



STATE ETHICS COMMISSION

1324 MAIL SERVICE CENTER

RALEIGH, NC 27699-1324

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ROBERT L. FARMER
CHAIRMAN

PERRY Y. NEWSON
EXECUTIVE DIRECTOR

CONFIDENTIAL FORMAL ADVISORY OPINION

May 10, 2013

Mr. Steven D. Michael, Esquire
Sharp, Michael & Graham, LLP
P.O. Drawer 1027
Kitty Hawk, North Carolina 27949

Re: Conflicts of Interest Associated with Continued Service on NC State Bar Disciplinary Hearing Commission and Law Partner's Position as President-Elect of NC State Bar
AO-E-13-003

Dear Mr. Michael:

This is in response to your request for a formal advisory opinion. You have asked whether the State Government Ethics Act ("Ethics Act"), North Carolina General Statutes ("G.S.") Chapter 138A, would restrict you from continuing to serve and take official action as a member of the North Carolina State Bar's Disciplinary Hearing Commission ("the DHC") in light of your law partner's position as President-Elect of the North Carolina State Bar ("the State Bar"). This formal advisory opinion is based upon the information provided in your request and was adopted by the Commission at its May 10, 2013, meeting.¹

I. Brief Conclusion.

The Commission has determined that the Ethics Act would not restrict you from continuing to serve as a member of the DHC and taking official action on disciplinary matters brought before the DHC because your law partner is the President-Elect of the State Bar.

II. Facts.

You are a member of the DHC. The DHC is a "covered board" subject to the Ethics Act. You are therefore a public servant subject to the requirements of the Ethics Act, including the conflict of interest restrictions.

Effective January 2, 2013, Mr. Ronald Baker joined your law firm as a partner. Mr. Baker is President-Elect of the NC State Bar and will become President in October 2013.

¹ Please see the enclosure entitled "Formal Advisory Opinions Issued by the State Ethics Commission" for further information regarding the protections offered to individuals receiving those opinions.

The State Bar's disciplinary procedure generally begins with an allegation that a lawyer violated the Rules of Professional Conduct. Upon receipt, those complaints are investigated by the State Bar's Office of Counsel. Once the investigation has been completed a State Bar lawyer will send a recommendation about the appropriate disposition of the matter, along with relevant information, to the State Bar's Grievance Committee for its consideration.

Members of the Grievance Committee are appointed by the State Bar President. The Grievance Committee reviews complaints and related materials and determines if there is enough evidence to prove that the lawyer against whom the complaint was filed acted unethically. Although the State Bar President has access to information about the deliberations of the Grievance Committee, he or she does not vote on complaints considered by the Committee and cannot overrule Committee decisions on those complaints.

In more serious cases, the Grievance Committee may refer complaints for consideration by the DHC, an independent judicial body. The DHC conducts trials of complaints, sitting in panels of three members to hear those complaints. The State Bar is represented in those trials by the Office of Counsel through its staff attorneys. Following the trial, the DHC panel decides whether the alleged misconduct occurred. Following that determination, the DHC will meet again to decide on the appropriate discipline. State Bar officers, including the President, are not involved in and do not have decision-making authority in DHC proceedings.

III. The Ethics Act's Public Servant Conflict of Interest Standards.

The overall purpose of the Ethics Act is to ensure that covered State officials "exercise their authority" free from favoritism and undue influence. G.S. 138A-2. The Act's gift ban, financial disclosure, and conflict of interest provisions are therefore designed to guard against a covered official's exercise of official authority in circumstances in which the official may be influenced by his or her personal or business interests.

The Ethics Act's conflict of interest standards focus on those actions taken in the public servant's official capacity that may impact specific private interests of that public servant. However, those standards do not restrict a public servant's actions unless he or she is taking an *official* action or otherwise participating in an official "proceeding," it is reasonably anticipated that the action or participation will have the requisite impact on the private interests of the public servant, and it would be reasonable to infer that the public servant's official actions would be influenced by those interests.

Specifically, G.S. 138A-36(a) prohibits a public servant "acting in that capacity" from participating in an "official action" if that public servant or a "person with which the public servant is associated" may incur:

- a reasonably foreseeable financial benefit;
- which would impair the public servant's "independence of judgment" or it could reasonably be inferred that the financial benefit would influence the public servant's participation in that official action.

“Official action” includes “[a]ny decision ... made or contemplated in any proceeding, application, submission, request for ruling, or other determination” G.S. 138A-3(25).

“Financial benefit” includes a “direct pecuniary gain or loss” to the public servant or a person with which associated, or a direct pecuniary loss to a business competitor. G.S. 138A-3(14c). However, the conflicts provisions do not apply to those financial benefits “that are so remote, tenuous, insignificant, or speculative that the public servant’s ability to perform his official duties would not be compromised.” G.S. 138A-31(a).

“Person with which the public servant is associated” includes a member of the public servant’s extended family, the public servant’s client, and a business in which the covered person holds a position as a “director, officer, partner, proprietor” G.S. 138A-3(3)b. A State agency that “employs” the public servant is also considered to be a “person with which associated.” G.S. 138A-3(27)e.

If a public servant is determined to have a conflict of interest, G.S. 138A-36(b) requires that a public servant:

- “Abstain from taking any verbal or written action”
- “[I]n furtherance of the official action.”

G.S. 138A-36(c) also requires that a public servant remove himself or herself from a “proceeding,” defined to include a “quasi-judicial proceeding or a quasi-legislative proceeding,” if his or her impartiality may reasonably be questioned due to a “familial, personal, or financial relationship” with a participant in the proceeding.² A participant includes an “.... employee, agent, officer, or director of a business organization or group involved in the proceeding, or ... an organization or group that ... has some specific, unique, and substantial interest in the proceeding.”

IV. Analysis

In order to comply with the full expectations of the conflicts provisions of the Ethics Act, you seek guidance concerning your obligations as a public servant in light of your partnership relationship with Mr. Baker and his status as the President-Elect of the State Bar.

The first question to be resolved is whether Mr. Baker, or the State Bar, is a “person with which associated,” a relationship that would trigger the conflict of interest standards of G.S. 138A-36(a). But, since your law partner is not included in the definition of a “business with which associated” and you are not an employee of the State Bar, neither interest would trigger the G.S. 138A-36(a) conflicts analysis.

² G.S. 138A-31(a) similarly prohibits a public servant from taking an “official action” in certain circumstances where the public servant or a “business with which the public servant is associated” would derive a financial benefit from that action.

The second consideration is whether, under G.S. 138A-36(c), you have a “personal” and/or “financial” relationship with Mr. Baker or the State Bar.

As your law partner, you have a personal and/or financial relationship with Mr. Baker as those terms are used in G.S. 138A-36(c). However, as discussed, Mr. Baker does not have a role in those proceedings. Therefore, since he is not a “participant” in DHC proceedings, the G.S. 138A-36(c) conflicts standards would not be triggered by your business relationship with Mr. Baker. You would therefore not be restricted from participating in those proceedings as long as Mr. Baker or other members of your law firm are not directly involved. That could be the case, for example, if a member of your law firm were the subject of a particular complaint or represented a litigant.

Similarly, although the State Bar is a “participant” in the DHC proceedings, you do not have a “personal” or “financial” relationship with the State Bar as a result of your membership in that organization. The G.S. 138A-36(c) conflicts standards would therefore not apply.

V. Closing.

Thank you for contacting the State Ethics Commission. Please do not hesitate to call the Commission’s staff if you have any questions about the foregoing formal advisory opinion.

Formal Advisory Opinions Issued by the State Ethics Commission
Pursuant to the Ethics Act

Upon the written request of a public servant or legislative employee, G.S. 138A-13(a) of the State Government Ethics Act (“the Ethics Act”) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions on the “meaning and application” of the Ethics Act “and the public servant’s or legislative employee’s compliance therewith.” All opinions have prospective application only, are limited to the particular facts presented, and confer limited civil immunity upon a requester who follows the advice given. G.S. 138A-13(a) and (a2).

Reliance upon a formal advisory opinion immunizes the public servant or legislative employee making the request from (1) investigation by the Commission, except the alleged violation of criminal law while performing his or her official duties, (2) adverse action by his or her employing entity, or (3) investigation by the Secretary of State. G.S. 138A-13(a2).

Once issued by the Commission, formal advisory opinions are published in a redacted format on the Commission’s website within 30 days of issuance. G.S. 138A-13(d). Otherwise, requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 138A-13(e).