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**FORMAL ADVISORY OPINION-EDITED FOR PUBLICATION**

June 9, 2016

Re: Permissibility of Licensing Board Member Providing Expert Witness Services  
AO-E-16-002

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Dear Requester:

This is in response to your request for a formal advisory opinion. You asked whether the State Government Ethics Act, G.S. Chapter 138A ("the Ethics Act"), would restrict a member of a State licensing board ("the Board") from providing expert witness services in court litigation in which the professional negligence of a board licensee is at issue.

This formal advisory opinion is based upon the information you have provided and was considered by the State Ethics Commission ("Commission") at its May 13, 2016, meeting.<sup>1</sup>

**I. Brief Conclusion**

You are not restricted from providing expert witness services concerning the standard of care applicable to a Board licensee while acting in your private capacity. However, you would be restricted from taking official action in your capacity as a member of the Board in certain matters involving the law firm that has hired you or the individual or entity represented in the matter in which you are providing expert witness services; or from appearing before the Board on behalf of either the law firm or the individual/entity represented. The Ethics Act would also prohibit you from using nonpublic and confidential information obtained as a Board member in connection with your role as an expert witness and from including your Board service in company advertising or in the promotion of the expert services provided.

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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.

Furthermore, although you are not restricted from providing expert witness services with the caveats described above, the Commission has a number of concerns regarding those activities which are outlined more fully below. You should therefore consider those concerns before agreeing to provide expert witness services in the future.

## **II. Facts**

You are a member of the Board. Therefore, you are a “public servant” who is subject to the Ethics Act.

The Board is responsible for the licensing, oversight, and discipline of members of a certain profession. The Board also provides continuing professional education to those individuals. In connection with its oversight responsibilities, the Board has the authority to administer examinations, issue, renew and revoke licenses, and consider complaints filed with respect to Board licensees, including those which allege gross negligence, incompetence, or misconduct in the practice of the profession. The Board is granted the authority to reprimand and assess civil fines against licensees, and suspend, refuse to renew, refuse to reinstate, or revoke those licenses. Thus, there is a distinct possibility that the Board may be presented with a complaint involving a litigant in one of the matters in which you have provided expert witness services.

You have been retained by a law firm to provide expert services in connection with pending court litigation in which the professional negligence of a licensee is alleged. That law firm previously retained you as an expert in other matters prior to your appointment to the Board. You may be asked to offer your professional opinion concerning whether the individual followed the applicable standard of care.

You state that you are asked to provide your professional opinion on that issue only in your private capacity, and not in your capacity as a Board member or on behalf of the Board. You will not use or disclose nonpublic or confidential information in the course of providing expert services in that litigation. In addition, although the Board is not currently considering any disciplinary action involving the parties to the litigation, you plan to recuse yourself from participating in the Board’s consideration of such matters.

## **III. Applicable Statutory Provisions**

A basic tenet of the Ethics Act is that public officials must “exercise their authority honestly and fairly, free from impropriety, threats, favoritism, and undue influence. Thus, although the Ethics Act does not specifically restrict a public servant’s private business or personal pursuits, it may restrict a public servant’s participation in certain “official actions” that could financially benefit the public servant or his/her clients, the public servant’s family members, and those employers or businesses in which they hold ownership interests or serve in a leadership position. “Official action” is broadly defined to include “any decision ... 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). “Official action” includes voting on a matter; participating in verbal or written discussions about the matter with agency staff, fellow board members, interested parties, and members of the media or the public; and accepting non-public information related to the matter or requesting such information from agency staff.

Specifically, G.S. 138A-36(a) restricts a public servant from taking an official action which would provide a “reasonably foreseeable” financial benefit or detriment to the public servant or a “person with which associated,” including a “client” of the public servant, if that benefit would impair the public servant’s independence of judgment. However, a public servant may take official action notwithstanding a conflict of interest, if that action would provide a similar benefit or detriment to all members of a profession, occupation, or general class. G.S. 138A-38(a)(1).

G.S. 138A-36(c) also requires that a public servant remove himself or herself from a quasi-legislative or quasi-judicial proceeding where the public servant has a familial, personal, or financial relationship with a participant if necessary to protect the public interest. That provision may require that public servants recuse themselves from voting on or participating in discussions concerning a matter. In order to protect the public interest, the Commission has also determined that a public servant would be restricted from representing a party or otherwise appearing before a board on which the public servant serves. AO-E-10-004 (November 19, 2010).

There may be circumstances where a public servant’s conflict of interest is so pervasive that it would disqualify the public servant from board service altogether. The Act defines a disqualifying conflict of interest as “a conflict of interest of such significance that the conflict of interest would prevent a public servant from fulfilling a substantial function or portion of the public servant’s public duties.” G.S. 138A-39(d).

A public servant is also restricted from disclosing or using confidential information obtained in connection with the public servant’s official position under any circumstance. And a public servant may not use or disclose “nonpublic” information obtained as a result of the public servant’s official position if such disclosure or use would result in a financial gain to the public servant, extended family members, or a business with which the public servant is associated. G.S. 138A-34.

G.S. 138A-31(b) also restricts a public servant from using his/her public position or title in connection with privately-funded advertisements promoting a private business. However, that provision generally allows a public servant to include his or her title in a biographical listing. Finally, a public servant is prohibited from using “state funds” for advertisements or public service announcements that include his/her name, picture, or voice and are included in a newspaper or on radio, television, or billboards. “State funds” has been interpreted by the Commission to include not only State monies but also State resources including “personnel, facilities, equipment, or supplies.” AO-E-13-004 (August 23, 2013).

#### **IV. Analysis**

G.S. 138A-36 would not restrict you from providing expert witness services in pending court litigation in your private capacity. Thus, the Ethics Act would not prevent you from providing expert services in the court matter described above, including providing testimony in a deposition, trial, mediation, and/or arbitration.

However, you would be restricted from taking official action in your capacity as a member of the Board if that action could be foreseen to result in a financial benefit or detriment to the law firm which hired you or the litigant whose interests the law firm represents; or in a proceeding in which the law firm or the litigant participate. Thus, you would need to recuse yourself from voting on and discussing those matters with Board staff, members, and interested parties. And, you may not appear before the Board in matters involving the parties to the litigation or which concern the particular facts underlying that matter.

In addition, while you are providing expert services in the litigation described, if a question of your Board membership is raised you should clarify that you are not expressing an opinion in your capacity as a Board member or otherwise representing the Board's views in that litigation.

You would further be restricted from using your official position to advance your business interests, either in connection with your business or your services as an expert witness. That would include using your position to promote your services to prospective customers, the news media, the general public, or the legal community if such actions could be reasonably foreseen to result in a financial benefit to you or your business. Moreover, although G.S. 138A-31(b) generally allows the inclusion of your official position in biographical listings, including resumes, you may want to consider removing your Board service from your resume in materials submitted in connection with providing expert services in order to avoid the perception that such services are provided in your official capacity.

The Ethics Act would also restrict your disclosure of any nonpublic or confidential information obtained as a Board member to benefit your business and those law firms that retain your expert services or the litigant represented by that firm.

In spite of the technical legal conclusions outlined above, I wanted to share the following additional insight into the Commission's extensive discussions regarding your request.

Because of the possibility that matters involving those litigants involved in the cases in which you have provided expert services will ultimately be addressed by the Board, you may find that you will be required to recuse yourself from a number of Board matters. This would prevent you from fulfilling your role on the Board in those instances. It is also possible that your private activities may ultimately interfere with your ability to perform a substantial portion of your Board duties and therefore create a disqualifying conflict of interest. Moreover, you may be placed in the very difficult position of being asked or compelled to testify before the Board in those matters and would therefore stand the risk of the Board disagreeing with your expert

opinion. Please carefully examine these concerns before agreeing to provide further expert witness services while you serve on the Board.

**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**

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).

Upon the written request of any person, State agency, or governmental unit affected by G.S. Chapter 120C (“the Lobbying Law”), G.S. 120C-102(a1) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions “on the meaning and application” of the Lobbying Law and “that person’s, State agency’s or any other governmental unit’s compliance therewith.” All opinions have prospective application only and must relate to real or reasonably anticipated fact settings or circumstances. G.S. 120C-102(a). Formal advisory opinions confer limited civil immunity upon a requester who follows the advice given. G.S. 120C-102(a1).

Once issued by the Commission, formal advisory opinions are published in an edited format on the Commission’s website within 30 days of issuance. G.S. 120C-102(c). Requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 120C-102(d). However, the Commission is required to send an unedited copy of each formal advisory opinion to the Secretary of State’s Office at the time the formal advisory opinion is issued to the requester, and the Secretary of State is required to treat the formal advisory opinion as confidential and not a matter of public record. G.S. 120C-102(d1). In addition, Commission staff is specifically authorized to share all information and documents related to requests for formal advisory opinions with the Secretary of State’s Office. The Secretary of State’s Office is required to treat any such information and documents in its possession as confidential and not a matter of public record G.S. 120C-102(d1).