

SUBJECT: LIMITATIONS UPON INDIVIDUALS AND BUSINESSES THAT ARE ASSOCIATED WITH A PUBLIC MEMBER OCCUPYING STATEWIDE OFFICE

SUMMARY:

Individuals and businesses that are associated with a public member occupying statewide office are not necessarily prohibited from representing clients before any level of the governmental entity with which the public member is associated, only those for which the public member has official responsibility as defined in Section 8-13-100(23).

QUESTION:

The Staff Counsel for the Department of Health and Environmental Control requests an advisory opinion concerning the prohibitions contained in Section 8-13-740(A)(3).

DISCUSSION:

This opinion is rendered in response to a letter dated July 15, 1992 requesting an opinion from the State Ethics Commission. The Commission's jurisdiction is limited to the applicability of the Ethics, Government Accountability, and Campaign Reform Act of 1991 (Act No. 248 of 1991; Section 8-13-100 et. seq., as amended, 1976 Code of Laws). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation.

Section 8-13-740(A) provides in part as follows:

(3) A public member occupying statewide office, an individual with whom he is associated, or a business with which he is associated may not knowingly represent another person before the same unit or division of the governmental entity for which the public member has official responsibility, except as otherwise required by law.

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(7) The restrictions set forth in items (1) through (6) of this subsection do not apply to:

- (a) purely ministerial matters which do not require discretion on the part of the governmental entity before which the public official, public member, or public employee is appearing;
- (b) representation by a public official, public member, or public employee in the course of the public official's, public member's, or public employee's official duties;
- (c) representation by the public official, public member, or public employee in matters relating to the public official's, public member's, or public employee's

personal affairs or the personal affairs of the public official's, public member's, or public employee's immediate family.

Applying Section 8-13-740(A) to the facts of this opinion requires a careful examination of its key terms and the context in which they are used. Public member is defined in Section 8-13-100(26) as:

...an individual appointed to a noncompensated part-time position on a board, commission, or council. A public member does not lose this status by receiving reimbursement of expenses or a per diem payment for services.

Thus, members of the DHEC Board are considered "public members" in accordance with Section 8-13-100(26).

Governmental entity is defined in Section 8-13-100(17) as:

...the State, a county, municipality, or political subdivision thereof with which a public official, public member, or public employee is associated or employed. "Governmental entity" also means any charitable organization or foundation, but not an athletic organization or athletic foundation which is associated with a state educational institution and which is organized to raise funds for the academic, educational, research, or building programs of a college or university.

Official responsibility is defined in Section 8-13-100(23) as:

...the direct administrative or operating authority, whether intermediate or final and whether exercisable personally or through subordinates, to approve, disapprove, or otherwise direct government action.

Individual with whom he is associated is defined in Section 8-13-100(21) as:

...an individual with whom the person or a member of his immediate family mutually has an interest in any business of which the person or a member of his immediate family is a director, officer, owner, employee, compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

Business with which he is associated is defined in Section 8-13-100(4) as:

...a business of which the person or a member of his immediate family is a director, an officer, owner, employee, a compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

Business is defined in Section 8-13-100(3) as:

...a corporation, partnership, proprietorship, firm, an enterprise, a franchise, an association, organization, or a self-employed individual.

Represent is defined in Section 8-13-100(28) as:

"Represent" or "representation" means making an appearance, whether gratuitous or for compensation, before a state agency, office, department, division, bureau, board, commission, or council, including the General Assembly, or before a local or regional government office, department, division, bureau, board, or commission.

In accordance with Section 8-13-740(A)(7), "representation" does not include purely ministerial matters requiring no discretion on the part of the agency. Therefore, a telephone inquiry regarding such nondiscretionary matters as permit applications or hearing procedures would not violate the requirements of Section 8-13-740.

The phrase "unit or division", which appears in Section 8-13-740(A)(3), is not defined in the Ethics Reform Act. Nevertheless, by including this language, the State Ethics Commission believes that the General Assembly did not intend to prohibit individuals and businesses that are associated with a public member from representing another person before any level of the same governmental entity. Indeed, had the Legislature intended that construction, the desired result could easily have been achieved by excepting the words "unit or division". Instead, the Commission believes that the insertion of these words manifests the General Assembly's recognition that many State governmental entities are sufficiently stratified or partitioned so as to eliminate the risk of undue influence being exercised when an individual or business with which a public member is associated represents another person before a unit or division of the same governmental entity. Thus, the paramount question in determining if an individual or business with which a public member is associated may represent another person is whether the public member has official responsibility over that level of the governmental entity before which the individual or business appears. Such a determination would obviously depend upon the specific facts in a particular circumstance.

For these reasons, the State Ethics Commission advises that individuals and businesses that are associated with a public member occupying statewide office are not necessarily prohibited from representing clients before any level of the governmental entity with which the public member is associated, only those for which the public member has official responsibility as defined in Section 8-13-100(23).