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TOM HOOD
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ADVISORY OPINION NO. 13-072-E

August 9, 2013

Question Presented: May an individual who is the law partner and spouse of the municipal judge be appointed as city attorney?

Brief Answer: Yes. If the city appoints both of the individuals to the positions in their individual capacities, no violation of Section 25-4-105(3)(a), Miss. Code of 1972, should occur. To comply with Section 25-4-105(1) the city attorney and municipal judge should completely recuse themselves from any matter coming before the city concerning the other or their law 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 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 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.

(c) "Business" means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, holding company, self-employed

individual, joint stock company, receivership, trust or other legal entity or undertaking organized for economic gain, a nonprofit corporation or other such entity, association or organization receiving public funds.

(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 Two Thousand Five Hundred Dollars (\$2,500.00) in annual income or over which such public servant or his relative exercises control.

(e) "Compensation" means money or thing of value received, or to be received, from any person for services rendered.

(h) "Governmental entity" means the state, a county, a municipality or any other separate political subdivision authorized by law to exercise a part of the sovereign power of the state.

(i) "Income" means money or thing of value received, or to be received, from any source derived, including but not limited to, any salary, wage, advance, payment, dividend, interest, rent, forgiveness of debt, fee, royalty, commission or any combination thereof.

(k) "Material financial interest" means a personal and pecuniary interest, direct or indirect, accruing to a public servant or spouse, either individually or in combination with each other. Notwithstanding the foregoing, the following shall not be deemed to be a material financial interest with respect to a business with which a public servant may be associated:

(i) Ownership of any interest of less than ten percent (10%) in a business where the aggregate annual net income to the public servant therefrom is less than One Thousand Dollars (\$1,000.00);

(ii) Ownership of any interest of less than two percent (2%) in a business where the aggregate annual net income to the public servant therefrom is less than Five Thousand Dollars (\$5,000.00);

(iii) The income as an employee of a relative if neither the public servant or relative is an officer, director or partner in the business and any ownership interest would not be deemed material pursuant to subparagraph (i) or (ii) herein; or

(iv) The income of the spouse of a public servant when such spouse is a contractor, subcontractor or vendor with the governmental entity that employs the public servant and the public servant exercises no control, direct or indirect, over the contract between the spouse and such governmental entity.

(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.

(3) No public servant shall:

(a) Be a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent, other than in his contract of employment, or have a material financial interest in any business which is a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent.

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 an Alderman for the City. I am requesting an advisory opinion concerning the hiring of the City Attorney.

A local attorney is now, and has for many years served as our part-time Municipal Judge. May the appointed City Attorney be the spouse of the part-time Municipal Judge? They are also law partners but were appointed as individuals to their respective positions. We also have appointed a different person as our city Prosecuting Attorney.

III. ANALYSIS

Section 25-4-105(3)(a), Miss. Code of 1972, prohibits a public servant of the city from serving as a contractor, subcontractor or vendor to the city and from having a material financial interest in a business which is a contractor, subcontractor or vendor to the city. "The term contractor is generally used in the strict sense of one who contracts to perform a service for another and not in the broad sense of one who is a party to a contract." Moore, ex rel. City of Aberdeen v. Byars, 757 So.2d 243, 248 (¶ 15) (Miss. 2000).

Section 21-23-3, Miss. Code of 1972, provides that the city may appoint an individual as municipal judge, and Section 21-15-25, Miss. Code of 1972, authorizes the city to appoint an individual as city attorney. An individual who simultaneously holds two positions with the same governmental entity, such as city attorney and city judge, could violate Section 25-4-105(3)(a). Here, however, the city is considering appointing a city attorney who is also the law partner and spouse of the part-time city judge. If the city appoints both of the individuals to their respective positions in their individual capacities and does not appoint the firm, no violation of Section 25-4-105(3)(a) should occur.

Nevertheless, as set forth in Section 25-4-105(1), a public servant may not use his or her official position to obtain or attempt to obtain a monetary benefit for himself or herself, a relative, or a business with which he or she is associated. See definitions in Section 25-4-103(d) & (q). To comply with Section 25-4-105(1), the city attorney and city judge should completely recuse themselves from any matter coming before them in their official capacity concerning the other or the law firm. This restriction will most likely require recusal by the city attorney rather than the city judge. For example, the city attorney should not provide any advice to city officials concerning retention or rate of pay for the city judge.

A total and complete recusal requires the public servant leave the meeting room before the matter comes up for discussion and remain absent until any vote is concluded. The public servant must not only avoid advising, debating, discussing or taking action on the subject matter during official meetings or deliberations but must also avoid discussing the subject matter or providing advice to municipal officials or employees. This restriction includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. Furthermore, any minutes

or other record of the meeting or other proceeding should state the public servant 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