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Opinion No. 06-065

Membership on Tennessee Ethics Commission

QUESTIONS

1.a. Does any provision of the 2006 Ethics Act, 2006 Tenn. Pub. Acts Ch. 1 (Ex. Sess.), including but not limited to Tenn. Code Ann. § 3-6-103(h)(7), prohibit a member of the Commission or such member's immediate family, who is a licensed attorney, from providing legal services to an elected officeholder, either in that officeholder's official capacity or as an individual?

b. Would it prohibit such an attorney from providing legal services to any governmental body, entity or agency of which an elected officeholder is a member?

c. Would it prohibit such an attorney from providing legal services to a governmental body, entity or agency appointed or otherwise employed by an elected officeholder?

2.a. Does any provision of the Act, including but not limited to Tenn. Code Ann. § 3-6-103(h)(7), prohibit a member of the Commission or such member's immediate family from being either an employee or member, partner, or holder of an equity interest, of a law firm or other association of lawyers that provides legal services to an elected officeholder, either in that officeholder's official capacity or as an individual, even if the Commission member or family member does not personally provide any such services?

b. Would such a prohibition apply if such law firm or other association provided legal services to any governmental body, entity or agency of which an elected officeholder is a member?

c. Would such a prohibition apply if such law firm or other association provides legal services to a governmental body, entity or agency appointed or otherwise employed by an elected officeholder?

OPINIONS

1.a. New Tenn. Code Ann. § 3-6-103(h)(7) prohibits a member of the Ethics Commission, or member's spouse, from accepting a legal engagement from an elected officeholder in such officeholder's official or individual capacity.

1.b. & c. Whether an attorney member of the Ethics Commission, or an attorney spouse of a Commission member, may provide legal services to a governmental body, entity or agency will depend on the facts and circumstances of the particular engagement. In our opinion, a member of the Commission or member's spouse may not provide legal services to a governmental body, entity or agency if an elected officeholder has the authority to employ counsel for the entity in question. If, however, an elected officeholder only has input concerning that decision, then a member of the Ethics Commission or such member's spouse may provide legal services to a governmental body, entity or agency in that instance.

2. In our opinion, the Ethics Act does not prevent a Commission member, or member's spouse, from being part of a law firm that provides legal services to an elected officeholder in that officeholder's official or individual capacity, assuming the member or member's immediate family is not providing the services. Similarly, we do not think the Act prevents a Commission member or member's spouse from being part of a law firm that provides legal services to a governmental body, entity or agency, as long as such Commission member or member's spouse is not personally participating in the provision of these legal services. But, a Commission member, or member's spouse, may not be employed by a law firm in which an elected officeholder has any direct input concerning the law firm's employment decisions.

ANALYSIS

1.a. This opinion concerns the Tennessee Ethics Commission created under 2006 Tenn. Pub. Acts Ch. 1 (Ex. Sess.), the "2006 Ethics Act." This act deleted Tenn. Code Ann. §§ 3-6-101, *et seq.*, and substituted a new part.[1] New Tenn. Code Ann. § 3-6-102 provides:

> It is the intent of the general assembly that the integrity of the processes of government be secured and protected from abuse. The general assembly recognizes that a public office is a public trust and that the citizens of Tennessee are entitled to a responsive, accountable, and incorruptible government. The Tennessee ethics commission is established to sustain the public's confidence in government by increasing the integrity and transparency of state and local government through regulation of lobbying activities, financial disclosure requirements, and ethical conduct.

[1] The Ethics Commission is created in Section 26 of the 2006 Ethics Act. That section is effective immediately for purposes of appointing the members of the Ethics Commission. 2006 Ethics Act, § 54. The act also rewrote the laws governing lobbyists, new Tenn. Code Ann. §§ 3-6-301, *et seq.* These provisions appear in Section 35 of the act. Only portions of this part of the 2006 Ethics Act are now effective. Most of them do not take effect until October 1, 2006. 2006 Ethics Act, § 54. To the extent that Tenn. Code Ann. §§ 3-6-101, *et seq.*, governs lobbyists, therefore, it remains in effect until the new laws become effective October 1. This opinion discusses the new statutes governing the Ethics Commission, not the lobbying statutes still in effect.

The Ethics Act creates the Tennessee Ethics Commission "as an independent entity of state government . . .." New Tenn. Code Ann. § 3-6-103(a). The first question is whether an attorney member of the Commission, or an attorney in the member's immediate family, may provide legal services to an elected officeholder in either that person's official or individual capacity. New Tenn. Code Ann. § 3-6-103(h)(7) provides:

> (h) No member of the commission or such member's immediate family, as defined in § 3-6-301, shall during such membership:
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> * * * *
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> (7) Be employed by any elected officeholder, either in an official capacity or as an individual, or be employed by any business in which an elected officeholder has any direct input concerning employment decisions.

In Op. Tenn. Att'y Gen. 06-056 (March 28, 2006), we opined that an attorney employed by the Shelby County Trustee, even as an independent contractor, may not continue to serve in that capacity while serving as a member of the Ethics Commission. The Shelby County Trustee is an elected officeholder. Tenn. Code Ann. § 8-11-101. Thus, the Ethics Act prohibits an attorney member of the Ethics Commission from accepting a legal engagement from an elected officeholder in either that person's official or individual capacity. The prohibition in Tenn. Code Ann. § 3-6-103(h)(7) also applies to a Commission member's immediate family as that term is defined in § 3-6-301(12) (spouse or minor child living in the household). Accordingly, an attorney spouse of a member of the Ethics Commission also may not accept a legal engagement from an elected officeholder in either that officeholder's official or individual capacity.

1.b. & c. The next issue is whether an attorney member of the Ethics Commission, or an attorney spouse of a Commission member, may provide legal services to a governmental body, entity or agency in two instances: 1) where an elected officeholder is a member of the body being represented, and 2) where an elected officeholder appoints or otherwise employs the attorney to represent the body. In the first instance, the answer is "yes," unless the second circumstance is also present, in which case the answer is "no." In reaching our conclusion, we have found the statute to be less than clear; thus, the General Assembly may want to clarify the law if our interpretation is not the intended meaning.

On one hand, the Ethics Act is remedial legislation, and such statutes are generally construed liberally to achieve their objective. *See Loftin v. Langsdon,* 813 S.W.2d 475, 478 (Tenn. Ct. App. 1991); *Big Fork Mining Co. v. Tennessee Water Quality Control Board,* 620 S.W.2d 515, 519-20 (Tenn. Ct. App. 1981). A purpose of the Ethics Commission is to protect the integrity of government, Tenn. Code Ann. § 3-6-102, and thus, the Commission has been created as an "independent entity." Tenn. Code Ann. § 3-6-103(a). It is well settled that a suit against a governmental official in that person's official capacity is really a suit against the governmental entity itself. *See, e.g., Cox v. State,* 217 Tenn. 644, 399 S.W.2d 776 (Tenn. 1965). If the term "employed by" in the first clause of § 3-6-103(h)(7) is liberally construed, an attorney member of the Ethics Commission could not provide legal services to a governmental body of which an elected

officeholder is a member, because the natural and ordinary meaning of the term "employ" includes "[t]o engage in one's service . . .." *Black's Law Dictionary* (5th ed. 1979). An attorney engaged in the service of a governmental body is likely to develop a relationship with the officials through whom the body must act. It is easy to conceive, therefore, that an attorney member of the Ethics Commission may have a conflict of interest in regulating the members of a governmental body that the attorney also represents. Such a fact situation seems contrary to the stated purposes of the Ethics Act.

On the other hand, the Ethics Act makes it a misdemeanor for a member of the Ethics Commission to participate in any of the activities prohibited by the Act. Tenn. Code Ann. § 3-6-103(j)(2). Criminal statutes are not construed liberally but are construed narrowly in favor of the defendant and against the government. *State v. Rogers*, 992 S.W.2d 393, 400 (Tenn. 1999). In our opinion, therefore, Tenn. Code Ann. § 3-6-103(h)(7) does not necessarily prohibit an attorney member of the Ethics Commission or spouse of a member from providing legal services to a governmental body, entity or agency of which an elected officeholder is a member. We think a court would conclude that the term "employ" as used in (h)(7) means "to hire . . .." *Black's Law Dictionary* (5th ed. 1979). Accordingly, there is no "one size fits all" answer to the question, and whether the members of the governmental body are appointed or elected is not the determining factor. We think the determining factor is whether an elected officeholder is the person authorized to hire counsel for the governmental body. An attorney member of the Ethics Commission or such member's spouse should examine the statute or other provision that authorizes counsel to be hired for the entity in question. If an elected official has the authority to hire the attorney to represent the entity in question, then we think the first clause of (h)(7) precludes a member of the Ethics Commission or member's spouse from accepting the legal engagement.

The second clause of (h)(7), not the first clause, addresses the situation in which an elected officeholder has input concerning, but does not directly make, employment decisions. The second clause provides that a Commission member may not "be employed by any ***business*** in which an elected officeholder has any direct input concerning employment decisions." (Emphasis added). We think the General Assembly would have inserted "or governmental entity" after the term "business" in that provision if it meant also to preclude a Commission member from furnishing legal services to a governmental entity because an elected officeholder has input concerning the employment decision. Accordingly, we do not think that § 3-6-103(h)(7) prevents a member of the Ethics Commission or member's spouse from providing legal services to a governmental body, entity or agency in circumstances where an elected officeholder is not the hiring or appointing authority, but only has input concerning that decision.

2. The next questions essentially ask whether the prohibitions that prevent an attorney member of the Commission, or such member's spouse, from providing legal services as discussed in Question 1, also prevent the member or spouse from being part of a law firm (either as employee, member, partner, or holder of an equity interest) that provides legal services in those instances, even if the Commission member or Commission member's spouse does not personally provide any such services. We do not think the prohibitions extend that far.

Certainly, a Commission member may face a conflict of interest if, in performing his or her duties under the Ethics Act, he or she must sit in judgment of an elected officeholder represented by the Commission member's law firm. But, the plain language of § 3-6-103(h)(7) applies to a member of the Commission and to a member's immediate family. It does not apply to a member's partner or to persons otherwise sharing ownership interest in a business with a Commission member. As stated above, subsection (h)(7) of the statute provides that a Commission member, or member's immediate family, may not "be employed by any business in which an elected officeholder has any direct input concerning employment decisions." We think the statute means a Commission member may not be employed by a business, if an elected officeholder has direct input concerning the employment decisions of that business. In the context of Question 2, therefore, a Commission member or member's spouse, may not be employed by a law firm in which an elected officeholder has any direct input concerning the firm's employment decisions.

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