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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

December 20, 1978

Honorable Paul Boudreau
86 Oakland Street
Waterville, Maine 04901

Dear Representative Boudreau:

This responds to your request for an opinion, dated December 11, 1978, which raised certain questions regarding the applicability of 5 M.R.S.A. § 15 to the Attorney General and other constitutional officers of the State of Maine.

The provisions of the statute of most immediate concern are those applying to former partners of present employees because of their potential application to a nominee for Attorney General, Mr. Charles Cragin, and his law partners. That section of the 12, 5 M.R.S.A. § 15(2), reads as follows:

> "2. Partner of former executive employee. Any former partner of a person who is currently a member of the classified or unclassifed service employed by an executive agency shall be guilty of a Class E crime if that former partner, within one year after the partnership has ended, acts as agent or attorney for anyone other than the State in connection with any official proceeding in which:
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> "A. The State is a party or has a direct substantial interest; and
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> "B. The subject matter at issue is directly within the official responsibility of the person, currently employed by an executive agency, who was formerly his partner."

Because Mr. Cragin's firm, Verrill and Dana, does a significant amount of legal business before State agencies and in other official proceedings in which the State is a party or has a direct and substantial interest, there is concern about the potential impact of this law on the firm if Mr. Cragin becomes Attorney General.

The conflict of interest law was originally enacted by P.L. 1975, c. 539. Subsequent amendments to sub-§ 2 have been of an editorial nature to conform the statute to the Maine Criminal Code, P.L. 1977, c. 696, § 32.

There is no significant legislative history available to provide guidance in interpretation of this law. The law initially was enacted as a result of a Senate amendment (S-297) which completely changed the nature of an original bill, L.D. 1608, establishing registration procedures for lobbyists. The amendment changing L.D. 1608 to the provisions of 5 M.R.S.A. § 15 does not appear to have been subject to public hearing or legislative debate. Subsequent clarifying amendments to subsection 1 of section 15 were included in the errors and inconsistencies bill for 1976, P.L. 1975, c. 770, §§ 16-18. These likewise do not appear to have been subject to any legislative debate. With this limited history, interpretations of this law must rely on doctrines of statutory construction and review of similar legislation in other jurisdictions.

The most nearly analogous legislation appears to be 18 U.S.C. § 207. This section, in pertinent part, provides:

> "(c) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest and in which such officer or employee of the Government or special Government employee participates or has participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or which is the subject of his official responsibility--
>
> "Shall be fined not more than $5,000, or imprisoned not more than one year, or both."

The initial provisions [sub-§§ (a) and (b)]of § 207 restricting former government employees dealing with the government are the most recent version of provisions of law dating back at least to the 1870's. However, the provisions of sub-§ (c) applying to former partners of current government officials appear to have been added in 1962 as a result of enactment of P.L. 87-849, 76 Stat. 1123; 2, 1962 U.S.C.C.A.N. 3852, 3862.1/ Sub-§ (c) of the Federal law, as is the case with the Maine provision, does not appear to have been subject to any judicial interpretation. Further, its terms are not directly analogous to the Maine statute. For example, sub-§ (c) extends its coverage to partners of "officers or employees of the executive branch" instead of partners of persons "currently a member of the classified or unclassified service employed by an executive agency." Also, its coverage extends to matters in which the government employee "participates or has participated personally and substantially" "or which is the subject of his official responsibility" instead of the provisions of the Maine law which address matters "directly within the official responsibility" of the executive employee. Both laws, however, appear to focus their restrictions on partners (or former partners) of current employees.

With this background, we would initially address your first three questions which are as follows:

> "1. Does 5 MRSA § 15 apply to constitutional officers such as the Governor, Attorney General, Secretary of State and Treasurer?
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> "2. Is the Governor and/or the Attorney General a 'state employee' as that term is utilized in section 1 of section 15?
>
> "3. Is the Governor and/or the Attorney General a 'member of the classified or unclassified service employed by an executive agency' within the meaning of 5 MRSA § 15?"

By an opinion dated December 5, 1975, this office addressed similar questions in regard to the applicability of 5 M.R.S.A. § 15 to members of the Maine Guarantee Authority. That opinion concluded that members of the Maine Guarantee Authority were

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1/ The United States Code Congressional and Administrative News citation contains some legislative history of the Federal law. The only detailed judicial examination is provided in United States v. Nasser, 476 F.2d 1111 (7th Cir., 1973) where the prohibitions on former employees practicing before their agencies are examined.

officers of the State but that they were not "employed by an executive agency" within the meaning of 5 M.R.S.A. § 15. A copy of that opinion is attached. That opinion addressed issues different from those raised in these questions. However, based on our analysis in this case we cannot conclude that 5 M.R.S.A. § 15 does apply to the Attorney General or to former partners of an Attorney General. This opinion is based on a careful examination of the constitutional, statutory and common law background of the Attorney General's position. Time has not permitted a similar analysis of the other positions. However, we have no reason to believe that such analysis would result in a different conclusion regarding the Governor, Secretary of State or Treasurer.

Title 5 M.R.S.A. § 15 applies to persons who are members "of the classified or unclassified service employed by an executive agency." By the terms of 5 M.R.S.A. § 711(1)(B), the Attorney General, and other constitutional officers chosen by the Legislature, are specifically included within the unclassified service. However, being a member of the unclassified service, as noted in the 1975 opinion, does not automatically make one an employee of an executive agency. The term "employed by an executive agency" appears designed to modify the more general term "unclassified service."

By the provisions of the Maine Constitution, Article IX, Section 11, the Attorney General is chosen biennially by the Maine Legislature. Thus, the body selecting the Attorney General is legislative, not executive, in origin. Further, the statutory authorization for the Attorney General specifies that: "The Attorney General shall be the executive head of the Department of the Attorney General, as heretofore established." 5 M.R.S.A. § 191. In such a position the Attorney General exercises directly some of the sovereign powers of the State. As the Supreme Judicial Court noted in Lund ex rel. Wilbur v. Pratt, 308 A.2d 554, 558 (1973);

> "The Attorney General, in this State, is a constitutional officer endowed with common law powers. See, Constitution of Maine, Article IX, Section 11. As the chief law officer of the State, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time require, and may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights. (citations omitted)."

As a person directly exercising sovereign powers, the Attorney General is an officer of the State. Further, the Attorney General is the head of a constitutionally created branch of government. As such, it is difficult to characterize the Attorney General as a person "employed by an executive agency." There is considerable history in Maine case law distinguishing officers and employees. This distinction was established early in Maine by Opinion of the Justices, 3 Me. 481 (1822). That opinion discussed the distinction between officers and employees in the following terms:

> "We apprehend that the term 'office' implied a delegation of a portion of the sovereign power to, and possession of it by the person filling the office;-- and the exercise of such power within legal limits, constitute the correct discharge of the duties of such office. The power thus delegated and possessed, may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the State. An employment merely has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law. And if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority and for the public good, but not in the execution of any standing laws, which are considered as the rules of action and the guardians of rights. By giving this construction to the term 'office,' the meaning of the first section of the ninth article and fourth part of the constitution appears plain, and the word office therein contained becomes intelligible as to the extent of its import.
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> "An office being a grant and possession of a portion of the sovereign power, it is highly proper that it should be guarded from abuse as far as possible; and to this end, that every person holding an office should be under the obligation of the oath in that section specified. It appears then, that every 'office,' in the constitutional meaning of the term, implies an authority to exercise some portion of the sovereign power, either in making, executing or administering the laws. . . . " 3 Me. at 481-482.

That early case has been cited with approval in several more recent Maine decisions: Burkett ex rel. Leach v. Ulmer, 137 Me. 120, 123 (1940); Pennell v. Portland, 124 Me. 14 (1924) Bowden's Case, 123 Me. 359 (1924); Goud v. City of Portland, 96 Me. 125 (1902); Opinion of the Justices, 95 Me. 564, separate opinion 585-589 (1901).2/

We recognize that the language of § 15 is less than precise on this point, and some persons may argue, in good faith, that the law was intended to apply not only to State employees but also to constitutional officers. However, where the Legislature intends such an application, it generally has used the term "officers and employees," see, for example, 5 M.R.S.A. § 7 "any State employee or official who misuses a state owned motor vehicle. . . "; 5 M.R.S.A. § 10, "All state officers and employees. . . "; and 5 M.R.S.A. § 14, "No officer or employee of this State. . . . "3/ Of most particular note in this regard is 5 M.R.S.A. § 711(1) which in ¶B limits its application to constitutional officers, but in some other paragraphs addresses "officers and employees."

The omission of the term "officer" in § 15 and the case law recognizing some distinction between officer and employee could reasonably lead one to conclude that § 15 was not intended to apply to constitutional officers, or at least to the office of Attorney General.

Further, the statute in question imposes a criminal penalty. It is well settled law in Maine that penal statutes must be strictly construed and, where the Legislature intends to impose penal sanctions, it should do so in "clear and unmistakable terms," State v. King, 571 A.2d 640 (Me., 1977);

2/ The Maine distinctions in this regard are also supported by Federal cases, most notably United States v. Germaine, 99 U.S. 508 (1878), a case arising in the United States Circuit Court for the District of Maine. In that case, the famous Thomas B. Reed successfully argued before the United States Supreme Court that a surgeon appointed by the Commissioner of Pensions was an employee, but not an officer of the United States and thus was exempt from an extortion statute which applied, by its terms, to "every officer of the United States." The holding in United States v. Germaine was criticized as too narrow in a later opinion of the Attorney General, but that opinion itself recognized the continuing viability of distinction between officers and employees of government. 40 Opinion of the Attorney General 294 (1943).

3/ In a similar manner, of course, the analogous Federal statute, 18 U.S.C. § 207(c) extends its coverage to both officers and employees.

State v. Peacock, 138 Me. 339 (1942). In this case, although there is legitimate dispute about the meaning of the statute, there can be no dispute that the meaning of the statute is uncertain.[4/] That being the case, application of the doctrine that penal statutes must be strictly construed requires a narrow construction restricting application of the statute to employees of executive agencies. Under this construction, we cannot state that 5 M.R.S.A. § 15 will bar an Attorney General's former law partners from appearing in official proceedings involving the State.

With this said, however, we must emphasize that this opinion is limited to interpretation of the meaning of 5 M.R.S.A. § 15 and its application to the Attorney General. We do not have sufficient awareness of the facts of any particular case or the relationships and clients of any particular law partnership to determine whether problems may arise under common law doctrines of conflict of interest[5/] or under the attorneys Code of Professional Responsibility currently in the process of development and publication by the Supreme Judicial Court. This opinion does not suggest that there may be problems in these areas, rather, it simply does not and cannot, because of lack of facts, address such concerns.

Should any questions relating to legal ethics develop, such matters should be addressed to the Board of Overseers of the Bar which has recently been established by the Maine Supreme Judicial Court.

4/ In this regard it is noteworthy that the Maine Senate has found the meaning of the statute to be uncertain in an order dated December 6, 1978, propounding questions to the Supreme Judicial Court.

5/ Maine cases addressing common law conflicts of interest include Opinion of the Justices, 330 A.2d 912 (Me., 1975); Tuscan v. Smith, 130 Me. 36 (1931); Lesieur v. Inhabitants of Rumford, 113 Me. 317 (1915).

We have reviewed the other 8 questions posed in your letter regarding interpretation of 5 M.R.S.A. § 15. We would note that these questions identify points of potential uncertainty in interpretation of law. However, in light of the conclusions reached, we see no necessity for answering the remaining questions at this time. If ambiguity does exist, such as addressed in your questions, such ambiguity may be appropriate for legislative action in the 109th Legislature.

I hope this information is helpful.

Sincerely,

DONALD G. ALEXANDER
Deputy Attorney General

DGA/ec
cc: Legislative Leadership
Philip Merrill
Charles Cragin

STATE OF MAINE

Inter-Departmental Memorandum Date December 5, 1975

To Philip G. Clifford, 2nd, Manager Dept. Maine Guarantee Authority

From Martin L. Wilk, Deputy Dept. Attorney General

Subject

This will respond to your memo dated November 10, 1975, inquiring whether 5 M.R.S.A. § 15, which disqualifies former State employees from participation in certain matters against the State, applies to members of the Maine Guarantee Authority. For the reasons which follow, it is our opinion that the statute does not apply to members of the Authority.

5 M.R.S.A. § 15 prohibits "any person who has been a member of the classified or unclassified service employed by an Executive agency. . . " from engaging in certain activities against the State after such person leaves State service. From this language it is clear that, broadly speaking, the section only applies when two elements are present, namely: (1) a person must have been a member of the classified or unclassified service, and (2) that person must have been employed by an Executive agency of State Government. Members of the Maine Guarantee Authority are not in the classified service.

5 M.R.S.A. § 711(3) provides that the unclassified service comprises positions held by "officers and employees" who are "heads of departments and members of boards and commissions required by law to be appointed by the Governor with the advice and consent of the Council. . . . " Since members of the Maine Guarantee Authority arguably are "officers" of a board required by law to be appointed by the Governor with the advice and consent of the Council, 10 M.R.S.A. § 751, such persons may well be considered within the unclassified service. If, on the other hand, such persons are not "officers or employees" within the meaning of 5 M.R.S.A. § 711 and are not in the unclassified service, the statute in question would not apply.

Assuming, arguendo, that the members of the MGA are within the unclassified service, we must consider whether they are employed by an Executive agency within the meaning of 5 M.R.S.A. § 15. In our opinion, such persons cannot properly be considered employed by the MGA. Members of the MGA constitute the governing body of the Authority, 10 M.R.S.A. § 751, and have power to appoint employees, who work at their direction, 10 M.R.S.A. § 751(C), (G). The members do not receive a regular salary and are not subject to supervision by other officials. Within statutory limitations they have complete policy and decision making authority within a quasi-independent "body corporate" which is an instrumentality of the State. Such persons are not employed by an Executive agency within the meaning of 5 M.R.S.A. § 15.

It should be noted that the statute refers to an "Executive agency." Because the MGA is an instrumentality of the State having its own corporate existence, it is further arguable that the MGA is not an "Executive agency" within the meaning of 5 M.R.S.A. § 15. See Maine State Housing Authority v. Depositors Trust Co., 278 A.2d 699, 707 (1971).

Finally, 5 M.R.S.A. § 15 is a criminal statute and therefore should be narrowly construed.

For all of the foregoing reasons, we conclude that 5 M.R.S.A. § 15 does not apply to members of the Maine Guarantee Authority. We do not express any opinion on the applicability of the statute to other persons associated with the MGA or to the members of any other board or commission.

Martin L. Wilk

MARTIN L. WILK
Deputy Attorney General

MLW/ec