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ADVISORY OPINION NO. 18-019-E

June 1, 2018

Question Presented: May a hospital board contract with one of its members to provide services to the board?

Brief Answer: No. Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, prohibit a member of a public board from having any direct or indirect interest in a contract which is funded or otherwise 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).

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.

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

(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 serve as general counsel for a community hospital. In that capacity, I have been asked to obtain an opinion from the Ethics Commission concerning orthopedic coverage and services at [the community hospital]. I previously requested and received an opinion on a related issue on July 8, 2016, under Advisory Opinion No. 16-042-E, however, the issues presented in that request are materially different than those presented herein.

By way of background, [the community hospital] was formed by [the local] City [and the] County. it operates a 200 bed acute care hospital, and employs approximately 1,500 individuals on its main campus and at various satellite facilities and clinics in other locations. [The community hospital's] service area as determined by its Board of Trustees consists of regional Counties and [three counties in a neighboring state].

[The community hospital] is a Level III trauma center as defined by the Mississippi State Department of Health, and is the only hospital located in [the] County. While hospitals are located in [neighboring counties], those hospitals have Level IV trauma designations.

The medical staff bylaws allow an active staff member¹ to cease taking unassigned emergency room call upon reaching the age of 55 years. There are currently only two orthopedic surgeons with active medical staff privileges at [the community hospital] and who historically have taken this call. Both surgeons have reached the age of 55 years and each have indicated an intention to stop taking unassigned emergency room call, as permitted by the medical staff bylaws, in the immediate future. Due to this, [the community hospital] is in immediate jeopardy of having zero emergency room orthopedic call coverage. Having no orthopedic call coverage would cause a reduction of [the community hospital's] trauma center designation to a Level IV, and would result in a substantial loss of available services to residents of [the community hospital's] service area.

¹ The phrase "active medical staff member" simply refers to a physician with admitting privileges to Magnolia Regional, and who may correspondingly perform surgical or other medical procedures there. To hold such privileges, physicians must provide call coverage for the Magnolia Regional emergency department, until the age of 55. Physicians are not compensated directly by Magnolia Regional for this call coverage.

The difference between a Level III and Level IV trauma designation is significant. Level IV centers are generally smaller, rural facilities which are primarily involved in the resuscitation of the trauma patient and immediate transfer to a higher level facility. A Level IV trauma center will not have resources available for emergency surgery for a trauma patient. A Level III trauma center, such as [the community hospital], is an acute care facility with the staff and specialty training necessary to provide initial resuscitation of a trauma patient, to provide immediate operative intervention to control hemorrhage, and to assure maximal stabilization prior to referral to a higher level of care. A Level III trauma center must have a general surgery department, an orthopedic surgery department, an emergency medicine department, anesthesia, a post-anesthesia care unit and an intensive care unit. As a result, the level of care available to a trauma patient at a Level III healthcare facility greatly exceeds that available at a Level IV facility.

[The community hospital] has evaluated a number of options to maintain at least 50% orthopedic call coverage, including contracting with an orthopedic hospitalist company to provide call coverage. The cost of such a contract, however, would now be approximately \$2,000,000.00 annually, and is not a financially viable alternative for [the community hospital]. Neither of the current orthopedic surgeons are [community hospital] employees. One of the surgeons ("Physician Doe") however, serves as an appointed member of the [community hospital's] Board of Trustees. In Advisory Opinion No. 16-042- E you opined that under this scenario, [the community hospital] could not enter into a contract with Physician Doe for on-call orthopedic services, given his position as a member of the Board of Trustees.

Although Physician Doe intends to stop taking unassigned orthopedic emergency room call, and in fact has only continued taking such call due to the severe impact it would have on [the community hospital] and the residents of its service area, Physician Doe has indicated a willingness to assist in recruiting one or more additional orthopedic surgeons to the area, which would allow [the community hospital] to retain Level III trauma designation. Physician Doe is also willing to locate and recruit potential physician assistants and/or nurse practitioners to assist with orthopedic coverage, and is further agreeable to his practice group providing ongoing management of the orthopedic service line to ensure uninterrupted provision of emergency department unassigned call. Such efforts by Physician Doe, while extremely beneficial to [the community hospital] and the residents of its service area, would involve the expenditure of significant time and expenses on Physician Doe's part in searching for and locating candidates, recruiting such individuals to the area, and assisting in the transfer of any physician's practice.

In order to facilitate the recruitment of additional orthopedic surgeons to provide call coverage, to locate and recruit potential physician assistants and/ or nurse practitioners to assist with orthopedic coverage, and to provide ongoing management of the orthopedic service line, [the community hospital] and Physician Doe would like to enter into an agreement whereby [the community hospital] reimburses Physician Doe for his out of pocket expenses, his reasonable

time spent, and administrative expenses incurred as a direct result of his efforts described herein.

[The community hospital] is aware of the general prohibitions found in Section 109 of the Mississippi Constitution of 1890, and Mississippi Code Annotated §§ 25-4-103 and 25-4-105, which prevent community hospital board members such as Physician Doe from entering into contracts with the governmental entity with which they are affiliated, for a financial benefit, during their term of service or for one (1) year thereafter.

This is not a situation where Physician Doe as a board member is seeking to take advantage of his position for personal financial gain; rather, Physician Doe is willing to provide a crucial service necessary for [the community hospital] to provide orthopedic call coverage. [The community hospital] simply desires to reimburse Physician Doe and ensure that while Physician Doe does not recognize a financial gain or benefit, he also does not suffer a financial detriment or loss by providing this invaluable service.

Allowing Physician Doe and [the community hospital] to enter into this reimbursement agreement would permit [the community hospital] to maintain its Level III trauma designation, and would further allow it to continue providing the highest quality medical services to the residents of its service area. A reduced trauma designation would mean that certain seriously injured patients could not be treated at [the community hospital] but instead would be required to be transferred as soon as practical to a higher designation trauma center. This can and often does result in a delay in treatment to severely injured patients, a result that [the community hospital] is striving to avoid.

The exact question posed to the Commission is as follows: May Physician Doe be reimbursed by [the community hospital] for out of pocket expenses, reasonable time expended, and administrative expenses associated with his identification and recruitment of orthopedic surgeons to the area, his locating and recruiting potential physician assistants and/or nurse practitioners to assist with orthopedic coverage, and his providing of ongoing management of the orthopedic service line to ensure uninterrupted provision of emergency department unassigned call?

If I may provide any further facts or information to you concerning this request please do not hesitate to contact my office. Otherwise my client and I await your response on this issue, which is crucial to [the community hospital] and the residents of its service area.

III. ANALYSIS

Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, prohibit a member of a public board from having any direct or indirect interest in a contract which is funded or otherwise 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). A hospital

board may not contract with a board member to provide services to the board. By contrast, physician staff privileges granted by a hospital board do not necessarily constitute a contract with the board and do not automatically prohibit the physician from serving on the hospital board of trustees. Mississippi Ethics Commission v. Aseme, 583 So.2d 955 (Miss. 1991).

“Good faith, long practice, and value received [are] not defenses to violations of the Ethics in Government Act or § 109.” Hinds Comm. Coll. Dist. v. Muse, 725 So.2d 207, 211 (Miss. 1998), citing Waller v. Moore ex rel. Quitman County School Dist., 604 So.2d 265, 266 (Miss. 1992). Additionally, any contract entered into in violation of Section 109 or Section 25-4-105(2) is null and void. 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). Therefore, the hospital board may not enter any agreement with the physician identified above to perform the services described above.

Members of hospital boards of trustees are typically entitled to some compensation and reimbursement for their service on the board. Such compensation is usually nominal and limited to a per diem or stipend. If this hospital board is authorized by law to pay such compensation and reimbursement to hospital trustees for their service on the board, then the physician identified above would be entitled to whatever compensation and reimbursement the board is authorized by law to pay. If the physician receives such compensation and reimbursement in the physician’s role as a hospital trustee as a result of searching for and recruiting orthopedic professionals and no compensation is paid to the physician as a result of any contractual agreement, then no violation of Section 109 or Section 25-4-105(2) would occur.

MISSISSIPPI ETHICS COMMISSION

BY: _____
Tom Hood, Executive Director and
Chief Counsel