



**STATE ETHICS COMMISSION**  
1324 MAIL SERVICE CENTER  
RALEIGH, NC 27699-1324

George L. Wainwright, Jr., Chair  
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Commissioners:  
Barbara K. Allen  
Francis X. DeLuca  
William P. Farthing, Jr.  
Clarence G. Newsome  
J. LeRoy Roberts

Perry Y. Newson, Executive Director

Phone: 919-715-2071  
Fax: 919-715-1644  
[Email: ethics.commission@doa.nc.gov](mailto:ethics.commission@doa.nc.gov)  
[www.ethicscommission.nc.gov](http://www.ethicscommission.nc.gov)

**FORMAL ADVISORY OPINION—EDITED FOR PUBLICATION**

November 14, 2014

Re: Conflicts of Interest Associated With Independent Contractor Relationship with Law Firm and Service on State Board  
AO-E-14-005

Dear Requester:

This is in response to your request for a formal advisory opinion. You have asked whether the State Government Ethics Act (“Ethics Act”), G.S. Chapter 138A, would restrict you from serving on and taking official action as a member of a State board if those actions have a financial impact on a company that is a client (“the client”) of a law firm with which you have an independent contractor relationship (“the firm”).

This formal advisory opinion is based upon the information provided in your request and was adopted by the Commission at its November 14, 2014, meeting.<sup>1</sup>

**I. Brief Conclusion.**

The Ethics Act would not restrict you from serving on the State board or taking official action regarding matters involving the firm’s client because of your independent contractor relationship with the firm as long as the firm is not representing the client in those matters. You may, however, be restricted from taking official action if the firm represents the client before the State board, depending upon the particular circumstances.

**II. Facts.**

You are an appointee to a State board. As a member of the State board you are a public servant subject to the provisions of the Ethics Act, including the conflict of interest standards.

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<sup>1</sup> 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.

Official actions taken by the State board may have a financial impact on various businesses, including the client.

You maintain a private law practice in Raleigh. You also have an independent contractor relationship with the firm. You are not an employee of or a partner in the firm and do not share in the firm's overall profits. Rather, you receive a percentage of those fees earned for work you perform for the firm's clients and for work performed for clients you secure but which is performed by other members of the firm.

You state that the firm does "substantial work" for the client. However, you have never provided legal representation to the client and do not expect to do so in the future. You also do not anticipate that the firm will represent the client before the State board.

### **III. Applicable Statutory Provisions.**

#### **A. G.S. 138A-36(a) Conflicts Standards.**

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 otherwise influence the public servant's participation in that official action.

"Financial benefit" includes a direct pecuniary gain or loss to a person with which the public servant is associated or a direct pecuniary loss to a business competitor. G.S. 138A-3(14c). "Person with which associated" is defined to include "a client of the public servant." G.S. 138A-3(27d). It also includes a "business with which the public servant or a member of the public servant's immediate family is associated," including an employer of the public servant or immediate family member or a business in which the public servant holds a partnership interest. G.S. 138A-3(3).

In circumstances where a public servant has 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."<sup>2</sup>

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<sup>2</sup> "Official action" includes "[a]ny decision, including administration, approval, disapproval, preparation, recommendation, the rendering of advice, and investigation, made or contemplated in any proceeding, application, submission, request for ruling or other determination, contract, claim, controversy, investigation, charge, or rule making." G.S. 138A-3(25).

The public servant is also required to submit written reasons for the abstention to the employing entity. In addition, if a conflict of interest “would prevent a public servant from fulfilling a substantial ... portion” of his or her public duties, G.S. 138A-39(a) requires that the public servant eliminate that interest or resign from his or her position.

**B. G.S. 138A-36(c) Conflicts Standards.**

G.S. 138A-36(c) also requires that a public servant:

- “Remove himself or herself” from a “proceeding,”<sup>3</sup>
- “Considering the particular circumstances and type of proceeding involved,”
- “To the extent necessary to protect the public interest and comply with the Ethics Act,”
- If the public servant’s impartiality might reasonably be questioned due to a “familial, personal, or financial relationship” with a participant in the proceeding.

**C. G.S. 138A-38(a)(1) Class Safe Harbor.**

G.S. 138A-38(a)(1) allows a public servant to take an official action, notwithstanding a conflict of interest, if the financial benefit or detriment that would accrue to the public servant, a “person with which associated,” or a “participant” in a proceeding:

- As a member of “a profession, occupation, or general class”
- Is “no greater” than that which would accrue to “all members of that profession, occupation, or general class.”

Thus, in order for the subsection 38(a)(1) safe harbor to apply, the financial benefit (or detriment) resulting from the public servant’s official action would have to be equal to or less than that which would accrue to all members of the class.

**IV. Analysis.**

The central questions posed by your request are (a) whether the client, as a client of the firm, is *your* client, because of your independent contractor relationship with the firm, and therefore “a person with which associated” under G.S. 138A-36(a); and (b) whether you, as an independent contractor of the firm, would have a “financial” relationship” with the firm’s client or the firm under G.S. 138A-36(c).

The Ethics Act does not define the term “client” and the Commission has not previously interpreted or applied that term in this context. Thus, it is unclear whether the term “client”

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<sup>3</sup> Defined to include a quasi-judicial or quasi-legislative proceeding.

would include all clients of a law firm in which the official is a partner or shareholder. But that is not the question you pose and the Commission therefore need not address it at this time.

You are not a partner in the firm, and you do not share in the firm's overall profits. Rather, you are compensated only for the work that you perform for the firm's clients or work performed by other members of the firm for your clients. In considering a similar circumstance, the Florida Ethics Commission concluded that where a public official was "of counsel" to the law firm and had no ownership interest in the firm or share in the firm's overall profits, he did not hold a contractual relationship with each client of the firm. Therefore, the Commission concluded, the official did not have a conflict of interest with respect to official actions taken with respect to the firm's (not the public official's) client. CEO 03-07. See also CEO 96-1 (Florida Ethics Commission, January 29, 1996) (same); Advisory Opinion No. 99-12 (New York State Ethics Commission, September 15, 1999) (Official who is "of counsel" to law firm does not have a conflict of interest with respect to clients of law firm).

Applying these principles, and considering the particular relationship you have with the firm, the Commission concludes that the firm's clients, including the client, are not your "clients" as that term is used in the Ethics Act. Therefore, G.S. 138A-36(a) would not restrict you from taking official action as a member of the State board with respect to matters involving the firm's client. Of course, those individuals and businesses which you represent directly would be your "clients" under that provision.

Similarly, under the conflict of interest standards established by G.S. 138A-36(c), you do not have a "financial" relationship with the firm's client as a result of your independent contractor relationship with the firm. Therefore that provision would not require you to remove yourself from taking official action as a member of the Commission with respect to matters concerning the firm's client.

However, due to your independent contractor agreement with the firm, you do have a "financial relationship" with the firm under G.S. 138A-36(c). Therefore, in the event the firm represents the client in a proceeding before the State board, you may be required to recuse yourself to the extent necessary to protect the public interest. However, that determination would need to be made on a case-by-case basis.

**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).