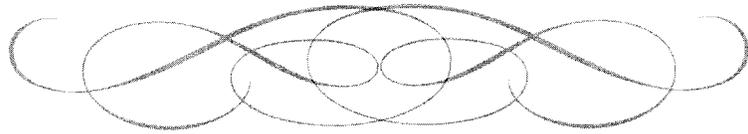


Report of the
Joint Committee on Legislative Ethics



IN RE: STATE DELEGATE WILLIAM "TONY" MCCONKEY



Annapolis, Maryland
February 4, 2013



MARYLAND GENERAL ASSEMBLY
JOINT COMMITTEE ON LEGISLATIVE ETHICS

February 4, 2013

Honorable Michael E. Busch
Speaker of the House of Delegates
State House
Annapolis, Maryland 21401

Dear Speaker Busch:

There is transmitted herewith the Report of the Joint Committee on Legislative Ethics, In
Re: State Delegate William "Tony" McConkey, adopted by majority vote of the Joint
Committee on January 23, 2013.

Sincerely,

A black rectangular redaction box covering the handwritten signature of Senator Norman R. Stone, Jr.

Senator Norman R. Stone, Jr.
Co-Chairman

A black rectangular redaction box covering the handwritten signature of Delegate Brian K. McHale.

Delegate Brian K. McHale
Co-Chairman

REPORT OF THE JOINT COMMITTEE ON LEGISLATIVE ETHICS

IN RE: DELEGATE WILLIAM “TONY” MCCONKEY

FEBRUARY 4, 2013

The Joint Committee on Legislative Ethics (Joint Committee), pursuant to the April 10, 2012, complaint of Senator Edward Reilly requesting review and proceedings regarding alleged ethical improprieties on the part of Delegate William “Tony” McConkey, submits this report with recommendations to the Speaker of the House of Delegates, adopted by a majority vote of Joint Committee on this date.

In accordance with the provisions of § 2-706(1) and Title 15, Subtitle 5 of the State Government Article, the Joint Committee commenced its review and proceedings in accordance with its mandate to “to perform all duties assigned to it by law or by legislative rules” including review of complaints received.

The Joint Committee met in closed executive session on May 16, 2012, to review the complaint sent by Senator Reilly. The complaint letter contained alleged facts of the specific activity that the complainant averred violated the provisions of the Maryland Public Ethics Laws. To provide Delegate McConkey with an opportunity to respond to the allegations made against him, the Joint Committee requested by letter dated May 18, 2012, that Delegate McConkey provide a written response to the complaint or appear in person before the Joint Committee on June 5, 2012. Delegate McConkey failed to respond to the written letter of the Joint Committee or several telephone messages left by Joint Committee Counsel.

On June 5, 2012, the Joint Committee met in a closed executive session to review any response provided by Delegate McConkey. Delegate McConkey failed to send a written response or appear in person before the Joint Committee. To ensure that the delegate was given a final and fair opportunity to respond to the complaint, the Joint Committee telephoned Delegate McConkey during this meeting and he, for the first time, responded to the telephone call. The Joint Committee proceeded to interview Delegate McConkey over the telephone, to review evidence relating to the allegations, and make a determination on the relevant issues.

On January 23, 2013, the Joint Committee voted to adopt this written Report.

SUMMARY OF RECOMMENDATIONS

Based on careful and thorough consideration of the evidence and the issues before it, and for the reasons set forth in detail in this Report, the Joint Committee recommends to the Speaker of the House of Delegates that:

1. The Speaker of the House of Delegates submit to the House of Delegates, and the full House of Delegates adopt, a resolution of reprimand expressing the House of Delegates' disapproval of Delegate McConkey's actions, based on his activities as set forth in this Report of the Joint Committee on Legislative Ethics.

2. The Speaker of the House of Delegates request that Delegate McConkey consider making a public apology to the members of the House of Delegates to acknowledge and express regret for his conduct and the dishonor he has brought to the Maryland General Assembly.

FACTUAL FINDINGS OF THE JOINT COMMITTEE

The Joint Committee, after gathering and thoroughly reviewing all available evidence relating to various activities of Delegate McConkey in connection with the Maryland Public Ethics Law, issues the following findings of ethical violations, including failing to disclose a conflict of interest and failing to abstain from participating and voting in a matter involving a conflict of interest.

Background on Senate Bill 134 of 2012

During the 2010 interim, the Department of Legislative Services conducted a full sunset evaluation of the State Real Estate Commission (Commission) under the Maryland Program Evaluation Act. The sunset report included a chart entitled *Guaranty Fund Data* showing the number of awards made from the Real Estate Guaranty Fund (Fund) for fiscal year 2006 through 2010, including awards that met the statutory cap. Legislation introduced during the 2011 legislative session to reauthorize the Commission did not pass. The legislation was reintroduced during the 2012 regular Session as Senate Bill 134, titled *State Real Estate Commission – Sunset Extension and Program Evaluation*. If not reauthorized during the 2012 legislative session, the Commission, the licensing of real estate professionals, and other protections afforded consumers through the Fund were scheduled to terminate on July 1, 2012.

In addition to extending the termination date of the Commission, Senate Bill 134, in relevant part, made changes to the Fund. The purpose of the Fund is to compensate consumers who suffer a financial loss as a result of licensee misconduct. A claim against the Fund must be based on an act or omission of a licensed broker, associate broker, salesperson, or unlicensed employee of a licensed broker in which money or property is obtained by a licensee through fraud, theft, embezzlement, false pretenses, or forgery. A complainant must prove actual loss to receive damages. The statutory cap for an award is \$25,000 per claimant. All new licensees pay a fee of \$20 toward the Fund. However, only licensees sanctioned by the Commission pay greater amounts into the Fund as a result of their misconduct. In relevant part, Senate Bill 134 proposed increasing the statutory cap to \$50,000 per claim.

Also introduced in the 2012 regular Session was House Bill 1073 entitled *Real Estate Brokers – Guaranty Fund – Claims and Repayment*. This bill would have:

- increased the statutory cap on a claim from the Fund to \$35,000 from \$25,000;
- reduced the annual interest rate on debt owed to the Fund to 6% from a minimum of 10%;

- required the Commission to allow a licensee to set up a payment plan for reimbursement of the Fund for up to 4 years; and
- authorized reinstatement of a licensee's license on establishment of a payment plan.

The fiscal note of both SB 134 and HB 1073 included a chart that indicated that only a small number of licensees owed payment for claims paid against the Fund that met the statutory cap of \$25,000. Neither bill was sponsored by Delegate McConkey.

Delegate McConkey and the Real Estate Commission

On October 25, 2010, the Commission and Delegate McConkey, a licensed real estate salesperson, entered into a settlement agreement of all the regulatory charges made against Delegate McConkey for committing fraud, misrepresentation, and false pretenses in the provision of real estate services against three clients. An Administrative Law Judge determined that these clients suffered actual monetary loss as a result of Delegate McConkey's actions. Consequently, on February 4, 2011, the Commission issued a final order requiring Delegate McConkey to reimburse the Fund for \$75,000 – the total amount owed for the award of \$25,000 for each client he was found responsible for harming plus 12% annual interest and a 17% collection fee. This debt to the Fund is the largest of any real estate licensee in the past five years and makes him one of only 7 individuals from fiscal 2006 through 2011 who have been ordered to pay the statutory maximum. As required by law, Delegate McConkey's salesperson license is suspended until he reimburses the Fund in full, including all the interest and administrative charges.

Amendments to Senate Bill 134

On March 28, 2012, the Economic Matters Committee (Committee) held a hearing on SB 134. That same day, Delegate McConkey requested that the Amendment Office draft three amendments to SB 134, to be sponsored by him, that would use the provisions of HB 1073 to make various changes to the Fund. At an unspecified time after the Committee hearing, Economic Matters Committee Counsel (ECM Counsel) had a conversation with Harry Loleas, Commissioner of Occupational and Professional Licensing for the Department of Labor, Licensing, and Regulation. Both ECM Counsel and Mr. Loleas told Joint Committee Counsel of their conversation regarding SB 134. During this conversation, Mr. Loleas told ECM Counsel that the provisions in HB 1073 effectively derailed the passage of the Commission Sunset bill in the 2011 session and of Delegate McConkey's involvement and interest with the Commission and Fund.

Following the Committee hearing, Delegate McConkey had a meeting with ECM Counsel to offer amendments to SB 134, sponsored by the delegate, that made changes to the Fund. Delegate McConkey later testified to the Joint Committee that ECM Counsel was aware of Delegate McConkey's involvement with the Commission and Fund and advised him during this meeting that his proposed amendments would likely not impact his situation. ECM Counsel told Joint Committee Counsel that she only became aware of Delegate McConkey's situation regarding the Commission and Fund from Mr. Loleas and it was not discussed with Delegate McConkey. According to ECM Counsel, the meeting with Delegate McConkey was brief and

described as “awkward” due to her knowledge of the delegate’s situation and only involved receiving copies of his proposed amendments to Senate Bill 134. ECM Counsel denies advising Delegate McConkey on how his proposed amendments would affect his personal situation relating to the Fund.

On April 3, 2012, the Committee voted SB 134 favorable with amendments, including Delegate McConkey’s proposed Fund amendment regarding a decreased interest rate, the repayment plan, and license reinstatement provisions. On Thursday, April 5, 2012, the full House unanimously approved SB 134 as amended by Committee, including Delegate McConkey’s vote of “yea”. Later that same day, the *Washington Post* published an article alleging that the amendments to SB 134 proposed by Delegate McConkey and adopted by the House could “help reinstate his Maryland real estate [salesperson] license” and highlighted the small number of people owing that large a debt to the Fund.

As a result of the revelations in that article, members of the General Assembly began expressing concern about maintaining the Committee amendments on SB134. On April 7, 2012, the Senate refused to concur in the House amendments and each house appointed a conference committee. The Senate appointed Senators Conway, Ferguson, and Reilly. The House appointed Delegates Davis, Jameson, and Schulz.

Ethics Advice

In the early afternoon of Saturday, April 7, 2012, Delegate McConkey called then-Ethics Advisor, William Somerville, to ask his advice on whether the amendments to SB 134 proposed by Delegate McConkey to the Committee constituted a conflict of interest. Delegate McConkey testified to the Joint Committee that he and Mr. Somerville had a lengthy telephone conversation during which Mr. Somerville advised the delegate that having a general disclaimer of conflict for employment as a real estate salesperson on file was a sufficient disclaimer and that proposing and voting on the proposed amendments SB 134 presented no conflict of interest. Delegate McConkey said he asked Mr. Somerville to send a confirmation email of this advice. Mr. Somerville told Joint Committee Counsel that their conversation was very short and that his advice to Delegate McConkey was reflected in the email he sent. This email was later sent by the delegate to various members of the General Assembly thereby waiving attorney-client confidentiality.

Mr. Somerville sent an email to Delegate McConkey at 2:30 p.m. shortly following their telephone conversation on Saturday, April 7, 2012. The email contained a recitation of the general standards for determining whether a legislative matter affects a legislative member personally. This type of matter would require either a disclaimer of conflict or recusal from voting as set forth in Ethics Opinion #8 and the *Ethics Guide of the Maryland General Assembly 2012*, a publication provided to all members at the beginning of the 2012 session. Following the statement of general standards was a paragraph discussing the interpretation of the phrase “very small number” of persons as it applied to examples of circumstances when a legislator has a “direct and personal conflict” stemming from legislation with provisions that apply “only to interests narrowly focused” and to which a “clear financial impact would flow from passage or defeat of such legislation”. Mr. Somerville wrote:

“You have previously filed a general “disclaimer of conflict” form with the Ethics Committee as to any legislative matter that affects the business of real estate.

The Ethics Committee has never set a specific number for the standard, quoted above, that requires recusal from participation if a legislator is one of “a very small number” of persons affected. Clearly, a legislative matter that affects *all* real estate professionals in the State is one on which you could always vote. I believe I can safely presume that legislation potentially affecting 100 or more individuals would not be considered a “small group” by the Ethics Committee. Conversely, a matter that affects 10 or fewer individuals most likely *would* be considered by the Committee to affect only “a small number”. Between these numbers, the question is decided by the Ethics Committee on a case-by-case basis. In order for a legislator to bring this question to the Ethics Committee’s attention, it is appropriate for the legislator to submit a Form D “disclaimer” (attached) that names the specific bill on the “subject” line. The form asserts the legislator’s ability to act impartially, notwithstanding any appearance of conflict.

In “close call” situations, even where a legislator might be allowed under the ethics standards to participate, it is sometime a wiser course of action to recuse oneself in order to avoid an appearance of impropriety. This is a decision for the legislator to make, based on the circumstances and his or her constituents’ perception of the matter. Recusal from participation in this manner must be documented in a form filed with the Ethics Committee (Form E, attached).”

Delegate McConkey did not ultimately file either form referenced in Mr. Somerville’s email. He later testified to the Joint Committee that this email “completely exonerated” him and supported his position that he had no conflict of interest. The delegate also stated that he came to this conclusion because he tends to “highlight the sentences that support my argument and disregard the others”.

Delegate McConkey’s Legislative Action

Delegate McConkey admits to “lobbying hard” to persuade members of the House and Senate to vote to pass SB 134 as amended by the House. At the Saturday, April 7, 2012, floor session, Delegate McConkey passed out bright yellow flyers printed on cardstock providing a detailed mathematical example to explain the amendments he sponsored to SB 134. The example from the flyer purported to show that an individual owing \$50,000 to the Fund under existing law (no payment plan structure) would pay approximately \$15,445 in interest charges at a 12% annual interest rate, plus \$8,500 in administrative costs if paid within 4 years (the payment structure proposed by Delegate McConkey). Under Delegate McConkey’s proposed payment structure, the individual would owe only \$6,364 in interest at a 6% annual interest rate with no administrative costs due to the elimination of the debt being sent to the State Central Collection Unit, if paid within four years. According to Delegate McConkey, this would save the licensee \$9,081.

Later in the day on Saturday, April 7, 2012, Delegate McConkey emailed a letter to several senators lobbying them for their vote in support of SB 134 as amended. In this letter Delegate McConkey references the email of advice from the Ethics Advisor stating “[t]hat letter said that I had complied with filing a ‘general disclaimer of conflict form with the Ethics Committees [sic]’ and that my amendment to the bill was not a violation of the Ethics laws because it applies to all real estate professionals in the State which is a matter ‘on which you could always vote’”. Delegate McConkey attached a copy of Mr. Somerville’s email.

Another example of Delegate McConkey’s lobbying for SB 134 as amended includes the contact he initiated with the Senate chair of the SB 134 conference committee, Senator Joan Carter Conway. Delegate McConkey testified to the Joint Committee that Senator Conway told him she supported the amendments and even suggested that adding a prospective special section would solve the delegate’s conflict issue. Senator Conway stated to Joint Committee Counsel that she had never even met Delegate McConkey until he approached her in the street the weekend of April 7-8 and said to her “[w]hy do you hate me?” Senator Conway denies ever supporting the amendments or suggesting to Delegate McConkey that SB 134 include a prospective special section.

On Monday, April 9, 2012, the last day of the regular session, Delegate McConkey approached another Senate member of the conference committee, Senator Edward Reilly, in his Senate office to ask for the senator’s support of SB 134 as amended. Senator Reilly told Joint Committee Counsel he explained to Delegate McConkey that he did not support the amendments based on the newspaper accounts of the delegate’s probable conflict of interest and would be voting to remove the amendments from the bill. Senator Reilly stated that Delegate McConkey shouted at and cursed the senator and refused to leave his office. Senator Reilly then called the Maryland State Police, Legislative Security Section, who escorted Delegate McConkey from Senator Reilly’s office.

Later in the day on April 9, the SB 134 conference committee met and voted to remove the House amendments from SB 134. Both the House and Senate adopted the SB 134 conference committee report and SB 134 passed without the House amendments as originally sponsored by Delegate McConkey.

Applicable Statutory Provisions

Under § 15-511(b) of the State Government Article, conflict of interest of a legislator is defined and provides that if a conflict exists, the legislator in question is disqualified from participating in any related legislation.

- (b) (1) An interest of a member of the General Assembly conflicts with the public interest if the legislator’s interest tends to impair the legislator’s independence of judgment.
- (2) The conflict disqualifies the legislator from participating in any legislative action, or otherwise attempting to influence any legislation, to which the conflict relates.

The statute sets out circumstances in which conflicts of interest are presumed to exist. § 15-511(c) describes these presumptive conflicts of interest:

(c) It is presumed that an interest disqualifies a legislator from participating in legislative action in any of the following circumstances:

(1) having or acquiring a direct interest in an enterprise which would be affected by the legislator's vote on proposed legislation, unless the interest is common to all members of:

- (i) a profession or occupation of which the legislator is a member; or
- (ii) the general public or a large class of the general public;

(2) benefiting financially from a close economic association with a person whom the legislator knows has a direct interest in an enterprise or interest which would be affected by the legislator's participation in legislative action, differently from other like enterprises or interests;

(3) benefiting financially from a close economic association with a person who is lobbying for the purpose of influencing legislative action; or

(4) soliciting, accepting, or agreeing to accept a loan, other than a loan from a commercial lender in the normal course of business, from a person who would be affected by or has an interest in an enterprise which would be affected by the legislator's participation in legislative action.

Disqualification of a legislator from participating in legislation under § 15-511 of the State Government Article may be suspended under § 15-512(a)(2) if the legislator with a conflict of interest files a sworn statement with the Joint Committee describing the circumstances of the apparent conflict and the related legislation, along with an assertion that the legislator is able to participate in the legislation fairly, objectively, and in the public interest. If such a statement is filed, the Joint Committee has the authority to comment on the propriety of the legislator's participation. The requirements under § 15-512(a)(2) and (b) of the State Government Article:

(a) ...

(2) As to any other conflict, the disqualification arising under § 15-511 of this subtitle is suspended if a legislator with an apparent or presumed conflict files with the Joint Ethics Committee a sworn statement that describes the circumstances of the apparent or presumed conflict and the legislation or class of legislation to which it relates and asserts the legislator is able to vote and otherwise participate in action relating to the legislation, fairly, objectively, and in the public interest.

(b) (1) Whenever a legislator files a statement for the suspension of the disqualification, the Joint Ethics Committee on its own motion may issue a statement concerning the propriety of the legislator's participation in the particular legislative action, with reference to the applicable ethical standards of this matter.

(2) The suspension of the disqualification by the filing of the statement is subject to further action by the Joint Ethics Committee if the question of conflict comes before it as to the same circumstances and the same legislator.

The statute does not allow a legislator to suspend a conflict of interest if the conflict is direct and personal to the legislator, a member of the legislator's family, or the legislator's employer:

- (a) (1) (i) Except as provided in subparagraph (ii) of this paragraph, the disqualification arising under § 15-511 of this subtitle may not be suspended if the conflict is direct and personal to:
1. the legislator;
 2. a member of the legislator's immediate family; or
 3. the legislator's employer.
- (ii) This paragraph does not apply to a vote on:
1. the annual operating budget bill, in its entirety; or
 2. the annual capital budget bill, in its entirety.

Once a recusal is taken, a legislator is required under § 15-512(c) of the State Government Article to file a Form E Statement with the Joint Committee:

(c) A member who is disqualified from participating in legislative action under subsection (a)(1) of this section, or who chooses to be excused from participating in legislative action on a bill or class of bills because of the appearance or presumption of a conflict, shall file in a timely manner a statement with the Joint Ethics Committee that describes the circumstances of the apparent or presumed conflict.

CONCLUSIONS OF LAW

Based on the factual findings outlined above, the Joint Committee makes the following findings and conclusions:

1) The Joint Committee finds that Delegate McConkey had a direct interest in the operation of the Fund outside the common interest of all licensed members of the real estate profession created by:

- the settlement entered into by Delegate McConkey and the Real Estate Commission settling all the regulatory charges brought against him as a licensed real estate salesperson for violating provisions of Title 17 of the Business Occupations Article of the Maryland Code and various regulations relating to ethical dealings by real estate agents; and
- the Commission's subsequent final order imposing civil penalties and requiring reimbursement of the Real Estate Guaranty Fund for \$75,000 in claims paid against the Fund.

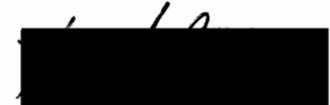
This direct interest is a presumptive conflict of interest under § 15-511(b) and (c)(1) of the State Government Article that generally requires the filing of a Form D disclaimer with the Joint Committee under § 15-512(a)(2) of the State Government Article, *if* the conflict can be disclaimed.

2) The Joint Committee, unanimously, further finds that Delegate McConkey participated in, drafted, offered, lobbied, and voted for amendments to Senate Bill 134 relating to the operation of the Fund, and that a clear and direct financial impact would have flowed to Delegate McConkey as a result of passage of the amendments, in the form of thousands of dollars in reduced interest charges, no administrative charges, and possible reinstatement of his real estate salesperson license. As a result, the Joint Committee rejects Delegate McConkey's contention that the ethics advice provided by the Ethics Advisor vindicated his legislative actions.

3) The Joint Committee, unanimously, further finds, despite Del McConkey's argument that the applicable class in this case is all real estate licensees, that the large debt of \$75,000 owed by Delegate McConkey to the Fund made him one of a very small number of persons, 1 of 7 persons during the years 2006 through 2011, to which the direct financial impact of the proposed regulations would have been substantial, and, thus, direct and personal, prohibiting Delegate McConkey from suspending this conflict and participating in legislative action under § 15-512(a)(1)(i) of the State Government Article, and requiring the filing of Form E Recusal with the Joint Committee under § 15-512(c) of the State Government Article.

Consequently, the Joint Committee concludes that Delegate McConkey failed to recuse himself of a direct and personal conflict of interest in violation of § 15-512(a) of the State Government Article, and failed to file a Form E Statement with the Joint Committee in violation of § 15-512(c) of the State Government Article.

Respectfully submitted,



Senator Norman R. Stone, Jr.
Co-Chairman



Delegate Brian K. McHale
Co-Chairman

Joint Committee on Legislative Ethics

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(Senate Chair)

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