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ADVISORY OPINION NO. 12-058-ER

November 2, 2012

Question Presented: **May a member of a state board of trustees and/or a business in which he holds a material financial interest provide free services to and make other donations to an institution governed by the board?**

Brief Answer: **Yes. While the payment of public funds for such services would be prohibited, the receipt of insurance payments and other ancillary benefits by the trustee or businesses will not violate Section 109, Miss. Const. of 1890, or Section 25-4-105(2) or (3)(a), Miss. Code of 1972. However, the trustee should carefully consider whether this conduct complies with the public policy set forth in Section 25-4-101, 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 25-4-101, Miss. Code of 1972.

The legislature declares that elective and public office and employment is a public trust and any effort to realize personal gain through official conduct, other than as provided by law, or as a natural consequence of the employment or position, is a violation of that trust. Therefore, public servants shall endeavor to pursue a course of conduct which will not raise suspicion among the public that they are likely to be engaged in acts that are in violation of this trust and which will not reflect unfavorably upon the state and local governments.

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

(a) "Authority" means any component unit of a governmental entity.

(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.

(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.

(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.

(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.

(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.
>
> (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 in a letter dated July 25, 2012, are set forth below, with identifying information redacted, and are considered a part of this opinion.

> This is related to Advisory Opinion No. l2-058-E, dated July 16, 2012, ("Opinion") which the Mississippi Ethics Commission ("Commission") issued at my request. Since receiving the Opinion, additional facts not presented to the Commission as a part of my original request have been brought to my attention which I believe warrant a full reconsideration of the Commission's Opinion. Those facts, and their legal implications, are set out below:
>
> 1. Additional Facts.
>
> Before I became a member of the Board of Trustees ("Board") of a state agency, the National Collegiate Athletic Association ("NCAA") adopted an amendment to its Constitution (3.2.4.8), effective August 1, 2005, requiring that all of its member institutions certify annually that insurance coverage exists for medical expenses resulting from athletically related injuries sustained by student athletes. The purpose is to enhance the health and safety of student athletes. The provision is set forth below in its entirety:
>
> 3.2.4.8 Certification of Insurance Coverage. An active member institution must certify insurance coverage for medical expenses resulting from athletically related injuries sustained by the following individuals while participating in a covered event (see Constitution 3.2.4.8.3):
>
> (a) A student-athlete participating in the covered event in an intercollegiate sport as recognized by the participating institution;

(b) A prospective student -athlete participating in the covered event who has graduated from high school and signed a National Letter of Intent or an institution's written offer of admission and or financial aid to participate in an intercollegiate sport at a participating institution.

3.2.4.8.1 Amount of Coverage Insurance. Such insurance coverage must be of equal or greater value than the deductible of the NCAA catastrophic injury insurance program and may be provided through the following sources:

(a) Parents' or guardians' insurance coverage;
(b) Participant's personal insurance coverage; or
(c) Institution's insurance program.

3.2.4.8.2 Athletically Related Injuries. For purposes of this bylaw, athletically related injuries are injuries that are a direct result of participation in a covered event (see Constitution 3.2.4.8.3).

3.2.4.8.3 Covered Event. A covered event includes the following:

(a) Any intercollegiate sports activity including team travel, competition, practices, and conditioning sessions during the playing season (as defined in Bylaw 17.1.1);

(b) An NCAA-sanctioned competition in which the insured person is an official competitor; or

(c) Practice and conditioning sessions that are authorized, organized, or directly supervised by athletic department personnel at the member institution other than during the playing season. Such sessions must occur on campus or at approved off campus facilities as part of an intercollegiate athletics activity. For insured student-athletes or prospective student athletes who compete in individual sports, off-campus intercollegiate athletics activities must be authorized by athletic department personnel at the participating school and take place at approved locations.

Rationale: This proposal is the result of analysis and study by an NCAA task force charged with reviewing student-athlete insurance programs, the Association's portfolio or business insurance policies and contingency planning for Association events. Based on the task force's findings, the health and welfare of student-athletes and prospective student-athletes will be greatly enhanced if the Association requires all active members of the NCAA to certify each year that insurance is in place to cover any medical expenses that may result from athletically related injuries sustained by student-athletes and prospective student-athletes while participating in athletics activities. This proposal does not require an institution to finance such insurance. Rather, if adopted, the proposal requires member institutions to certify that the affected participants present proof of insurance coverage.

The University of Southern Mississippi ("USM") was an NCAA member prior to the beginning of my service on the Board and its NCAA membership continues. Consequently, USM must annually certify to the NCAA that all of its student athletes are covered by a plan of medical insurance while participating in USM athletic events. Since many such athletes do not carry personal medical insurance coverage, USM is mandated to purchase this coverage to comply with the foregoing certification requirements and to maintain its membership in the NCAA.

In 2012, the State Legislature adopted Senate Bill No. 2957, which is the appropriations measure for FY 2013. In Sections 1 and 2 of SB 2957, the Legislature made lump sum appropriations to the Board of for the funding of the activities of USM and the other public universities in the state. Pursuant to SB No. 2957 and a funding formula adopted by before I became a member, does not have any discretion regarding the allocation of these appropriated funds to USM or any other public university. In fact, the fund allocations are mandated by a precise formula, and has no discretion to vary that formula in making monetary distribution of appropriated funds to USM or the other public universities. Consequently, any contract entered into between USM - of which I am neither an officer or employee - and my clinic or me are funded by the Legislature rather than the action of **.** Further, does not authorize the contract of insurance between USM and the provider of such insurance, and neither nor USM direct an insured to see one medical provider rather than another. The insured is free to seek medical services from any medical provider that the insured selects subject to the terms and conditions of the policy.

2. Legal Analysis.

In *Frazier* v. *State*, 504 So. 2d 675 (Miss. 1987), the State Supreme Court recognized that public school teacher contracts funded by *discretionary* local tax levies violate Section 109 of the Mississippi Constitution when the school teachers' spouses are members of the local tax levying boards. *Frazier*, 504 So. 2d at 700. *Frazier* also holds that when the levy is mandated by statute or a court decree, the school teacher spouse/levying board member's conduct in voting for the levy is purely ministerial and does not violate Section 109. *Frazier*, 504 So. 2d at 701.

In *Jones* v. *Howell*, 827 So. 2d 691 (Miss. 2002), the State Supreme Court again examined Section 109, this time in a scenario involving legislators/pharmacists and legislative Medicaid appropriations. In refusing to find these legislators' conduct of to appropriate funds to the Mississippi Division of Medicaid a violation of Section 109, Court quoted *Frazier* regarding the proper interpretation of Section 109 explaining that Court looks to "'the evils to be avoided or cured, and thereby arrive at the reasonable meaning.'" *Jones*, 827 So. 2d at 697, quoting *Frazier*, 504 So. 2d at 694. The *Jones* explained that Section 109's purpose is "to instill public confidence in the integrity of government and to remove any temptation to invade its proscription." *Jones*, 827 So. 2d 699. In applying Section 109, the *Jones* Court inquired as to whether the legislators were "guilty of self-dealing and whether their interests could reasonably be expected to influence their judgment." *Id.* The Court

found that the legislators' interest in Medicaid appropriations was so remote "as to remove them from the purpose of Section 109." According to the Court, no decision made by the legislators could affect the amount of Medicaid reimbursement they received. In addition, the Court noted that Medicaid recipients are entitled to choose the pharmacies from which they purchase their medications. *Id.*

3. Legal Analysis.

In much the same manner as the tax levying board members/spouses of public school teachers in *Frazier* had no discretion with regard to school funding, as an Board member I had no discretionary role concerning USM's expenditures for medical insurance for its student athletes or its employees. First, the purchase of such insurance is mandated by NCAA rule or state law. Secondly, no action of affects the amount of funds provided to USM or its expenditure of those funds for any legal purpose including its insurance purchasing decisions. My role in this matter is purely ministerial and wholly lacking in the exercise of discretion on my part or the part of .

Likewise, just as the *Jones* Court found that the proper Section 109 inquiry is whether the public officer in question is guilty of self-dealing, and that when there was nothing the public officer could do to control the income they receive by their vote, there was no violation, so my conduct should not be found to violate Section 109. Any action on my part as an Board member related to the mandatory allocation of State appropriated funds pursuant to a formula adopted by the before I joined the Board for the provision of insurance required by state law or NCAA membership rules (again adopted before I joined the Board) is so remote from my own receipt as a physician of insurance proceeds for treating these athletes as to bring my conduct squarely within the interpretation of Section 109 adopted in *Frazier* and *Jones.*

Finally, since the patients I treat are contractually obligated to pay me and my businesses for the costs of their treatment, my only contracts are with the patients and not with a governmental entity of which I am a member (Section 25-4-105(3)(1972)). In this way, the Commission's finding that my prospective conduct would result in a violation of this statutory prohibition is not well founded.

For all the foregoing reasons, I respectfully ask that the Commission reconsider its position based on this additional information and any other relevant information brought to its attention, withdraw its prior opinion, and issue a new opinion addressing these issues.

The following facts, with identifying information redacted, were provided by the requestor in a second letter dated August 29, 2012, and are considered a part of this opinion.

This supplements my letter dated July 25, 2012, related to Advisory Opinion No, 12-058-E, dated July 16, 2012. Since the date of my letter, Advisory Opinion No, 08-058-E, dated June 6, 2008, has been brought to my attention.

> As I indicated earlier, I am no longer treating any student athletes and have not been since my appointment to the Board in 2008. As stated in my initial letter to the commission dated May 25, physicians in [the Professional Association (PA) with which I am associated] are compensated principally based on work they personally perform. For example, if a physician treats a patient, the net collections from that service are attributed solely to him in calculating his compensation. This type of service results in the great majority of a physician's compensation, and so by ceasing to provide those services, I gave up the greatest economic benefit derived from this arrangement. As an aside, and while it may be irrelevant to the Ethics Commission's deliberations, this was all discussed at my State Senate Committee confirmation hearing, and I was told at that time that cancellation of the agreement between [the PA/LLC] and [the university], and my personally ceasing to provide services or treat [university] athletes, would satisfy any concerns.
>
> Since the Ethics Commission appears not to agree with what I was told by members of the State Senate Committee, my fellow physicians and I have considered arrangements to reduce further any economic benefit that could accrue to me from the treatment of [university] athletes by other [PA] physicians. Initially, based on Advisory Opinion No, 08-058-E, we explored the idea of establishing a separate professional corporation, in which I would not be an owner, to treat the [university] athletes. We concluded, however, that the administrative and legal burdens involved would make this administratively impractical if not impossible.
>
> We did, however, determine another way to reduce any benefits to me. Facility fees collected by [the Limited Liability Company (LLC) with which I am associated] for services provided there are split among its owners based on their respective ownership, as required by federal health care laws. After further reviewing Advisory Opinion No. 08-058-E and consulting with my fellow physicians in [the PA] and [the LLC], we have agreed to make the following additional change in our practice if the Ethics Commission does not agree with [the letter sent to the Commission on my behalf] dated August 8, 2012[, which is quoted below]:
>
> 'No [PA] physician will perform surgery on a [university] student athlete at [the LLC facility].'
>
> Based on this proposed change, the facts and reasons set forth in [the letter quoted below] and my previous letters, and any other relevant information brought to the Commission's attention, I respectfully ask that the Commission reconsider its position based on this additional information and any other relevant information brought to its attention, withdraw its prior opinion, and issue a new opinion addressing these issues.

The following facts were provided in a letter dated August 8, 2012, by another individual who asked for reconsideration on behalf of the requestor.

> This is in response to the Ethics Opinions referenced above [Advisory Opinions No. 12-054-E and 12-058-E] issued at the request of two members of the Board of

Trustees. For the reasons set forth below I, as [an employee of the board], respectfully request that the Mississippi Ethics Commission reconsider both of the Advisory Opinions.

In interpreting Section 109 of the Mississippi Constitution and its statutory parallel, Section 25-4-105(2), the Commission concludes that neither the physician Trustee nor his business may accept insurance benefits for treating university athletes when the university or the athletic foundation pays the insurance premiums, without violating the ethics laws. The Commission's rationale is that the … Board of Trustees has authorized payment of medical insurance benefits to the trustee or his business where the university pays the premiums with public funds and/or where the athletic foundation pays the premiums. This is an overreaching application of Section 109 and in conflict with *Jones v. Howell*, 827 So.2d 691 (Miss. 2002), in which the Mississippi Supreme Court stated "…Section 109 must not be interpreted too expansively, without regard to common sense considering modern, current circumstances and conditions." *Id.*, at 693.

As explained in greater detail in … request for reconsideration [No. 12-058-ER] dated July 25, 2012, the Commission's position makes no allowance for the fact that the National Collegiate Athletic Association's Constitution, versus the Board, has required since 2005 certification by member institutions that all student athletes have insurance coverage for medical expenses related to athletic injuries. This insurance may be provided through parents' or guardians' insurance policies, students' personal insurance policies, or the universities' insurance programs. Public funds or foundation funds have to be used to purchase insurance coverage for those athletes who do not have coverage through the other means.

The Commission's position ignores the reality of how funds are appropriated to the State's public universities by the Legislature. Funding allocations for the universities are made by the Legislature pursuant to a formula that cannot be altered by the Board of Trustees. The Board's physician Trustees have no control, direct or indirect, over the amount of state appropriated funds allocated to the universities.

The Ethics Opinions issued to the two subject Board members state that payment of insurance premiums by a university's athletic foundation on behalf of a student athlete whose insurance provider pays medical insurance benefits to the physician Board member violates Section 109. These Opinions misinterpret the legal relationships existing between the Board of Trustees, the universities and the universities' foundations. The university foundations are private nonprofit corporations. The Mississippi Attorney General has opined that "[t]he Board of Trustees has no authority under Mississippi law to approve or disapprove foundation contracts." MS AG Op., Layzell, 1997 WL 306740. Moreover, when asked "[u]nder what circumstances does a foundation formed to support a university lose its 'independent' status and become an instrumentality of the university and subject to the public laws and policies which govern said university" the Attorney General replied:

> We are aware of no circumstance or rule of law by which such foundation could lose its independent status and become an instrumentality of the state or a subdivision thereof. Instrumentalities of the state can only be created by specific legislative action or by the action of an agency or subdivision pursuant to a prior grant of authority by the legislature. MS AG Op., Layzell (May 14, 1997)

The Attorney General has also interpreted State law to the effect that foundations are not agencies or political subdivisions of the State and that "…the funds raised and collected by them are not public funds as defined by the statute (Section 7-7-1 of the Mississippi Code of 1972) until such time as they are paid over to the universities." MS AG Op., Bryant, 1998 WL 889833.

The independent nature of the university foundations is clearly set out in Board Policy 301.0806 which states that the "Board recognizes that the Entities (Foundations) are not state agencies. The Entities have their own governing authorities. The Board recognizes that it does not have the power to exercise governing control over the Entities."

Consequently, for the Commission to conclude that payment of a student athlete's insurance premiums by a foundation is tantamount to use of public funds authorized by the Board is not supported by the laws governing the relationships between the universities, their foundations and the Board of Trustees. An independent legal entity (foundation) would be paying the premiums to the insurance carrier which, in turn, would pay any claims of the insured in accordance with the insurance policy.

The subject Ethics Opinions ignore the fact that there is no contractual relationship between the physician Trustee (or his businesses) and the university or the foundation. The self-dealing by public servants through contractual relationships that Section 109 is designed to prevent is not possible given the legal relationships of those here involved: physician Trustee, university, foundation, insurance carrier and student athlete.

In *Jones*, the Supreme Court noted that the participation agreements executed by the pharmacist legislators "…are totally unlike any contract previously found by this Court to be within the scope of Section 109." *Id*. at 697. In the case at hand, the physician Trustee does not have a contract with any of the other parties. In *Jones* the Court found that the legislator pharmacists' interest in the State Medicaid appropriations was so remote as to remove them from the scope of Section 109. No decision made by them in voting on the Medicaid appropriation bill could affect the amount of reimbursements they received.

The nexus between the physician Trustees and any receipt by their businesses of insurance benefits paid by the insurance carriers of the student athletes is even more attenuated than the facts presented in *Jones*. Moreover, a significant link in the chain

of any public funds and payment to the physician Trustee is the student athlete, who may or may not choose to seek medical treatment from the physician Trustee's medical group. Neither the university nor the foundation directs the student athlete to any particular medical group for treatment. The insurance carrier is obligated to pay benefits to the treatment provider in accordance with its contract with the insured student athlete.

If Section 109 of the Mississippi Constitution is applied to prevent physician Trustees from treating student athletes whose insurance premiums are paid by the university or foundation then a similar prohibition would apply for treatment of faculty members and … system personnel whose insurance premiums are paid wholly or in part by a university or the … system. Such a result under these facts seems to be completely inconsistent with the Mississippi Supreme Court's decision in *Jones*. As pointed out by the Court in *Jones,* "[s]trong public policy considerations undergird the need for a reasonable interpretation of Section 109. Nor should Section 109 be applied in a manner which would render vast sectors of our society ineligible for service…" *Id.* at 701.

The physician members of the … Board of Trustees bring valuable insight and expertise to the … system. The Board's oversight of the University of Mississippi Medical Center is one of the great challenges faced by the Trustees. Having fellow Board members who are practicing physicians is enormously important to the Board's operations and oversight responsibilities. Referring to members of the Legislature in the *Jones* case, the Mississippi Supreme Court stated:

> The need for members who possess particular skills as a result of education and training cannot be overemphasized. Neither should we be blind to the fact that members from isolated or rural areas of the state may be unfairly prohibited from serving simply because of a radical interpretation of Section 109 which wholly fails to apply common sense with consideration of modern economic, cultural and political circumstances or conditions. *Id.*, 827 So.2d at 701.

The same can be said for the physicians who are members of the … Board of Trustees. The Ethics Opinions will likely have a chilling effect on actively practicing physicians serving the State as a member of the Board.

Regarding university stadium suites, even though members of the Board of Trustees pay the market rates for their stadium suites, the subject Opinions state that Trustees are prohibited from having interests in any future stadium suites agreements authorized by the Board during their terms of office and for one year thereafter. Stadium suites agreements are not subject to … Board approval. This, again, is an overreaching application of the ethics laws. There is no self-dealing when Trustees pay the same prices and are subject to the same terms and conditions as the general public. Trustees receive no favoritism under the stadium suites license agreements. The Commission's reasoning would also prohibit Board members from renting

> rooms at the Alumni House, buying general admission tickets to university cultural and athletic events, and purchasing university apparel at the bookstore.
>
> In conclusion, the opportunities for self-dealing and abuse of power that Section 109 of the Constitution and Section 25-4-105 of the Mississippi Code are designed to prevent are not present in the current contractual and legal relationships between the physician Trustees and the Board, universities, and foundations. For the reasons stated above and those expressed in [request No. 12-058-ER, quoted above], I respectfully request that the Commission reconsider its Advisory Opinions.

The following facts, with identifying information redacted, were provided by the requestor in a third letter dated September 26, 2012, and are considered a part of this opinion.

> This supplements my May 25, 2012 letter to the Ethics Commission and my two prior letters related to Advisory Opinion No. 12-058-E, dated July 16, 2012, which the Ethics Commission currently has under review and reconsideration.
>
> First, I want to thank the Ethics Commission and you for allowing [persons to appear on my behalf before the Commission during its September 7, 2012 meeting. I also want to thank the Commission for giving me the opportunity to submit this additional letter to the Ethics Commission before its next meeting which is to take place on October 5, 2012. To that end, I would be grateful if you would provide a copy of this letter to each member of the Commission before the October meeting.
>
> The issues raised by my May 25 letter are, I know, important to the Ethics Commission as it oversees its responsibilities arising under Section 109 of the State Constitution of 1890 and the State Conflict of Interest statutes, Miss. Code 25-4-101 *et seq.* (2012). As seen [in the letter] dated August 8, 2012, they are equally important to the [Board of Trustees] as its members fulfill their constitutionally imposed duties of "management and control" over the State's eight public universities under Section 213-A of the State Constitution of 1890, as amended. Needless to say, they are equally important to me as evidenced by my attempt over the past several months to have these issues clarified and resolved.
>
> Based on the lengthy discussions that took place during open session of the Ethics Commission's September 7 meeting, I have a better understanding of the thinking of the Ethics Commission members about the issues raised by my prior letters to the Commission as well as the letter … dated August 8, 2012. I understand that with respect to the matters that I brought to the attention of the Ethics Commission in my May 25 letter, the Staff and the Commission are concerned about what they refer to as "authorization" issues and "expenditure" issues that are implicated under Section 109 of the State Constitution and the State Conflict of Interest statutes for "any contract with the state ... authorized by any ... order made by any board" of which a public official such as myself is a member. I shall address and summarize these two general topics separately.

As for the "authorization" issues, I respectfully submit that the following facts should be taken into consideration by the Ethics Commission before it reaches a final decision about this matter:

1. I was not a member of [the Board] when [the Board] authorized by order any of the contracts mentioned in my May 25 letter to the Commission.

2. I was not a member of [the Board] when it authorized its eight public universities to be a member of the NCAA and to abide by the rules of that organization, including its rules for the provision of medical insurance for any student athletes engaged in NCAA-sponsored events.

3. I have not provided any medical services to any university student athlete since being appointed in 2008 to [the Board], other than on an uncompensated urgent or emergency care basis.

4. [The Board] does not authorize any of the contracts of medical insurance that exist between the eight public universities and the insurance companies and that provide coverage for any university student athletes.

5. [The Board] does review and approve the annual budgets for each one of the eight public universities in the discharge of its express constitutional authority of "management and control" over the State's eight public universities under Section 213-A of the State Constitution of 1890, as amended. To the extent that these budgets address the item of insurance, the public universities are required by law or order of [the Board] approved before I joined [the Board] (such as any order authorizing them to be members of NCAA) to provide such insurance coverage. With all respect, it would be imprudent if [the Board] did not review and approve these annual budgets, and it would be equally imprudent if [the Board] did not require the public universities to include the subject of insurance coverage in their annual budgets in the light of its constitutional Section 213-A duty of "management and control."

6. I have participated each year since 2008 in the review and approval of these budgets. The budgets are a management tool that allows [the Board] to access the annual performance and leadership of the heads of the eight public universities. The budgets are not "contracts" between [the Board] and the public universities within the plain meaning of that term as it is used in Section 109 and the State Conflict of Interest Laws. To reach such a conclusion would in my judgment create an unnecessary conflict between Section 109 and the State Conflict of Interest Laws and the express authority granted [the Board] over the budgetary process by Section 213-A, and it would seem that if there is a conflict between the State laws and Section 213-A, the statute should yield and be interpreted in such a manner as to avoid the conflict.

7. The contract for medical services and treatment is between the recipient of those services and the medical provider. [The Board] does not approve the contract. The recipient makes his or her own decision about whom to seek out for medical treatment. In addition to each of the foregoing factors, I also respectfully ask that the Ethics Commission consider each of the points raised [in the August 8] letter to the Commission.

As for the "expenditure" issues, I respectfully submit that the following facts should be taken into consideration by the Ethics Commission before it reaches a final decision about this matter:

1. The Legislature annually appropriates the amount of state funds allocated to each public university, and [the Board] has no discretion in this allocation process.

2. The head of each public university makes his or her own decision about how any contract of medical insurance for student athletes will be authorized and funded or paid for. [The Board] does not authorize the contracts for the payment of, and it does not fund, these contracts of insurance.

3. Since my appointment to [the Board] in 2008, I have not directly received any portion of the income that any of my fellow physicians have received for their treatment of university student athletes at the P.A. A portion of their total income, including the amounts received for treating university student athletes, was applied against the overhead of the P.A. Similarly, any income realized by the LLC for treatment of university athletes was paid to me purely on the basis of my minority ownership in the LLC. As set forth in my letter of May 25, 2012, all such money paid by the university to my fellow physicians, me, the P.A. or the LLC for those services (not just any amounts that benefited me) has been repaid to the university.

4. After reviewing Advisory Opinion No. 08-058-E and consulting with my fellow physicians in the P.A. and the LLC, we have agreed to make the following additional changes in our practice if the Ethics Commission does not agree with the points that I have raised here and in my prior letters to the Commission or [the August 8th] letter to the Commission:

> a. No P.A. physician will perform surgery on a university student athlete at the LLC.
>
> b. Income that my fellow physicians receive for treating university student athletes at the P.A. will not be applied to reduce my overhead expense.

These two proposed modifications in our current practice will prevent any income that my fellow physicians receive for the treatment of university student athletes regardless of the funding source for the contract of insurance from being applied to the overhead of either the P.A. or from being received by the LLC.

> Based on this proposed change, the facts and reasons set forth in [the August 8th] letter and my previous letters, and any other relevant information brought to the Commission's attention, I respectfully ask that the Ethics Commission reconsider its position based on this additional information and any other relevant information brought to its attention, withdraw its prior opinion, and issue a new opinion addressing these issues. Thank you again for your consideration in this matter.

III. ANALYSIS

Advisory opinions issued by the Commission are prospective in nature and neither review nor condone past conduct. Furthermore, this opinion provides no immunity from liability for past conduct nor should it be construed to establish any defense for past conduct.

A. University funded payments

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 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 contract exists when payment is made in exchange for goods or services, whether the contract is reduced to writing or not. See Section 25-4-103(f), above. Payment of public funds by the university will have been authorized by the board of trustees. If not specifically authorized, then the board will have allocated appropriations to the university and/or approved the annual budget of the university, each of which constitute an authorization of those expenditures. See Frazier at 693, citing Cassibry v. State, 404 So. 2d 1360, 1366-67 (Miss. 1981).

The trustee has cited Advisory Opinion No. 08-058-E in which a law firm intended to create an entirely separate business entity to avoid a similar conflict. The trustee has stated "that the administrative and legal burdens involved would make this administratively impractical if not impossible" to completely divest himself of any interest in such transactions. The commission determines that all university expenditures are authorized by the board of trustees. Therefore, the payment of public funds made by a university to the trustee or his business in exchange for services is strictly prohibited. For instance, a trustee could not enter into a contract to teach at a university.

B. Athlete insurance

In Jones, et al. v. Howell, et al., 827 So.2d 691 (Miss. 2002), the Supreme Court held a legislator who owned a pharmacy and received payments from the Mississippi Division of Medicaid had no interest in the contract between the state and the Medicaid beneficiary, even though the Legislature authorized the program and set the reimbursement rates. With regard to university athletes who receive insurance coverage paid for by the university, an analogy can be drawn with the Medicaid recipients in Howell. Consequently, no violation of Section 109 or Section 25-4-105(2) should arise if the trustee's clinic receives payments from the insurance carrier for treating university athletes. Moreover, neither the trustee nor his clinic will be a contractor, subcontractor or vendor to the university if they are paid by the insurance carrier for treating university athletes, and no violation of Section 25-4-105(3)(a) should occur from doing so.

The payment of insurance premiums by the athlete or the university athletics foundation, a nonprofit corporation, would not involve public funds and would not be authorized by the board of trustees. Such payments would not violate Section 109 or Section 25-4-105(2). Upon further reflection and consideration, findings to the contrary contained in Advisory Opinion No. 12-058-E are hereby modified to conform herewith.

C. Appearance of impropriety

The trustee should consider the public policy codified in the Ethics in Government Laws at Section 25-4-101, Miss. Code of 1972. The Commission has previously determined that an independent choice by a patient in choosing a healthcare provider is a relevant factor in analyzing whether a board has authorized a contract between a patient and provider. See Advisory Opinion No. 06-031-E. (Alderman's pharmacy allowed to fill prescriptions paid for by city workers compensation insurance.)

Here, the trustee's clinic works closely with the university and previously served as the exclusive "team doctor" for the university. While the clinic and the university terminated the formal, written agreement, the physicians in the clinic have continued to act as a team doctor. Physicians from the clinic are present at all games. They have a medical office on the campus which bears the clinic's name and contains clinic equipment. The public may perceive that university athletes are unlikely to make a truly independent choice about their treating physician for sports-related injuries. Although the relationship predates the trustee's tenure on the board, such a continuing relationship between a university and a trustee's business could create an appearance of impropriety.

Public suspicion could be aroused by this relationship, whether the university or the athletic foundation is paying the insurance premiums, and could be especially piqued when the foundation is paying the trustee or his business directly, such as in the form of copayments or deductible amounts. Direct transactions between the trustee's clinic and the athletic foundation could be seen by the public as a subterfuge to circumvent the prohibition against the trustee receiving payments from the university.

Inherent in all public service is a paramount duty to the public, a public trust. Pursuant to Section 25-4-101, public servants should conduct themselves in a manner which does not tend to raise suspicion among the public that they are violating the public trust. If a member of the board of trustees or his medical clinic has exclusive access to university athletes as patients, members of the public may think the trustee is violating the public trust and using his position in a manner which benefits his business interests. The trustee should consider taking appropriate action to ensure no appearance of impropriety exists.

D. Insurance purchased on behalf of university employees

Participation in the State and School Employees Life and Health Insurance Plan is mandated by law, and the Plan is administered by an independent board. See Sections 25-15-3 through 25-15-23, Miss. Code of 1972. All university employees are covered by the Plan, and the board of trustees has no discretion to participate in or withdraw from the Plan. Id. While the board of trustees authorizes the hiring of university employees and the expenditure of university funds for the payment of employee insurance premiums, no violation of Section 109 or Section 25-4-105(2) will

result if a trustee or his business receives payments from the Plan. Frazier v. State, ex rel. Pittman, 504 So.2d 675, 700-701 (Miss. 1987).

E. Donations of equipment or money to the university

Neither the trustee nor the PA or LLC are prohibited from making donations of equipment or money to the university or its athletic programs. The letters of commitment attached to the request letter as Exhibit D specify that the PA and LLC will be allowed to display a sign at the field house and will be allocated three parking spaces at the field house in exchange for significant donations of cash, equipment and services to the athletic department for the construction and operation of the field house. This agreement does not involve a contract authorized by the board of trustees and will not result in a violation of Section 109 or Section 25-4-105(2).

The agreement set forth in the letters of commitment does not make the PA or LLC a contractor to the university. Pursuant to Section 25-4-105(3)(a), a member of the board of trustees may not have a material financial interest in a business which is a contractor, subcontractor or vendor to the board or a university, subject to some narrow exceptions codified in Section 25-4-105(4). See also Section 25-4-103(a), (c), (h) and (k), above, and Moore, ex rel. City of Aberdeen v. Byars, 757 So.2d 243, 248 (¶ 15) (Miss. 2000). Under the letters of commitment, the PA and LLC are not contracting to provide a paid service to the university. Rather, the PA and LLC are making donations to the athletic department and are receiving signage and parking in connection with those donations, as described above. Therefore, while the university may have a contract with the PA and LLC, they are not "contractors" to the university under the rule in Byars, and no violation of Section 25-4-105(3)(a) will result from this arrangement.

However, the trustee should consider whether this arrangement implicates the public policy section of the Ethics in Government Laws. If the clinic's physicians did not serve as team doctor or other physicians were given equal access to university facilities and student athletes, the agreement would not, in and of itself, create an appearance of impropriety. However, when combined with the clinic's status as team doctor and the unparalleled access to athlete patients which accompanies that relationship, the arrangement between the trustee's clinic and the university could contribute to the appearance of impropriety discussed above. The trustee should consider taking appropriate action to ensure no appearance of impropriety exists.

F. Donation of money for priority seating within a stadium suite that is offered to the trustee as well as the general public

The board of trustees provided additional information which indicates that the stadium suite agreement in question was not authorized by the board of trustees. Therefore, no violation of Section 109 or Section 25-4-105(2) will result if the current agreement is renewed in the future. Moreover, the agreement does not make the PA a contractor to the university and will not violate Section 25-4-105(3)(a).

Furthermore, Section 25-4-105(3)(b) can prohibit a trustee from being a "purchaser, direct or indirect" from a university, "except in respect of the sale of goods or services when … offered to the general public on a uniform price schedule." This section does not prohibit a trustee from donating money to a university and receiving priority seating for athletic events as allowed by any member of

the public. Neither does this section prohibit a trustee from renting rooms at the Alumni House, buying general admission tickets to university cultural and athletic events, or purchasing university apparel at the bookstore. None of these actions will violate Section 109 or Section 25-4-105(2) or (3)(b).

MISSISSIPPI ETHICS COMMISSION

BY: _____
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