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ADVISORY OPINION NO. 11-085-E

January 6, 2012

Question Presented: May a former legislator have an interest in the lease or sale of property to state agencies within one year of leaving office?

Brief Answer: No. Section 109, Miss. Const. of 1890, and Section 25-4-105(2), Miss. Code of 1972, prohibit a legislator from having an interest in a contract during his term of office or within one year after leaving office if the contract was funded by the Legislature.

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.

(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.

(o) "Public funds" means money belonging to the government.

(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.

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

(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 have been a member of the State Legislature since 1999, and chose not to stand for reelection this year. I am a real estate broker and am the listing agent for a number of properties.

Section 109 of the Mississippi Constitution of 1890 provides that a public servant shall not "... be interested, directly or indirectly, in any contract with the state ..." or any political subdivision of the state "... 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 25-4-105(2) contains language that tracks very closely the language in Section 109.

In the case of Cassibry v. State, 404 So.2d 1360, the Mississippi Supreme Court held that an appropriation bill is authorization for a contract and an interest by a legislator in a contract funded by an appropriation bill passed during his term of office is prohibited by Section 109. Section 109 appears to prohibit only interests in contracts authorized by the body of which a person is a member during the term of office of the person or one year after the expiration of the term. If the person is not a member of the body at the time of the authorization of the contract the prohibition does not seem to apply.

Of course the Legislature passes numerous appropriation bills. Since I will not be a member of the Legislature during the 2012 Regular Session it seems to me that I will not be prohibited in having an interest in a contract authorized by appropriations passed during the 2012 Regular Session for the 2013 state fiscal year.

I am requesting an advisory opinion from your office and pose the following question:

If a state agency desires to lease or purchase a property for which I am an agent or have an ownership interest in, is it a violation of Section 109 of the Mississippi Constitution of 1890 or Mississippi's ethics laws for me to be involved in that transaction and, if so, when does the prohibition expire?

Also, on a different subject, if a company or association wishes to employ me in a paid lobbying capacity for the 2012 legislative session, is it a violation of the constitution or Mississippi's ethics laws for me to be involved and, if so, when does the prohibition expire?

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 the Legislature from having any direct or indirect interest in a contract which is funded or otherwise authorized by the Legislature during his or her term or for one year thereafter. Frazier v. State, ex rel. Pittman, 504 So.2d 675, 693 (Miss. 1987). In this context “authorized” means more than just the obvious act of approving a contract. It also means appropriating money. As the requestor points out, an appropriation of public money which ultimately funds a contract is an action which authorizes that contract. See Id., citing Cassibry v. State, 404 So. 2d 1360, 1366-67 (Miss. 1981).

Section 109 and Section 25-4-105(2) prohibit a legislator from having an interest in a contract during his term of office or within one year after leaving office if the contract was authorized by the Legislature. Therefore, a former legislator may not obtain a prohibited interest in a contract within one year of leaving office if that contract is funded by the Legislature. Once the former legislator has been out of office for one year, this prohibition expires.

The requestor will have a prohibited interest in the lease or sale to a state agency of property for which he is an agent or in which he has an ownership interest. Such a transaction is prohibited until the requestor has been out of office for one full year. Once the former legislator has been out of office for one full year, this prohibition will expire.

The Ethics Commission has no authority to issue advisory opinions regarding the Lobbying Law Reform Act of 1994, Sections 5-8-1 through 5-8-23, Miss. Code of 1972. However, under Section 109 and Section 25-4-105(2), a former legislator would be prohibited from performing any services, including lobbying, within one year of leaving office if compensated with funds appropriated by the Legislature, such as a former legislator lobbying on behalf of a state agency. Conversely, the Ethics in Government Laws would not prohibit a former legislator from lobbying on behalf of “a company or association” as proposed in the facts above, assuming the lobbyist’s compensation is not derived from funds appropriated by the Legislature.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
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