



North Carolina General Assembly Legislative Ethics Committee

December 10, 2014

PUBLISHED EDITED ADVISORY OPINION OF THE LEGISLATIVE ETHICS COMMITTEE

Re: **AO-LEC-14-002** – Legislator Official or Legislative Action Resulting in Benefit to
Member of Legislator's Extended Family *Wnt* *AS*

Question: Is it permissible under the State Government Ethics Act ("the Act") for a legislator to take official action and/or legislative action, including voting on a bill, when an extended family member of the legislator, who is a registered lobbyist but does not reside with the legislator, has lobbied for or against the official action or legislative action on behalf of a lobbyist principal where the official action or legislative action produces a benefit, if any, to the lobbyist or lobbyist principal? In considering your response, please assume that the registered lobbyist's/extended family member's professional reputation could benefit from the successful effort, and that reputational enhancement could attract third party interest in hiring the lobbyist for additional lobbying work.

Answer: On the facts presented, the legislator is not prohibited from participating in an official action or legislative action simply because the official action or legislative action may or will result in the enhancement of the professional reputation of a registered lobbyist who is a member of the legislator's extended family not residing in the legislator's household and who has lobbied on behalf of a lobbyist principal for or against the official action or legislative action.

The following provisions of the Act are applicable to this request:

"§ 138A-31. Use of public position for private gain.

(a) Except as permitted under G.S. 138A-38, a covered person or legislative employee shall not knowingly use the covered person's or legislative employee's public position in an official action or legislative action that will result in financial benefit to the covered person or legislative employee, a member of the covered person's or legislative employee's extended family, or business with which the covered person or legislative employee is associated. This subsection shall not apply to financial or other benefits derived by a covered person or legislative employee that the covered person or legislative employee would enjoy to an extent no greater than that which other citizens of the State would or could enjoy,

or that are so remote, tenuous, insignificant, or speculative that a reasonable person would conclude under the circumstances that the covered person's or legislative employee's ability to protect the public interest and perform the covered person's or legislative employee's official duties would not be compromised."

"§ 138A-37. Legislator participation in legislative actions.

(a) Except as permitted under G.S. 138A-38, no legislator shall participate in a legislative action if the legislator knows the legislator or a person with which the legislator is associated may incur a reasonably foreseeable financial benefit from the action, and if after considering whether the legislator's judgment would be substantially influenced by the financial benefit and considering the need for the legislator's particular contribution, including special knowledge of the subject matter to the effective functioning of the legislature, the legislator concludes that an actual financial benefit does exist which would impair the legislator's independence of judgment."

Conflict of Interest Analysis under G.S. 138A-31(a)

Under G.S. 138A-31(a), a legislator shall not knowingly use the legislator's public position in an official action or legislative action if it will result in financial benefit to the legislator, a member of the legislator's extended family, or a business with which the legislator is associated.

The request states that the benefits, if any, resulting from the official action or legislative action will be limited to the lobbyist and the lobbyist principal. Therefore, the inquiry is whether the official or legislative action will result in a "financial benefit" to the lobbyist, as a member of the legislator's extended family, or to the lobbyist principal, as a business with which the legislator is associated.

The Act defines "financial benefit" as "[a] direct pecuniary gain or loss to the legislator, the public servant, or a person with which the legislator or public servant is associated, or a direct pecuniary loss to a business competitor of the legislator, the public servant, or a person with which the legislator or public servant is associated." G.S. 138A-3(14c). Therefore, a benefit to the extended family member must be a direct pecuniary gain or loss in order for it to create a conflict of interest under G.S. 138A-31(a).

G.S. 120C-300 prohibits a lobbyist from accepting a contingency fee. For purposes of this analysis, it is assumed that the extended family member complies with the law and will not receive any compensation from the lobbyist principal that is dependent upon the result or outcome of the legislative action.

The possible enhancement of the lobbyist's professional reputation and any additional lobbying business that may be generated as a consequence of that reputational enhancement is an indirect rather than a direct pecuniary gain or loss. On the facts

presented, the legislator's participation in the official action or legislative action would not result in a financial benefit to a member of the legislator's extended family and a conflict of interest under G.S. 138A-31(a) would not arise solely due to an extended family member registering as a lobbyist under Chapter 120C.

A financial benefit to the lobbyist principal resulting from the official or legislative action is a conflict of interest under G.S. 138A-31(a) only if the lobbyist principal is a "business with which the legislator is associated." Under G.S. 138A-3(3) of the Act, a "business with which the legislator is associated" is defined as a business having one of several specified relationships to a member of the legislator's immediate family.¹ A member of a legislator's extended family is not a member of the legislator's immediate family unless he or she resides in the legislator's household. G.S. 138A-3(17). In this case, the extended family member is not a member of the legislator's immediate family as defined in the Act because he or she does not reside in the legislator's household. Therefore, the lobbyist principal's relationship to the legislator's extended family member does not make the lobbyist principal a business with which the legislator is associated.

The lobbyist principal also could be a "business with which the legislator is associated" as a result of its relationship with the legislator under G.S. 138A-3(3). The request does not indicate whether or not the legislator has one of the requisite relationships with the lobbyist principal under G.S. 138A-3(3)a.-d., and for purposes of this advisory opinion, it will be assumed that such a relationship does not exist.

Based on the stated facts and this assumption, the lobbyist principal would not be a business with which the legislator is associated solely due to the extended family member registering as a lobbyist under Chapter 120C. Consequently, the lobbyist

¹ Business with which associated. – A business in which the covered person or filing person or any member of that covered person's or filing person's immediate family does any of the following:

- a. Is an employee.
- b. Holds a position as a director, officer, partner, proprietor, or member or manager of a limited liability company, irrespective of the amount of compensation received or the amount of the interest owned.
- c. Owns a legal, equitable, or beneficial interest of ten thousand dollars (\$10,000) or more in the business or five percent (5%) of the business, whichever is less, other than as a trustee on a deed of trust.
- d. Is a lobbyist registered under Chapter 120C of the General Statutes.

For purposes of this subdivision, the term "business" shall not include a widely held investment fund, including a mutual fund, regulated investment company, or pension or deferred compensation plan, if all of the following apply:

1. The covered person, filing person, or a member of the covered person's or filing person's immediate family neither exercises nor has the ability to exercise control over the financial interests held by the fund.
2. The fund is publicly traded, or the fund's assets are widely diversified.

principal's receipt of a financial benefit as a result of the official action or legislative action would not create a conflict of interest under G.S. 138A-31(a).

Conflict of Interest Analysis under G.S. 138A-37(a)

A legislator's participation in a legislative action can create a potential conflict of interest under G.S. 138A-37(a) if the legislator knows that the legislator or "a person with which the legislator is associated" may incur a reasonably foreseeable financial benefit from the legislative action. Under the Act, a member of a legislator's extended family is "a person with which the legislator is associated." G.S. 138A-3(27c)a.

G.S. 138A-37(a) would potentially prohibit the legislator from participating in a legislative action if the legislator knows that the legislator's extended family member may incur a reasonably foreseeable direct pecuniary gain or loss from the action. As discussed above, however, the only potential benefit to the legislator's extended family member presented on these facts is the possible enhancement of the lobbyist's professional reputation and any additional lobbying business that may be generated as a consequence of that reputational enhancement. This indirect benefit would not constitute a direct pecuniary gain or loss resulting from the legislative action and would not create a conflict of interest under G.S. 138A-37(a).

The analysis of conflict of interest issues under the Act is extremely fact-specific, and therefore any variation in the facts from those upon which this opinion is based may lead to a different conclusion.