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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. 10-110-E

January 7, 2010

**Question Presented:** May the board of alderman appoint the brother of an alderman to serve as city attorney?

**Brief Answer:** Yes. If the alderman and his brother are financially independent, no violation of Section 109, Miss. Const. of 1890, or Section 25-4-105(2), Miss. Code of 1972, should occur. The alderman's recusal should prevent a violation of Section 25-4-105(1), Miss. Code of 1972.

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 protection 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 protection from liability 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:

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

(b) "Benefit" means any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.

(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:

- (i) The spouse of the public servant;
- (ii) The child of the public servant;
- (iii) The parent of the public servant;
- (iv) The sibling of the public servant; and
- (v) The spouse of any of the relatives of the public servant specified in subparagraphs (ii) through (iv).

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

(1) No public servant shall use his official position to obtain, or attempt to obtain, pecuniary benefit for himself other than that compensation provided for by law, or to obtain, or attempt 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.

I am the City Clerk, and I would like to request an official opinion on the following: Our City Attorney is resigning effective December 31, 2010. Would the City be in violation if the Board of Aldermen appointed the brother of one of them as the City Attorney for the City?

## III. ANALYSIS

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 having any direct or indirect interest in a contract with the government 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). If the alderman is totally, financially independent from his brother, then the alderman should not have a prohibited interest in the brother's employment with the city under Section 109 and Section 25-4-105(2).

If the alderman has a common financial interest with his brother, then the alderman may have a prohibited interest in his brother's employment as city attorney. See Waller v. Moore ex rel. Quitman County School Dist., 604 So.2d 265, 266-67 (Miss. 1992). Examples of common financial interests precluding total financial independence include, but are not limited to, the employee living

with the public official, leasing or renting property from the public official, owing money to the public official, living on property owned by the public official, sharing liquid assets with the public official or co-owning a business with the public official.

A recusal 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. Any employment contract which violates Section 109 or Section 25-4-105(2) is null and void, and money paid under the void contract may have to be repaid by the public official in violation. Towner v. Moore, ex rel. Quitman County School District, 604 So. 2d 1093, 1096 (Miss. 1992), quoting Smith v. Dorsey, 530 So. 2d 5, 9 (Miss. 1988).

Section 25-4-105(1), Miss. Code of 1972, prohibits the alderman from taking or attempting to take any action in his official position which would create a monetary benefit for his or her relative. The term “relative” includes the alderman’s brother. See Section 25-4-103(q). Actions in which the alderman should not participate include, but are not limited to, the hiring or selection of the brother as city attorney or adjustments to his salary, benefits or other compensation, and any other action which is a necessary predicate to the brother’s compensation, such as approval of the budget from which he is paid. The alderman may participate in matters involving the city’s legal issues so long as those actions do not result in a monetary benefit to his brother.

A total and complete recusal requires that the alderman not only avoid debating, discussing or taking action on the subject matter during official meetings or deliberations, but also avoid discussing the subject matter with city employees or officials. This includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. An abstention is considered a vote with the majority and is not a recusal. Furthermore, the minutes of the meeting should state the recusing alderman left the room before the matter came before the board and did not return until after the vote.

MISSISSIPPI ETHICS COMMISSION

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