party; (ii) contract negotiations or project development matters in which the Compact or its Members have an interest; and (iii) other matters in which the Compact has a direct or substantial interest, provided that in each instance, such dual or common representation would not cause a violation of rules governing attorney conduct. Compact counsel shall discharge such duties only when requested in writing by the Compact's Governing Board. Prior to making such a request, the Compact's Governing Board shall determine whether the interests of the Compact would be advanced by such dual or common representation and shall evaluate if actual or potential conflicts of interest exist. If any conflicts are identified, they shall be described in the written request. Counsel shall then make its own determination whether such dual or common representation would not cause a violation of rules governing attorney conduct.

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CAPE LIGHT COMPACT BYLAW

- ❖ The Compact is required to have the bylaw in order to share legal representation with other parties under G.L. c. 268A, the state Conflicts of Interest Law.
- ❖ As set forth in the bylaw, shared legal representation allows the Compact to pool resources for a common purpose, develop mutual interests, and preserve scarce Compact funds.
- ❖ The bylaw does not require the Compact to share legal representation with other entities; it only permits shared legal representation if the conditions set forth in the bylaw are met.

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CAPE LIGHT COMPACT BYLAW

- ❖ The Compact's Governing Board makes a determination as to whether the interests of the Compact would be advanced by such dual or common representation and evaluates if actual or potential conflicts of interest exist.
- ❖ The Compact's Governing Board then requests shared legal representation in writing to counsel. If the Board previously identified any conflicts, they are to be described in the written request.
- ❖ Counsel then makes its own determination whether such dual or common representation would not cause a violation of rules governing attorney conduct.

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CAPE LIGHT COMPACT BYLAW

- ❖ The Compact is free to select legal counsel at any time for any reason. It does not have to work jointly with other public entities on a particular matter using shared legal representation with any other party entity.
- ❖ The Compact on certain matters uses shared legal representation with its sister organization, the Cape & Vineyard Electric Cooperative, Inc. and the Town of Sandwich.
- ❖ The Compact's bylaw only permits it to share legal counsel with other public entities (not private parties).

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MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT

- ❖ Even if the Compact requests that a particular attorney represent it and another entity on a particular matter, the attorney must make sure that such representation is permitted under the Massachusetts Rules of Professional Conduct.

- ❖ The Massachusetts Rules of Professional Conduct provide as follows:

Rule 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

GUIDANCE FROM STATE ETHICS COMMISSION

- ❖ The leading opinion from the State Ethics Commission on joint legal representation is EC-COI-92-10.
- ❖ In EC-COI-92-10, the Town of Webster adopted a bylaw permitting special town counsel to jointly represent private parties and the Town.
- ❖ The Commission found that adoption of the bylaw was consistent with the Conflicts of Interest Law, G.L. c. 268A.

GUIDANCE FROM THE OFFICE OF INSPECTOR GENERAL

- ❖ The use of shared legal representation is consistent with recommendations from the Massachusetts Office of Inspector General (“OIG”).
- ❖ In its report on *An Investigation of the Use of Certain Bond Funds by the North Attleborough Electric Light Department* (December 2005), the OIG recommended that the Town of North Attleborough and the North Attleborough Electric Department consider using a common lead law firm in order to improve efficiency and control costs.

CONTACT INFORMATION

The information in this presentation is general in nature and is not legal advice.

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