

ADVISORY OPINION NO. 130

The question is whether the outside activities of a research analyst [analyst] who works for a member of the City Council [Council] and who has a real estate broker's license [license] would conflict with the standards of conduct in the Revised Charter of Honolulu 1973 (1983 Ed.) [RCH] and the Revised Ordinances of Honolulu 1978 [ROH].

The analyst attended a meeting of the Ethics Commission [Commission] to respond to questions posed by the Commissioners. This opinion will list the standards of conduct which could apply in the analyst's situation. After listing the appropriate standards of conduct, the Commission will show, by setting out specific examples, when and how a particular standard of conduct may be breached. The Commission, in emphasizing its concern, is not impugning the analyst's integrity or character by the examples it utilizes in this opinion. Moreover, an advisory opinion issued by this Commission sets out what could happen, rather than what has happened, in the hope of identifying and eliminating any potential conflict of interest. For every conflict of interest this Commission can prevent, the confidence of the public in City government is enhanced.

Since ethics is a nebulous subject, the Commission shall reflect the situation in a diagram (see Appendix A attached) based on the definition of a "conflict of interest" found in 73 Michigan Law Review 758 (1975). A "conflict of interest" is:

[Any] circumstance in which the personal interest of a public official in a matter before him in his official capacity may prevent or appear to prevent him from making an unbiased decision with respect to the matter. [Emphasis added]

The diagram has three blocks. Block One is labeled "Research Analyst," while Block Two is labeled "Real Estate Broker." Block Three is labeled "Real Estate within the City and County of Honolulu." Note that Blocks One and Two are connected by a solid line. This indicates that the analyst as a public employee is wearing two hats. That is, during regular working hours as a public employee the analyst is an analyst, while as a private citizen working after hours, the analyst is a real estate broker [broker]. Note also that there is a solid line extending from Block Two to Block Three. This indicates that as a broker, the analyst works with real estate located within the City and County of Honolulu. However, there is a dotted line extending from Block One to Block Three. This dotted line indicates that as an analyst, his activity deals indirectly with land situated within the City and County of Honolulu. His indirect relationship with land is because the Council has the authority to affect the use of, and consequently, the marketability of land for particular purposes, such as residential or commercial. An example of

indirect activity on land in his case is when he is asked by the councilmember to submit a report on a proposed bill to rezone several properties from residential to agricultural. The Commission can cite other examples of his indirect activity with legislation or permits affecting land use. However, from the public's standpoint, the fact that he has a broker's license and that the Council has the authority to enact legislation affecting land use or can issue permits affecting land use results in an appearance of a conflict of interest.

Based on his testimony, the Commission has found that the following facts are relevant to the analyst's situation:

1. On (date), he was appointed as an analyst and assigned to a councilmember. He is a full-time employee and occupies an exempt position.
2. As an analyst, his duties are to:
  - a. Assist the councilmember's senior advisor with his duties as needed from time to time;
  - b. Assist the councilmember's legislative aide with his duties and assignments;
  - c. Attend meetings of governmental agencies and community groups to convey the councilmember's interest and concern with their work and advise the councilmember on what transpired at these meetings as well as his assessment of significant issues;
  - d. Receive and research constituent inquiries and concerns and keep the councilmember advised as to the status of each;
  - e. Read and analyze various written reports and transcripts of meetings and advise the councilmember of the significant issues contained therein and his recommendations regarding the same; and
  - f. Perform such other duties as the councilmember may specifically assign him from time to time.
3. At present, he has X number of licensed real estate salespersons. His activities under such license are conducted after working hours and during weekends.
4. He and his sales staff have not concluded any real estate transactions since the economic recession began in 1980. He further stated that he sees no improvement in real estate sales in the immediate future.

Upon examining his duties as an analyst in conjunction with his license, the Commission concludes that the following standards of conduct could apply, if the facts presented in the examples become a reality. The standards of conduct which may apply are:

1. Section 11-102.1, RCH, relating to gifts.
2. Section 11-102.2, RCH, relating to disclosure of confidential information by a public employee.
3. Section 11-102.3, RCH, relating to business or financial interests which are incompatible with the duties of an officer or employee.
4. Section 11-102.4, RCH, relating to compensation for services as an officer or employee of the City from other than City sources.
5. Section 11-102.5, RCH, relating to representing interests against the City before City agencies.
6. Section 11-104, RCH, relating to fair and equal treatment of all persons.
7. Section 6-1.2(2), ROH, relating to business interests which may come before a public employee for official action.

The full text of these standards of conduct can be found in Appendix B, attached hereto and made a part hereof.

The following are several examples in which the Commission demonstrates how the relevant standards of conduct apply in specific situations. Although the examples are hypothetical, the Commission is of the opinion that the probability for the hypothetical situations to become an actual case is not remote. This statement is based on the fact that at least fifty percent of the items on the Council's agenda for a meeting consist of bills for ordinances regulating land use or actions affecting interests in land. For example, the Council has the authority to enact land use legislation, such as the general plan, development plan, and zoning. It also has the authority to issue certificates of appropriateness for the development of land or the construction of buildings on land when such land is situated within the Capital District, Historical District, or Interim District Ordinances. The Council also has authority to issue shoreline management permits for development of land situated within established shoreline management areas. It also has the power to affect interest in land being condemned for public use or projects.

Example Number 1. As an analyst, he is aware that the development plans are subject to annual review by the Council, and based on such review, the Council enacts the necessary

amendments thereto. The councilmember wants to know the status of a review being conducted by the Department of General Planning [DGP]. He assigns the analyst to obtain such information. The analyst contacts the DGP personnel who are conducting the review and discovers which land is likely to be redesignated from a lower use to a higher use. His knowledge and experience as a broker leads him to the conclusion that such information could be profitable. Even though such information is confidential, he instructs his sales staff to contact the owners of the land which he believes will most likely be redesignated to a higher use, and his sales staff obtains the options to purchase or develop the subject land. Subsequently, the proposed amendments are adopted by the Council. Among the lands affected are the lands on which he has obtained options to purchase or develop. The adoption by the Council and approval by the Mayor of the amending ordinances has increased the value of the land because they have been rezoned to a higher use. As a result, he can either sell the option to a developer or he can jointly develop the land with the owner. After the land has been subdivided and is ready for sale to the general public, he retains the exclusive right as a broker to sell any subdivided lot.

In this example, the standards of conduct which would apply are (1) Section 11-102.2, RCH; (2) Section 11-102.3, RCH; and (3) Section 11-104, RCH. Section 11-102.2, RCH, could apply in this example because he instructed his sales staff to obtain the option to purchase or develop the subject land. Such information was confidential because the proposed annual amendments were not filed with the City Planning Commission. Section 11-102.3, RCH, could also apply in this example because having his license impaired his judgment so that he used confidential information for personal gain. Section 11-104, RCH, could apply because he took advantage of his position as an analyst and utilized confidential information which is not available to the public.

Example Number 2. One of the analyst's salesmen has the option to buy or to develop land which constitutes the mauka/ewa corner of the Capital District Ordinance. A land owner would like to have a high-rise condominium built on his land. The underlying zoning for the subject land is medium-density, but the Capital District Ordinance superimposes a 40-foot height limitation. A medium-density structure can be built on the subject land if the Certificate of Appropriateness can be obtained from the Council. The building superintendent recommends to the Council that the permit be denied because a medium-density structure is inappropriate on the subject land. Based on past experience as a broker, the analyst knows that he will be able to generate commissions if he has the exclusive right to be the sales agent of the condominium apartments. Without disclosing his interests in the subject land, he asks the senior advisor of the Planning and Zoning Committee [PZC] to assign the case to him for study and report. Since the senior advisor and other members of the PZC have a heavy work load, he accedes to his request. He works on a study and report and submits it to the PZC. Because of his

interest in the subject land, he recommends that a Certificate of Appropriateness be issued to the applicant. The PZC reviews the report and accepts same. It recommends to the Council issuance of a favorable Certificate of Appropriateness. The Council does so. With the construction financing in place, together with the long-term financing for the sale of the individual apartments, the analyst will be receiving his commission from the sale of each apartment in the complex as the principal broker for the project.

In this example, the standards of conduct which could apply are: (1) Section 11-102.3, RCH; (2) Section 11-102.5 RCH; (3) Section 11-103, RCH; (4) Section 11-104, RCH; and (5) Section 6-1.2(2), ROH. Section 11-102.3, RCH, could apply because having his license caused him to request assignment of his client's application for a Certificate of Appropriateness. Moreover, because of his license, he submitted a favorable report. Thus, his business and financial interest is incompatible with the proper discharge of his duties as an analyst, or they tended to impair his independence of judgment as analyst. Section 11-102.5, RCH, applies in the example because he appeared before City agencies representing private interests. A breach of this standard of conduct occurred when he appeared before the building superintendent to request reconsideration of his negative recommendation to the Council regarding the Certificate of Appropriateness for the subject land. Also, when he did not inform the senior advisor of the PZC of his interest in the subject property, he violated Section 11-103, RCH, which requires the filing of a disclosure with his appointing authority, the Chair of the City Council. With respect to Section 11-104, RCH, it could apply because he took advantage of his position as an analyst to achieve his objectives as a broker. Lastly, when he was assigned to submit the study and report on the client's application for a Certificate of Appropriateness, his financial interest in a business enterprise did come before him for official action. The official action in this case is developing and submitting the study and report to the PZC. The last standard of conduct which could apply in this example is Section 6-1.2(2), ROH. This standard of conduct could apply because he took official action in which his personal business or financial interests were involved. That is, he asked the senior advisor of the PZC to assign the subject property to him so that he could submit the study and report thereon. Thus, a matter in which he has a personal financial or business interest was before him. As to the official action, the study and report to which he affixed his signature and which he submitted to the PZC is characterized as his "official action" because he did exercise his discretion regarding the contents and report.

Example Number 3. A real estate broker-developer files an application for a Shoreline Management Permit (hereinafter "SMP") on real property located within the Shoreline Management Area. The applicant is concerned that if issuance of the SMP is delayed, his financial arrangements for development and construction of residences on the subject land could be

jeopardized. Consequently, he contacts the analyst and offers to split his fees with him if he assists him in successfully obtaining the SMP. He solicits his assistance because since he is employed by the Council as an analyst, the SMP would be issued within a reasonable time. Moreover, the Commission believes that he is in a position to shepherd his application towards a satisfactory conclusion. At the time he contacts the analyst, the Department of Land Utilization [DLU] has submitted its study, with a favorable recommendation. He takes advantage of his position and obtains a copy of the favorable report before such report becomes a matter of public record. Armed with such information, he informs the applicant that he will have no trouble in obtaining his SMP. The recommendation of the director of DLU is filed with the City Planning Commission. He then informs the applicant that he should be present at the City Planning Commission meeting because his application is on its agenda. The application is subsequently submitted to the Council for its review and action. He does not inform the councilmember or the Council that he has a personal business or financial interest in the subject SMP application. The Council conducts a public hearing and at its PZC meeting takes favorable action recommending approval of the SMP to the Council. He advises the applicant of the PZC's decision and that Council action would be favorable, based on the PZC recommendation. After issuance of the SMP to the developer-applicant, the developer-applicant turns over part of his fees to the analyst for his services.

In this example, the standards of conduct which could apply are: (1) Section 11-102.2, RCH; (2) Section 11-102.3, RCH; (3) Section 11-102.4, RCH; (4) Section 11-103, RCH; and (5) Section 11-104, RCH. Section 11-102.2, RCH, could apply in this case because the analyst obtained a written report of the director's recommendation regarding the application before such report became a matter of public record. That is, he obtained the favorable report before such report was filed with the City Planning Commission. As to the application of Section 11-102.3, RCH, it was the fees he received as a broker which caused him to obtain the confidential report and disclose its contents to the applicant. Also, it was his license that caused an impairment of his judgment because he obtained the confidential report based on his position with the Council. Section 11-102.4, RCH, could apply in this example because the services he rendered to the applicant are services which are normally carried out by any employee of the Council. Thus, when he received the fees from the applicant, he was getting compensation for work he is required to do as an employee of the Council. Moreover, the confidential report would have become a matter of public record pursuant to the statutory procedure established by the SMP statute. Thus, there was no necessity for him to obtain the report while it was still confidential. On the other hand, if he intended to impress the applicant by obtaining such confidential report, it was the right ploy. As in the prior examples, Section 11-103, RCH, could apply because he failed to file a disclosure with the chair of the City Council, informing him of his financial interest in the appli-

cation. Another standard of conduct which could apply in this case is Section 11-104, RCH, because he took advantage of his position as an employee of the Council to obtain the confidential report which could not have been obtained if he was not an employee of the Council and an analyst for a councilmember.

Example Number 4. A broker-developer with whom the analyst had prior joint developments filed an application to subdivide land. The proposed subdivision involved approximately fifty acres of land which could be subdivided into approximately 300 residential lots. This land was located at the foot of the Ko'olau Range in Kaneohe. The mauka boundary along the foot of the Ko'olau Range was characterized as a "floating boundary." Such boundaries were established at the time when the services of registered surveyors were not available. Such "floating boundaries" were established by natural markers, such as piles of stones, eucalyptus trees, and irrigation ditches or a rock wall. However, as the years went by, such natural markers either disintegrated or disappeared. As such, the exact boundary line became murky. The applicant wanted to exploit this condition and develop additional residential lots. He enlisted the analyst's services because he was an employee of the Council and as a broker would be advantageous for the proposed subdivision. The applicant offered to let the analyst have five residential lots at no cost to him for his services. The analyst assisted in developing the subdivision map based on a resurvey of the land. Based on such resurvey, the applicant was able to add fifteen additional residential lots to his development. The analyst had no qualms about assisting the applicant because if the discrepancy were discovered, the applicant could state that he believed that the mauka boundary was established based on the existing "floating boundary" markers. Moreover, the analyst believed that he would not be held responsible for such discrepancy because he was not the applicant, nor the registered agent of the applicant. The plan checkers in DLU did not check whether or not there was a discrepancy because the subdivision map was developed and surveyed by a registered surveyor. However, since the approval for the subdivision took unusually long, the analyst personally checked with the employees who were assigned to review the proposed subdivision. Eventually, the application for the subdivision was approved by the director. Thereafter, the applicant transferred to the analyst legal title to five residential lots for his services.

In this example, the standards of conduct which could apply are: (1) Section 11-102.1, RCH, relating to gifts; (2) Section 11-102.3, RCH; (3) Section 11-102.5, RCH; (4) Section 11-103, RCH; and (5) Section 11-104, RCH. Section 11-102.1, RCH, could apply because the offer of the five lots was a gift intended to influence his judgment as analyst for a member of the Council. The monetary value of the subdivided lots is such that the applicant's intent to influence the analyst's judgment was assured. As in the other examples, Section 11-102.3, RCH, could apply in this example because his license caused him to

participate in the scheme. That is, once he made a decision to participate in the scheme, his duty as analyst for a member of the Council was compromised by his personal financial and business interest as a broker. When he personally contacted the DLU employees to check on the progress of the subdivision, Section 11-102.5, RCH, could apply because he could be charged with representing private interests before a City agency. Also, in this example, Section 11-103, RCH, could apply because he failed to file a disclosure with the Chair of the City Council regarding the proposed gift of the five lots if the scheme worked. As to Section 11-104, RCH, it could apply because he took advantage of his position as analyst for a member of the Council to effectuate the scheme.

Example Number 5. The Council has received the Mayor's capital improvement budget and appropriation bill for the current fiscal year. Once the capital budget and bill are in the hands of the Council, it can reduce or add the amount of the appropriation of a particular project or delete a project. The Budget Committee chair will announce that members of the Council should submit their capital projects for their respective districts. Such requests are reviewed by the Budget Committee chair and her staff to cull capital projects which do not meet the criteria established by the Budget Committee chair for consideration as an amendment to the capital improvement budget and bill. Finally, copies of the amended version for the capital budget and Bill are circulated to members of the Council. They have not been filed with the Budget Committee so they are not public records. The analyst has a copy of the proposed amended capital budget and bill and decides to exploit such information to generate commissions as a broker. His past experience as a salesman and a broker enables him to select specific land acquisition projects which he believes would be profitable. Moreover, he is aware that the funds spent to purchase the portions will be invested for at least eighteen months. The eighteen-month limitation is the period in which the land would have to be condemned by the City to encumber appropriate funds.

In this example, the standards of conduct which could apply are: (1) Section 11-102.2, RCH; (2) Section 11-102.3, RCH; (3) Section 11-103, RCH; and (4) Section 11-104, RCH.

Since the proposed amendment to the capital budget and appropriation bill was not a public record, the analyst disclosed confidential information when he instructed his sales staff to purchase options on certain land. As such, Section 11-102.2, RCH, could apply. As to Section 11-102.3, RCH, it could apply because his license was the basis for his decision to take advantage of the confidential information and purchase the options on the land. In other words, his license is incompatible with the proper discharge of his duties as analyst, or the license impairs the independence of his judgment when he decides to take advantage of the confidential information. Section 11-103, RCH, was breached when he failed to file a disclosure with his appointing

authority, the chair of the City Council, after he purchased the options on land which were to be acquired by the City. As to Section 11-104, RCH, it could apply because he took advantage of his position as analyst and an employee of the Council and obtained information which was not available to other persons.

Example Number 6. One of the Council's secretaries informs the analyst that he has a caller on the telephone. He picks up the phone, and it is one of his salesmen orally reporting to him as to the outcome of a meeting between a seller and purchaser of one of the properties listed by his brokerage firm. This call interrupts the work he was doing as analyst for the councilmember. Moreover, the call was made during regular working hours. He utilizes a ball-point pen issued by the City and a note pad, also issued by the City, to jot down the information given by his salesman. Later, on the same day, he uses a City phone to contact his brokerage office to see whether a particular salesman is in the office. He is in the office, so he converses with him regarding a proposed purchase of an option on developable land. That situation may be repeated from time to time because he has three salesmen, and they would require his input regarding any transaction. Moreover, there may be telephone calls from prospective clients and other brokers, and he may make outgoing calls to clients and other brokers. More likely than not, he will be utilizing ball-point pens and note pads belonging to the City to jot down notes and other information.

Section 11-102.3, RCH, applies because use of City time, equipment, and material for personal business or financial interests is not permitted. When the analyst uses City time, equipment or material on behalf of his activities as a broker, one can conclude that his duties as analyst are affected by such use.

The foregoing examples are to illustrate how the analyst's license or his activities as a broker may result in the application of the standards of conduct in the RCH and ROH. Moreover, there may be other situations which may lead him to generate commissions to enhance his license. Such opportunities may recur because land use bills and actions affecting interests in land are two of the primary functions of the Council. If he does take advantage of such opportunities, he may violate one or all of the standards of conduct listed in Appendix A and discussed in this opinion.

Another of the Commission's concerns is that there are three persons in the Councilmember's office who have active licenses as brokers. Such a situation may be criticized by the public because they would not accept any explanation that it was circumstantial, but rather by design to enhance the personal financial interests of the three persons. Therefore, such situation may be embarrassing and detrimental for the Council. This perception of the public may be justified because of the volume of legislation regarding land use by the Council. Moreover, the existence of

such a situation may undermine the confidence of the public in City government. Finally, the analyst testified that he and his sales staff have not been active in the sale or purchase of either improved or unimproved land for the past three years because of the economic recession affecting the housing market.

In view of the foregoing, the Commission recommends that the analyst inactivate his license. If, however, he is unable to inactivate his license because he needs his license to augment his income to support his family, the Commission submits another recommendation for his consideration. That is, the Commission recommends that he sign the attached affidavit and return same to the Commission on or before ten working days after the date noted on this opinion.

To summarize, the Commission concludes that under the facts in this case, his license or activities as a broker and his duties as an analyst appear to conflict and, therefore, fall within the definition of conflict of interest. Moreover, the diagram shown in Appendix A illustrates that his duties as an analyst and a public employee appear to conflict with his license or activities as a broker because in both his public and private capacities, he deals with land situated in this City. Generally, when the duty of a public employee and his after-hours activities involve a single subject matter, it creates situations where the private interests of the employee prevent or appear to prevent such employee from making an unbiased decision in his public employment. The Commission has discussed in this opinion the standards of conduct which apply in this case.

There are three persons in one councilmember's office who have brokers' licenses. The public may perceive this situation was by design, rather than circumstantial. Any criticism by the public of this situation could be embarrassing and detrimental to the Council.

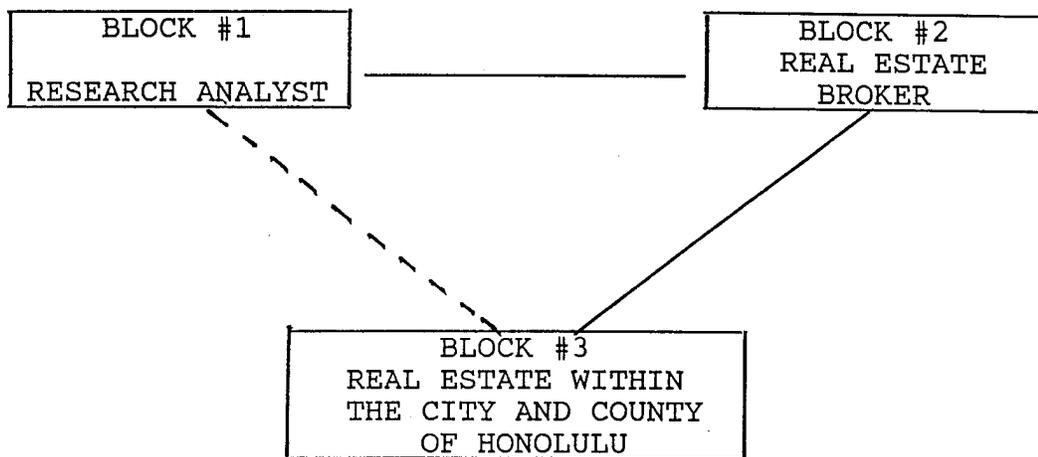
Accordingly, the Commission has made its recommendations as stated hereinbefore. The Commission would like to have the analyst's decision in writing whether or not he will accept one of its recommendations within ten working days after the date noted on this opinion.

Dated: February 14, 1984

MAZEPPA K. COSTA  
Chair, Ethics Commission

Note: The Commission's *Guidelines on Real Estate Licenses*, issued March 21, 1988, supersede this opinion.

DIAGRAM OF CONFLICT OF INTEREST



APPENDIX A

I. CONFLICT OF INTEREST SECTIONS

A. Section 11-102, RCH, states:

No elected or appointed officer or employee shall:

1. Solicit or accept any gift, directly or indirectly, whether in the form of money, loan, gratuity, favor, service, thing or promise, or in any other form, under circumstances in which it can reasonably be inferred that the gift is intended to influence him in the performance of his official duties. Nothing herein shall preclude the solicitation or acceptance of lawful contributions for election campaigns.

2. Disclose confidential information gained by reason of his office or position or use such information for the personal gain or benefit of anyone.

3. Engage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of his official duties or which may tend to impair his independence of judgment in the performance of his official duties.

4. Receive any compensation for his services as an officer or employee of the city from any source other than the city, except as otherwise provided by this charter or by ordinance.

5. Represent private interests in any action or proceeding against the interests of the city or appear in behalf of private interests before any agency, except as otherwise provided by law.

B. Section 11-104, RCH, provides that:

No elected or appointed officer or employee shall use his official position to secure or grant special consideration, treatment, advantage, privilege or exemption to himself or any person beyond that which is available to every other person.

APPENDIX B

C. Section 6-1.2(2) and (3), ROH, provides that:

No officer or employee of the City, except as hereinafter provided, shall:

. . . .

(2) Acquire financial interest in business enterprises which he has reason to believe may be directly involved in official action to be taken by him.

(3) Appear in behalf of private interests before any agency other than a court of law, nor shall he represent private interests in any action or proceeding against the interests of the City in any litigation to which the City is a party; provided, however, that a member of any board, commission or committee, whose board, commission or committee does not exercise either quasi-judicial or quasi-legislative power, may appear for compensation in behalf of private interests before agencies other than the one on which he serves and other than those agencies that have the power to review the actions of the agency on which he serves, or to act on the same subject matter as the agency on which he serves; provided further that no officer or employee shall be denied the right to appear before any agency to petition for redress of grievances caused by any official act or action affecting his personal rights, privileges or property, including real property.

II. DEFINITION SECTION

A. Section 6-1.1, ROH, states:

Unless the context of this article otherwise clearly requires, for purposes of this article the terms defined in this section shall have the respective meanings hereinafter set forth:

. . . .

(2) 'Business' includes (A) a corporation; (B) a partnership; (C) a sole proprietorship; (D) institutions; (E) trusts; (F) foundations; or (G) any other individual or organization carrying on a business, whether or not operated for profit.

. . . .

(4) 'Compensation' means (A) any money; (B) thing of value; and (C) economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another.

(6) 'Financial interest' means an interest held by an individual, his spouse, or minor children which is: (A) an ownership interest in a business; (B) a creditor interest in an insolvent business; (C) an employment, or prospective employment for which negotiations have begun; or (D) an ownership interest in real or personal property.