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OPINION COMMITTEE



STATE of TEXAS
HOUSE of REPRESENTATIVES

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Texas State Representative
22nd Legislative District

RQ-0954-GA

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The Honorable Greg Abbott
Office of Attorney General
Attn: Opinion Committee
Post Office Box 12548
Austin, Texas 78711-2548

March 14, 2011

Dear General Abbott,

I write to seek your opinion regarding the legislative conflicts of interest prohibition found in the Texas Constitution.

Article III, Section 18 of the Texas Constitution provides the following prohibition on legislator's interest in contracts:

INELIGIBILITY FOR OTHER OFFICES; INTEREST IN CONTRACTS. No Senator or Representative shall, during the term for which he was elected, be eligible to (1) any civil office of profit under this State which shall have been created, or the emoluments of which may have been increased, during such term, or (2) any office or place, the appointment to which may be made, in whole or in part, by either branch of the Legislature; provided, however, the fact that the term of office of Senators and Representatives does not end precisely on the last day of December but extends a few days into January of the succeeding year shall be considered as de minimis, and the ineligibility herein created shall terminate on the last day in December of the last full calendar year of the term for which he was elected. No member of either House shall vote for any other member for any office whatever, which may be filled by a vote of the Legislature, except in such cases as are in this Constitution provided, nor shall any member of the Legislature be interested, either directly or indirectly, in any contract with the State, or any county thereof, authorized by any law passed during the term for which he was elected.

There are few court and advisory opinions on this matter. As I understand them, the opinions establish some guidelines for the type of activities this provision encompasses. The prohibition applies only to current (not former) legislators, and applies to any contract funded by an appropriations bill passed while the legislator was a member of the legislature. The prohibition does not apply to a small ownership interest in a widely-held company, and does not apply to a legislator's receiving payment for his representation of an indigent criminal defendant.

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I request your opinion on the following questions:

1. Does the prohibition found in Article III, Section 18, apply to contracts entered into with a university system funded with the Available University Fund?
2. Does the prohibition found in Article III, Section 18, apply to an ownership interest held by a legislator in a blind trust?
3. Does the prohibition found in Article III, Section 18, apply to an ownership interest held by a legislator that, through partnership agreement, neither increases nor decreases in value during the time the legislator is subject to the prohibition?
4. Does the prohibition found in Article III, Section 18, apply to a company owned by a legislator's non-dependent child or that employs a legislator's non-dependent child?

Sincerely



Joe D. Deshotel
State Representative
22nd Legislative District

Enclosed: Background Information

Background Information

Available University Fund

Article 7, Section 11 of the Texas Constitution establishes the Permanent University Fund ("PUF"). Section 18 then establishes the Available University Fund ("AUF"), composed of earnings from the PUF. Section 18 constitutionally requires a portion of the AUF be used to pay principal and interest on certain bonds issued by the Texas A&M System and the University of Texas System. Further Section 18 provides that a portion of the AUF be used by the Texas A&M System and the University of Texas System for the support and maintenance of those systems.

Because of these constitutional provisions, it appears the AUF operates outside the control of the legislature. While the legislature may (and frequently does) include AUF funding in the appropriations bill, its inclusion does not grant the legislature any actual power over those funds. In other words, while a legislature may vote on the AUF funds, his or her vote is powerless in that regard, as the funds are constitutionally dedicated for the purposes described in Section 18.

Blind Trust

Legislators frequently hold their assets in a blind trust account, managed and controlled by professional managers without the control or oversight of the beneficiary, during the legislator's time in office. Because a legislator using a blind trust is prohibited from knowing where his or her assets are invested, the legislator does not know where his or her assets are invested. Imposing the constitutional requirement on such situations would appear to impose a significant burden on legislators, the companies their blind trust invests in, and the state entity contracting with those companies.

Frozen Ownership Value

There are some types of business interests that are both capital intensive and difficult to divest. In this situation, the legislator owns an interest in a company. However, prior to the constitutional prohibition on contracts taking place, the partnership establishes a value on the legislator's ownership, essentially transferring his percentage ownership into a dollar amount. During the time the legislator would be subject to the constitutional prohibition, the legislator's ownership value does not change. When and if the legislator leaves office, his ownership interest would be unfrozen, and his ownership percentage would be based on the equity value of the company versus the frozen value of his ownership. In other words, during his time in office, the legislator would not receive any benefit from contracts with the state, since he would not be a participating partner in any activities undertaken during that time period.

Non-Dependent Children

The constitutional prohibition applies to direct and indirect benefits. The indirect benefits could be read to include those paid to a legislator's spouse or a legislator's dependent children. However, applying the prohibition to a legislator's non-dependent children would potentially broaden the prohibition to apply to a legislator's extended family. Instead, it appears the proper interpretation of the indirect benefit language is to limit its application to a legislator's spouse, dependent children, and holdings held directly or indirectly (such as through a holding company) by those individuals.