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## MISSISSIPPI ETHICS COMMISSION

Post Office Box 22746  
Jackson, Mississippi 39225-2746  
Telephone: 601-359-1285  
Telecopier: 601-354-6253  
www.ethics.state.ms.us

TOM HOOD  
Executive Director and Chief Counsel

### ADVISORY OPINION NO. 07-094-E

October 12, 2007

**Questions Presented:** (A) May the spouse of an alderman join the city attorney's law firm as an attorney?

(B) May an alderman resign his position on the board of aldermen and join the city attorney's law firm?

(C) May the spouse of an alderman join the city attorney's law firm as an attorney if the city contracts with city attorney personally rather than with the city attorney's law firm?

(D) May an alderman resign his position on the board of aldermen and join the city attorney's law firm if the city contracts with the city attorney personally rather than with the city attorney's law firm?

**Brief Answers:** (A) No. The alderman will have a prohibited interest in the city's contract with the city attorney's firm under Section 109 and Section 25-4-105(2) if her husband joins the city attorney's law firm.

(B) No. The alderman in question will have a prohibited interest in the city's contract with the city attorney for one year after his resignation from the board of aldermen under Section 109 and Section 25-4-105(2).

(C) No. The alderman will have a prohibited interest in the city's contract with the city attorney's firm under Section 109 and Section 25-4-105(2) because the alderman will have a continuing indirect interest in the city attorney's contract through her spouse's employment with the city attorney's firm.

**(D)No. The alderman will continue to have a prohibited interest in the city's contract with the city attorney's firm under Section 109 and Section 25-4-105(2) for one year after his resignation because the alderman will have a continuing indirect interest in the city attorney's contract through his employment with the city attorney's firm.**

The Mississippi Ethics Commission issued this opinion on the date shown above in accordance with Section 25-4-17(i), Mississippi Code of 1972, as reflected upon its minutes of even date. The Commission is empowered to interpret and opine only upon Article IV, Section 109, Mississippi Constitution of 1890, and Article 3, Chapter 4, Title 25, Mississippi Code of 1972. This opinion does not interpret or offer indemnity from liability for any other laws, rules or regulations. The Commission based this opinion solely on the facts and circumstances provided by the requestor as restated herein. The indemnity provided under Section 25-4-17(i) is limited to the individual who requested this opinion and to the accuracy and completeness of these facts.

#### I. LAW

The pertinent Ethics in Government Laws to be considered here are as follows, to wit:

Section 109, Miss. Const. of 1890.

No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any district, county, city, or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term.

Section 25-4-101, Miss. Code of 1972.

The legislature declares that elective and public office and employment is a public trust and any effort to realize personal gain through official conduct, other than as provided by law, or as a natural consequence of the employment or position, is a violation of that trust. Therefore, public servants shall endeavor to pursue a course of conduct which will not raise suspicion among the public that they are likely to be engaged in acts that are in violation of this trust and which will not reflect unfavorably upon the state and local governments.

Section 25-4-103, Miss. Code of 1972.

(d) "Business with which he is associated" means any business of which a public servant or his relative is an officer, director, owner, partner, employee or is a holder of more than ten percent (10%) of the fair market value or from which he or his relative derives more than One Thousand Dollars (\$1,000.00) in annual income or over which such public servant or his relative exercises control.

(f) "Contract" means:

- (i) Any agreement to which the government is a party; or
- (ii) Any agreement on behalf of the government which involves the payment of public funds.

(g) "Government" means the state and all political entities thereof, both collectively and separately, including but not limited to:

- (i) Counties;
- (ii) Municipalities;
- (iii) All school districts;
- (iv) All courts; and
- (v) Any department, agency, board, commission, institution, instrumentality, or legislative or administrative body of the state, counties or municipalities created by statute, ordinance or executive order including all units that expend public funds.

(l) "Pecuniary benefit" means benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain. Expenses associated with social occasions afforded public servants shall not be deemed a pecuniary benefit.

(p) "Public servant" means:

- (i) Any elected or appointed official of the government;
- (ii) Any officer, director, commissioner, supervisor, chief, head, agent or employee of the government or any agency thereof, or of any public entity created by or under the laws of the state of Mississippi or created by an agency or governmental entity thereof, any of which is funded by public funds or which expends, authorizes or recommends the use of public funds; or
- (iii) Any individual who receives a salary, per diem or expenses paid in whole or in part out of funds authorized to be expended by the government.

(q) "Relative" means the spouse, child or parent.

Section 25-4-105, Miss. Code of 1972.

(1) No public servant shall use his official position to obtain pecuniary benefit for himself other than that compensation provided for by law, or to obtain pecuniary benefit for any relative or any business with which he is associated.

(2) No public servant shall be interested, directly or indirectly, during the term for which he shall have been chosen, or within one (1) year after the expiration of such term, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member.

## II. FACTS

Facts provided by the requestor are set forth below, with identifying information redacted, and are considered a part of this opinion.

My law firm is currently serving as City Attorney and City Prosecuting Attorney in the City, which positions it has held since 1985 and will continue at the pleasure of the Board of Aldermen. The City is a growing community fueling the need for our law firm to grow.

The husband of a member of the board of aldermen will cease to serve as district attorney of two counties on January 1, 2008. He is considering associating with my law firm at that time. I respectfully request an opinion as to whether the his association with my law firm at a time when my firm represented the City would in anyway violate the Rules of Ethics of the State.

Also, there is a practicing Attorney who is currently serving on the Board of Aldermen in the City. He is expecting to move outside of the City limits, thereby necessitating his resignation from the Board. After his move and resignation, he is also considering affiliating with my law firm as an employee. I also request an opinion as to whether his association with my law firm at a time when my firm represented the City will in any way violate the Rules of Ethics of the State.

If I personally represented the City as City Attorney and City Prosecuting Attorney instead of my law firm doing so, would this change the answer to either of your opinions to the above questions.

## III. ANALYSIS

This advisory opinion request contains four questions which are addressed separately below:

### A. Spouse of an alderman joining the city attorney's law firm

Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, both quoted above, prohibit a member of a public board from being directly or indirectly interested in a contract authorized by that board during his or her term or for one year thereafter. Frazier v. State, ex rel. Pittman, 504 So.2d 675, 693 (Miss. 1987).

It is well settled that a public servant has an interest in his or her spouse's income for purposes of Section 109 and Section 25-4-105(2). Smith v. Dorsey, 530 So.2d 5, 7 (Miss. 1988); Waller v. Moore ex rel. Quitman County Sch. Dist., 604 So.2d 265, 266 (Miss. 1992); Towner v. Moore ex rel. Quitman

County School Dist., 604 So.2d 1093, 109 1096 (Miss. 1992). Section 109 and Section 25-4-105(2) prohibit a city's authorization of a contract with the city attorney's firm when an alderman's spouse is an attorney in that firm.

Thus, if the city continues to contract with the city attorney's law firm after the spouse of an alderman joins the law firm, a violation of Section 109 and Section 25-4-105(2) will occur. A contract which violates Section 109 and Section 25-4-105(2) is null and void. Towner at 1096, quoting Smith v. Dorsey at 9. A recusal by the alderman in question will not prevent or ameliorate a violation of Section 109 and Section 25-4-105(2), as they do not require any affirmative act by an individual member but merely action by the board. Towner at 1100, and Waller at 266-267.

B. Resigning member of the city board of alderman joining the city attorney's law firm

Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, both quoted above, prohibit a member of a board of aldermen from having an interest in a contract authorized by that board during his or her term or for one year thereafter. Frazier at 693. In this context "authorized" means more than just the obvious act of approving a contract. It also means appropriating money to fund the contract. The alderman in question will have a prohibited interest in the city's contract with the city attorney once he joins the city attorney's law firm. See Ethics Op. No. 06-036-E. The one-year period under Section 109 and Section 25-4-105(2) begins to run when the alderman leaves office, whether the office is vacated before or after the expiration of the term. Smith v. Dorsey at 9. Thus, the resigning alderman is clearly prohibited from joining the firm if it remains under contract with the city within one year of his resignation.

C. Spouse of an alderman joining the city attorney's law firm where the city attorney represents city in an individual capacity

As discussed above, Section 109 and Section 25-4-105(2) prohibit the spouse of an alderman from joining the city attorney's law firm because the alderman will have a continuing indirect interest in the city attorney's contract through her spouse's position as an attorney in the city attorney's firm. This interest is not affected by the city attorney's decision to contract directly with the city rather than his law firm contracting with the city.

Moreover, when the city attorney and an alderman's spouse have a common financial interest, the potential exists for the alderman to use her position to benefit her spouse in violation of Section 25-4-105(1), Miss. Code of 1972. For instance, the alderman could make her support for extending the city attorney's contract conditioned upon her husband receiving some increased financial advantage in the firm. This discernable potential for a violation of law provides an additional reason to avoid such a situation.

Further, these proposed arrangements also raise public policy concerns relating to Section 25-4-101, Miss. Code of 1972, quoted above. Public servants should conduct themselves in a manner which enhances public trust in government and avoid actions which may tend to create public suspicion about the honesty and integrity of those in government. If an alderman's spouse joins the city attorney's law firm, that alderman will suffer an undue and unfair burden to constantly guard against potential violations of law, and

public confidence in the board of aldermen and the city attorney may tend to be impeached. For these reasons the Commission finds the Ethics in Government Laws prohibit an alderman's spouse from joining a law firm in which the city attorney is a member.

D. Resigning member of the city board of alderman joining the city attorney's law firm where the city attorney represents city in an individual capacity

Section 109 and Section 25-4-105(2) prohibit a former alderman from joining the law firm of the city attorney for one year following the former alderman's resignation from the board. Even if the city contracts directly with the city attorney, the alderman in question will have a prohibited indirect interest in that contract for one year following the member's resignation from the board of aldermen. This conflict arises whether the board approves the contract during the alderman's tenure on the board or within one year after his resignation. Therefore, the resigning alderman is prohibited from joining a law firm in which the city attorney is a member for one year following the member's resignation from the board of aldermen.

MISSISSIPPI ETHICS COMMISSION

BY: \_\_\_\_\_  
Tom Hood, Executive Director and  
Chief Counsel