

Source: IHL Board Member to Resign over USM Flap

HATTIESBURG – An anonymous source contacted USMNEWS.net stating that IHL Board member Doug Rouse is expected to resign his IHL post this month (Aug-2012). According to the tip, Rouse received an opinion from the Mississippi Ethics Commission relating to his business (medical practice) relationship with the USM athletics department. A copy of the MEC's opinion, dated 16-July-2012, was provided to USMNEWS.net and is inserted at the end of this report. Although it does not mention Rouse by name, or implicate USM by name, it seems clear from facts stated in the document that the IHL Board member in question is indeed Rouse, and that the IHL institution is indeed USM.

According to the anonymous source, Rouse has until 16-Aug-2012 to either cease his business with USM or resign his post from the IHL Board. The tipster indicates that all indications are that the outcome will be IHL Board resignation. However, the watermark in the MEC opinion indicates that the July-2012 opinion is currently being reconsidered by the MEC. That could be a sign that Rouse is seeking a third option – having the MEC reverse itself. If such a reversal is indeed being sought by Rouse, then long-time followers of USM will likely view this whole episode as simply another example of the Mississippi political machine spinning its wheels again in a way that benefits the well-connected.



ADVISORY OPINION NO. 12-058-E

July 16, 2012

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

Brief Answer: No. The receipt of medical insurance benefits by the trustee or business where the insurance premiums are paid by the university or its athletic foundation would violate Section 109, Miss. Const. of 1890, and Section 25-4-105(2) and (3)(a), Miss. Code of 1972. Additionally, an agreement between a university and a business owned by a trustee creates an appearance of impropriety and should be avoided in compliance with Section 25-4-101.

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 are set forth below, with identifying information redacted, and are considered a part of this opinion.

I write to advise you and the Ethics Commission ("Commission") of certain past conduct, and to notify you of steps taken with respect to that conduct, and to seek an official opinion of the Commission as to certain other arrangements.

I am a proud alumnus of [a public university in Mississippi], and for many years have been a loyal and dedicated contributor and supporter. My wife and I have contributed significantly to the University for many years, to programs as diverse as [various programs and foundations]. Also, in my role as an orthopaedic surgeon, I began providing care to [university] varsity athletes in 1984. Businesses in which I am one of several owners, [a Professional Association (PA)] and [a Limited Liability Company (LLC)], and their physicians, have also provided such care. On-campus care has always and continues to be provided free of charge. PA currently has 13 orthopaedic surgeons, including three sports medicine surgeons, and the only fellowship trained orthopaedic surgeons in the ... area in hand, orthopaedic spine, and foot and ankle surgery. Beginning in 1999, off-campus care was provided pursuant to a written Professional Services and Reimbursement Agreement ("Agreement"), attached hereto as Exhibit A. Pursuant to this Agreement, PA was the University athletic department's official and exclusive orthopaedic provider. The athletes, of course, were always able to see other providers if they wanted to do so. Other doctors in our group and I continued to provide free on-campus medical care to varsity athletes.

In May 2008, my appointment by the Governor as a member of the Board of Trustees ("Board") of [a state agency ("Agency")] was confirmed by the Mississippi Senate and I began serving a 10-year term on the Board. At that time, PA and LLC's financial arrangement changed in three (3) respects: first, the written Agreement was

terminated, but the university continued to pay certain amounts on behalf of scholarship athletes that were not paid by insurance. (A copy of that termination letter is attached as Exhibit B.) Secondly, I no longer personally performed any of the orthopaedic services rendered to University athletes (other than without charge on campus) and thirdly, there was no longer any official or exclusive relationship between PA/LLC and the University in terms of providing orthopaedic care for University scholarship athletes.

Throughout my 2008 Senate confirmation process, I disclosed and discussed my and PA and LLC's medical business relationship with the University. At no time was I advised by anyone involved (PEER, Governor's Office, Mississippi Senate) that there were any ethics law concerns about the arrangement, especially in light of my agreement not to perform any of these services. In fact, this arrangement and the revisions to it were discussed at the Senate confirmation hearing, and I was expressly told they were not a problem. This was an important change in the arrangement for me in that physicians in PA are compensated principally based on work personally performed so I was denying myself certain income by not treating University athletes.

Recent events have caused me to review Section 109 of the Mississippi Constitution. Following that review, and in spite of the revisions to the arrangement and the statements at the Senate confirmation hearing, I immediately took steps to determine exactly how much money the University has paid PA and LLC for scholarship athlete orthopaedic care provided since my 2008 term on the Board began. On May 22, 2012, I was able to determine that amount, which totaled \$44,488.21, from financial records supplied by the University. This amount has been repaid in full to the University. A copy of the letters transmitting the checks and a copy of the checks are attached as Exhibit C. Going forward, I seek the Commission's opinion as to future medical treatment by PA/LLC of University athletes, along with other relationships we have with the University and the University Athletic Foundation. The Commission's assistance in the form of an opinion with regard to these matters is greatly appreciated.

1. PA and LLC would propose to continue to treat University scholarship athletes and accept payment from the athlete's health insurance carrier. With respect to co-payments and deductibles that are the responsibility of the patient, not the insurer, we would pursue one of two options:

- (a) We would bill the athlete as we would any other patient, or
- (b) We would enter into a contract with the University Athletic Foundation for payment of the co-payment and deductible amounts.

I seek the Commission's opinion as to whether any ethics law is violated if either option is implemented.

2. PA/LLC has an office and a small x-ray room inside and three (3) designated parking spaces outside the University Field House where PA/LLC physicians provide on the spot care and treatment to injured University athletes free of charge. The x-ray equipment was donated by PA. This arrangement began as a part of a commitment from PA and LLC to contribute some \$390,000 toward construction of the Field House. The annual contributions in this regard are to continue through 2014. Please reference the letters dated November 5, 1999, and May 22, 2001, attached as Exhibit D. I seek the Commission's opinion as to whether any ethics law is violated if my businesses continue this arrangement at the Field House.

3. In 2005, PA, the University Educational Building Corporation [a public nonprofit corporation] and the University Athletic Foundation [a private nonprofit corporation] entered into a Stadium Suites Agreement (a copy of which is attached as Exhibit E) whereby PA committed to lease stadium suites to be constructed. We understood the commitment would be used to secure bonds to be issued by the Foundation to finance the construction. In exchange for the commitment, PA obtained tickets for seating in the private suite, designated parking and related benefits. This agreement expires in 2012 but I expect it to be renewed. It is my understanding that PA is paying the same amount for the suite rental as are all others receiving the same benefit. I seek the Commission's opinion as to whether PA may continue to make these contributions in exchange for these benefits.

I appreciate the Commission's consideration of these issues. My fellow physicians at PA and LLC are hopeful that my service on the Board will not cause us to have to end our long standing support of the University which helps the University and its athletic program to reach its full potential.

Public documents obtained by the commission's staff show the university uses public funds to purchase insurance coverage for collegiate athletes and approves affiliation agreements between the various universities and their athletic foundations.

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.

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, which constitutes an authorization of those expenditures. See Frazier at 693, citing Cassibry v. State, 404 So. 2d 1360, 1366-67 (Miss. 1981).

Therefore, the payment of public funds made by a university to a trustee or his business in exchange for services is strictly prohibited. The university athletics foundation is a nonprofit corporation, and the board of trustees does not allocate public funds to the foundation. However, the board of trustees does periodically approve an affiliation agreement between the university and the athletics foundation. The approval of the affiliation agreement by the board of trustees constitutes an authorization of contracts entered into by the foundation. Therefore, neither the trustee nor his business may accept payments from the university foundation for treating university athletes, pursuant to Section 109 or Section 25-4-105(2).

Likewise, the payment of medical insurance benefits to the trustee or his business are authorized by the board of trustees where the university pays the premiums with public funds and where the athletic foundation pays the premiums. Consequently, neither the trustee nor his business may accept insurance payments for treating university athletes when the university or the athletic foundation pays the premiums, pursuant to Section 109 or Section 25-4-105(2). However, the trustee and his business may accept insurance payments for treating university athletes when the insurance premiums are not paid by the university or the foundation.

Neither the trustee nor the PA or LLC are prohibited from donating free medical services to university athletes or from making other 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. Section 25-4-101 admonishes public servants to conduct themselves in a manner which enhances the public trust in government and avoid actions which may tend to create public suspicion regarding the honesty and integrity of those in government. An agreement between a university and a business owned by a trustee creates an appearance of impropriety and should be avoided.

Information obtained by the commission's staff shows the board of trustees must authorize the lease of stadium suites by a university or educational building corporation. However, the current lease was authorized and executed prior to the trustee's term of office and does not violate Section 109 or Section 25-4-105(2). The trustee is prohibited from having an interest in any future stadium suites agreement authorized by the board of trustees during his term of office or for one year thereafter.

MISSISSIPPI ETHICS COMMISSION

BY: _____

Tom Hood, Executive Director and
Chief Counsel