



STATE OF NORTH CAROLINA
Office of the State Auditor

Leslie W. Merritt, Jr., CPA, CFP
State Auditor

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April 15, 2008

Senator Martin L. Nesbitt, Jr.
300 N. Salisbury Street
Raleigh, North Carolina 27603

Dear Senator Nesbitt:

We received a complaint through the State Auditor's Hotline related to a potential conflict of interest involving the Senator and his involvement with the day-to-day operations of a stock car racing team owned by his son and whose major sponsor at the time was Blue Cross Blue Shield of North Carolina (BCBSNC). In addition, we learned that a company the Senator co-owns with his son has a direct financial relationship with the racing team. In our opinion, the Senator's involvement with the racing team is a potential conflict of interest. Furthermore, we believe the potential conflict of interest was not properly disclosed on the Statement of Economic Interest filed with the State Ethics Commission.

The State Government Ethics Act vested responsibility for review and evaluation of the Statement of Economic Interest as well as issuance of both formal and informal advisory opinions with the State Ethics Commission. However, conflicts of interest issues pre-date the Ethics Act and the Ethics Act does not preclude other agencies of government from investigating credible allegations related to conflict of interest issues.

In addition, the Ethics Act requires a signed, sworn complaint to initiate an investigation. However, this complaint was received via the statutory State Auditor's Hotline in accordance with North Carolina General Statute § 147-64.6 (c) (16) which requires confidentiality and allows for anonymity. To limit all ethics-related and conflict of interest-related inquiries in all of North Carolina to only the few that may be presented by signed, sworn affidavits to the Ethics Commission would eliminate the vast majority of inquiries of this nature. Therefore, we proceeded with our investigation in accordance with the Office of the State Auditor's enabling statute. We are presenting the following findings and recommendations for your review and written response.

Nesbitt Racing Enterprises, Inc.

Nesbitt Racing Enterprises, Inc. is a registered North Carolina corporation that, according to annual reports filed with the North Carolina Secretary of State, is engaged in “automobile racing, sales, and repair.” The original Articles of Incorporation, filed on January 24, 1997 with the Secretary of State, name the Senator’s son and another individual as the initial Board of Directors of the corporation.

A subsequently filed annual report names the Senator’s son as President and the other individual as Secretary of the corporation. However, annual reports filed for the years ending December 31, 2003, through December 31, 2006 name the Senator’s son as President and the Senator as Vice-President. In addition, these forms were amended on July 18, 2007 to remove the name of a Vice-President and include the previously named individual as Secretary.

When we questioned the Senator with regard to the annual reports, he said that he is not (and never has been) an officer of Nesbitt Racing Enterprises, Inc. The Senator said that him being named as Vice-President was done in error by his accountant. The accountant filed the reports for this company and another company named Nesbitt Ventures, Inc. that the Senator co-owns with his son.

We spoke with the Senator’s accountant who verified that he had made an error when completing the forms. During this conversation, the accountant stated that Nesbitt Racing Enterprises, Inc. does not have a Vice-President, but only a President and the individual previously named as Secretary.

The Senator said that his only involvement with his son’s racing team is as an un-paid crew chief. We contacted various individuals involved with the racing industry who informed us that the position of crew chief of a racing team is a critical position. The crew chief is responsible for the preparation of the race car and coordination of race-day activities before and during the race. While many teams use part-time labor to man a race team, the crew chief usually is the only full-time employee.

Nesbitt Ventures, Inc.

According to the original Articles of Incorporation on file with the Secretary of State, Nesbitt Ventures, Inc. was formed on July 2, 1996 (seven months prior to the formation of Nesbitt Racing Enterprises, Inc.) and names the Senator’s son as President and the Senator as Vice-President. The business purpose of the corporation is to “own and lease real estate.”

The Senator's Statement of Economic Interest lists real estate holdings with a value of \$10,000 or more. It discloses that all holdings are in Buncombe County with the exception of land in Rutherford County. We searched property records in these counties and found that the only real estate owned by Nesbitt Ventures, Inc. is a commercial building that was deeded to Nesbitt Ventures, Inc. on May 23, 1996. The address of this building is the same address listed for Nesbitt Racing Enterprises, Inc.

Also, on April 25, 2003, a Deed of Trust Securing Future Advances was recorded that shows this property being used as collateral by Nesbitt Racing Enterprises, Inc. as the "borrower" to obtain a \$90,000 line of credit. A similar instrument was also recorded on December 18, 2007 to increase the amount to \$150,000.

The Senator acknowledged that the only property owned by Nesbitt Ventures, Inc. is the garage that houses his son's racing team and that the building was used as collateral by his son's company to secure the line of credit.

Blue Cross Blue Shield sponsorship of racing team

The financial success of a racing team is determined primarily by the amount of sponsorship money that a team can generate because winnings in the Hooters Pro Cup series (of which Nesbitt Racing is a participant) do not typically reach substantial amounts. We contacted various individuals involved with the racing industry who informed us that race teams normally operate either "out of pocket" or garner financial support by obtaining sponsorships from various corporations or other organizations.

A formal sponsorship agreement usually entails an arrangement between a corporation and a racing team whereby the corporation offers financial support in return for various levels of advertising and/or access to the racing team and venues. This sponsorship can take the form of a team agreeing to display corporate logos, attending corporate events, or using the corporation's goods or services. For example, the truck that transports the Nesbitt race car had a BCBSNC corporate logo displayed on its exterior. (See Attachment A) In addition, corporate sponsors usually gain access to the inner circle of the race team and "up close" access during races in the form of hospitality tents to entertain clients or business associates.

Based upon information we were able to obtain related to the BCBSNC sponsorship of Nesbitt Racing, Inc., we determined that the corporation was a "major" sponsor. The sponsorship was in place for seven years and related only to advertising. As of January 1, 2008, BCBSNC is no longer a sponsor for Nesbitt Racing, Inc.

Conflict of Interest

In general, a conflict of interest can be defined as a conflict between a person's private interests and public obligations when the individual is in a position to take advantage of their position for their personal benefit. The existence of a conflict of interest may not, in and of itself, be evidence of wrongdoing. In most instances, a conflict of interest only becomes an issue when an individual tries to influence the outcome of a decision for personal benefit. However, an individual not acting upon the conflict of interest does not remove the need to address it.

For many legislators, it is virtually impossible to avoid having conflicts of interest from business and personal relationships formed prior to taking office. In fact, a conflict of interest can exist even if there is no improper act as a result of it. The Senator stated that he does not believe that a conflict of interest exists with his relationship to Nesbitt Racing Enterprises, Inc. because "...anyone who knows me knows that there is no conflict."

North Carolina General Statute § 138A-21 indicates that the purpose of disclosing financial and private interests is to identify and avoid conflicts of interest between a covered person's ¹ private interest's and a covered person's public duties. A covered person has "...an affirmative duty to provide any and all information that a reasonable person would conclude is necessary to carry out the purposes of this chapter and to fully disclose any conflict of interest or potential conflict of interest between a covered person's public and private interests...."

The disclosure of any actual or potential conflict of interest is required in question 19 of the Statement of Economic Interest. Disclosure of a potential conflict of interest is one method to mitigate the existence of a conflict of interest. It is often easier to see a conflict of interest in others than in oneself. Therefore, a third party evaluation of the relationship is critical to ensure full disclosure and alleviate questions concerning the relationship.

Statement of Economic Interest

The Senator filed the required Statement of Economic Interest with the State Ethics Commission on March 15, 2007. The form includes no disclosure relating to his son's racing team and/or the fact that BCBSNC is the major sponsor for the race team. As a major provider of health insurance in the state, BCBSNC has frequent interaction with the North Carolina General Assembly. The Senator is a member of the Senate Health Care Committee and is Vice-Chair of the Senate Mental Health/Youth Services Committee. Both of these committees historically have had issues before them involving BCBSNC.

¹ N.C.G.S. § 138A-3 (10) Covered Person- A legislator, public servant, or judicial officer, as identified by the Commission under N.C.G.S. 138A-11.

Question number 19 on The Statement of Economic Interest states:

*“Please provide any other information necessary to **fully disclose** (emphasis added) any actual or potential conflicts of interest you may have had during the preceding year or have currently. This includes actual or potential conflicts of interest related to past personal or business relationships. If you are uncertain as to whether additional information should be disclosed, please contact the Commission for guidance.”*

We asked the Senator if he believed that the financial relationship between Nesbitt Ventures, Inc. (which he is half-owner) and his son’s race team, whose major sponsor is a company that has many issues coming before him at the General Assembly, might be perceived as a potential conflict of interest. The Senator said that he contacted the State Ethics Commission and received an informal opinion that no disclosure was necessary.

We asked the Senator with whom he spoke at the Commission, and he declined to provide a name. We also asked the Senator if he had informed the Ethics Commission of the economic involvement between Nesbitt Ventures and his son’s racing team. He stated that he could not recall if he had.

We questioned the Senator further about what he believed should be included on question 19 of the Economic Interest form and he said that there were “many questions about that.” He said that he believed the question and the form itself did not pertain to legislators but to appointed state officials and that all of his relationships were not required to be listed “...because we come into office with many different business relationships and you can not possibly list them all.”

We asked the Senator why, as a legislator, he would not simply list the relationship and involvement with his son’s racing team on the form in order to avoid any questions. He said that “by my listing that relationship on the form, I would be admitting to a conflict of interest and anyone who knows me knows that there is no conflict of interest.” The Senator indicated that disclosure would inhibit his son’s ability to conduct business. “In fact, his (son’s) business has already suffered from all of this. People who do business with people I know do not want to be dragged into my politics.”

The Senator stated the following regarding the form: “The funny thing is, I can receive actual payments from BCBSNC and not have to disclose it on the form.” We asked how this was true and he said that all he needed was “to have the payments made to my law firm and I only had to disclose my law firm on the form, not the payment.”

We requested to speak with the State Ethics Commission staff concerning this matter. Specifically, we requested to verify if the Senator had asked for an informal opinion and, if so, the specific information he provided to them related to his involvement with Nesbitt Racing

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Enterprises, Inc. However, Commission officials chose not to provide the information citing their understanding of the State Ethics Act. Therefore, the Office of the State Auditor continued its review of the conflict of interest complaint in accordance with its enabling statutes.

Conclusion

Nesbitt Racing Enterprises, Inc. used property owned by Nesbitt Ventures, Inc. as collateral to secure a \$150,000 line of credit. In light of his position as half-owner of Nesbitt Ventures, Inc., the Senator has a direct financial interest in Nesbitt Racing Enterprises, Inc. Because BCBSNC is a major sponsor of Nesbitt Racing Enterprises, Inc., and is a company that does business before committees upon which the Senator presides (including one which he co-chairs), this situation is a potential conflict. Furthermore, as a potential conflict of interest, disclosure on the Statement of Economic Interest is required. According to the Statement of Economic Interest Form:

“North Carolina law establishes a fine of \$250 for failure to file a complete Statement of Economic Interest. In addition, it is a Class 1 misdemeanor to knowingly conceal or fail to disclose required information, and a Class H felony to provide false information on a Statement. Such actions can also subject you to disciplinary action in accordance with your employment.”

Recommendation

We recommend that the Senator include all business and personal relationships that may create an actual or potential conflict of interest explicitly as required by the Statement of Economic Interest. We also recommend that the Senator consult with the North Carolina State Ethics Commission regarding the need to file revised Statements to include his involvement with his son's racing team on previously filed forms.

Please provide your written response to this finding and recommendation including corrective actions taken or planned by April 29, 2008. In accordance with General Statute §147-64.6(c) (12), the Governor, the Attorney General and other appropriate officials will receive copies of this management letter. If you have any questions or wish to discuss this matter further, please contact us.

Sincerely,



Leslie W. Merritt Jr., CPA, CFP
State Auditor

Management letters and responses receive the same distribution as audit reports.

ATTACHMENT A



AUDITOR'S NOTE

In your response, you fail to disclose that we provided you additional time to respond to our special review. The original response was due April 29, 2008 and we granted you an extension until May 7, 2008. A subsequent extension request was denied because, during our interviews, you stated that you had already asked for and received an informal advisory opinion. Therefore, granting an additional extension in order to get another advisory opinion was not necessary. However, with respect to all issues involved, we have refrained from releasing this report until May 27, 2008, in effect, granting the extension you requested

You state that you “tried to work cooperatively” with us and “provide...any information possible to help you fully understand the laws and facts at hand.” However, in December 2007, we asked you to provide us full information regarding your conversations with the State Ethics Commission. You refused to provide contact information within the Ethics Commission.

Further, when we contacted the Ethics Commission, they declined to provide us any information regarding your conversation with them citing their confidentiality requirement and we agreed to honor that requirement. On April 10, 2008, we requested that you grant the Ethics Commission consent to speak with us and you declined. However, you are now providing us an informal advisory opinion that is dated May 7, 2008 as well as a “Confidential Recommended Formal Advisory Opinion” dated May 9, 2008.

It is clear that Ethics Commission and Legislative Research Division staff adamantly disagree with our position that the Commission does not have sole-jurisdiction in broader potential and actual conflict of interest matters. Until now, questions regarding jurisdiction and confidentiality issues with the ethics laws have not been addressed. We believe the legislative intent of ethics laws was to increase the visibility and public scrutiny of ethical concerns.

You state in your response that our report will somehow “undercut” the goal of the ethics law to “improve oversight and transparency” in state government. However, one could argue the opposite, that the Office of State Auditor is the agency championing transparency in this matter.

You infer in your response that our investigators did not understand the ethics law and therefore had to ask for your assistance. However, you are misrepresenting our questions. An important process of any audit or investigation is to ask others for explanations and clarifications regarding their knowledge and understanding of laws and regulations. Then, we attempt to verify the veracity of the answers to our questions. This is fundamental to the investigative process.

Further, you note that we must “read the entire sentence, if not the entire statute, to understand its meaning.” We agree on that. However, we respectfully disagree with your accusation that we did not consider all content. The phrase you cite speaks of “unnecessary and irrelevant personal information.” We do not believe the issues that we have raised are “unnecessary or irrelevant” to fully disclose a “potential” conflict of interest.

Regarding statements made by you during an interview about companies providing payments to your law firm, we stand by the statements recorded by two investigators during the interview as

well as their interpretation of the context of your statement. We trust that, if a client of your law practice for which you were receiving payment was a business with significant matters before you at the legislature, you would at least consider the “potential” conflict of interest that situation might create rather than simply consider “the funny thing” about the Statement of Economic Interest even though you would not be “legally” required to disclose that relationship.

Finally, you make accusations regarding investigators “hid(ing) in the bushes” and “contact(ing) clients and ask(ing) them suspicious questions.” The photographs included in the report were taken during broad daylight on a public street. Further, any contact we make with third parties is done as part of the investigation to gain full understanding of the facts as presented to us during the course of our work.



North Carolina General Assembly
Senate

SENATOR MARTIN L. NESBITT, JR.
49TH DISTRICT

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May 7, 2008

COMMITTEES:

APPROPRIATIONS
EDUCATION/HIGHER EDUCATION
SUBCOMMITTEE
COMMERCE
EDUCATION/HIGHER EDUCATION
FINANCE
HEALTH & HUMAN SERVICES
JUDICIARY
PENSIONS, RETIREMENT & AGING
RULES

The Honorable Leslie W. Merritt, Jr.
State Auditor
2 S. Salisbury Street
20601 Mail Service Center
Raleigh, NC 27699-0601

Dear Auditor Merritt:

I am writing in response to your special review regarding allegations related to my relationship with a racing team company owned by my adult son, and whether my disclosure of that relationship is sufficient. You will be pleased to know that I had previously complied with all the actions you recommended long before you began your review, including seeking guidance from the State Ethics Commission.

At your suggestion, I followed up with the Ethics Commission and have provided the Commission with a copy of your report for their review. The Commission has confirmed in an informal opinion that I have already taken all the actions required by law with regard to my relationship with my son's company.

The Ethics Commission is scheduled to meet this Friday, May 9, 2008, to consider my request for a formal opinion on these matters. I asked you for additional time to respond to your draft report until after I had received the formal opinion next week. You denied my request, saying you did not see the necessity to delay the issuance of your report pending an additional advisory opinion. Accordingly, I am attaching a copy of the informal opinion I received from the State Ethics Commission and incorporate it as part of my response to your draft report. I would still like to request that I be able to provide you with the formal opinion to be incorporated as part of my response when it is available next week.

I have tried to work cooperatively with you and your employees, and provide you with any information possible to help you fully understand the laws and the facts at hand, and I had assumed you were acting in good faith. However, when I asked you for additional time to



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respond so that the State Ethics Commission could issue a formal opinion on this matter – the same Commission which, as you state in Paragraph 2 of your report, has vested responsibility for review and evaluation of the Statement of Economic Interest – you denied my request. In view of the fact that the only question of substance your report raises is whether a question on the SEI was answered appropriately, and in view of the fact that, as you acknowledge, the evaluation of that question lies within the purview of the Ethics Commission, I can only conclude that your actions are nothing more than an attempt to turn negative politics and misleading attacks into official, tax-subsidized actions of State government. I can think of no other reason you would deny the Ethics Commission an opportunity to be heard before you issue your final report.

For you to continue down your path will undercut the progress we have made in recent years to strengthen our ethics laws, improve oversight and transparency, and help restore the public's faith in their government. Your actions undercut the State Ethics Commission's ability to regulate ethics in our state, diminish the office that you hold – an office that, your Web site says, is to work in a "proactive, nonpartisan manner" and be "committed to honesty, integrity and professionalism" – and takes political mudslinging to a new level in North Carolina. You must assume that your continued actions in this regard will either enhance your reputation or diminish mine. In my opinion it will do neither.

Legal Issues to Consider

The fact that I have already taken all the appropriate steps to comply with our ethics laws does not mean that I agree with your findings. It became apparent to me during my discussions with your staff that there was significant confusion and misinterpretation of the ethics laws – including which agencies have the proper statutory jurisdiction over such investigations, what obligations legislators have to avoid conflicts of interest, and which information must be disclosed on economic interest forms. I have taken the liberty of enclosing for your review a legal analysis of these and other questions as part of my formal response to your report. I attach and incorporate that legal analysis as part of my response. I hope you will review it and share it with your staff. You should know that, at one point in our interviews, your employee admitted to me that he did not understand the ethics laws and asked me to explain it to him! The integrity of our ethics laws – and the seriousness with which violations of these laws should be addressed – demand that anyone dealing with questions of ethics fully comprehend the laws and their consequences. This is exactly why the General Assembly provided jurisdiction to the State Ethics Commission and its staff, who have the expertise needed to properly interpret the laws.

I hope the following example will help clarify the importance of understanding the ethics laws. G.S. 138A, Article 3, "Public Disclosure of Economic Interests," begins with G.S. 138A-

21 which states the purpose of requiring such disclosure. Your report cites a portion of this law stating that a covered person has "an affirmative duty to provide any and all information... and to fully disclose any conflict of interest or potential conflict of interest between the covered person's public and private interests," but you fail to include the remainder of that sentence which states: "but the disclosure, review, and evaluation process is not intended to result in the disclosure of unnecessary or irrelevant personal information." When you interpret a statute, you must at least read the entire sentence, if not the entire statute, to understand its meaning – not just a portion of the sentence, as your staff quoted in your report.

This lack of understanding of the public disclosure laws has led to flawed logic in your report regarding what should be disclosed about Nesbitt Racing. Following your logic, if a company in which I own stock in has a lease with another company, I would not only have to list all the companies with which my company does business, but I would also be required to list all the companies with which the *other* company does business. And, following the same logic, let's say I owned more than \$10,000 worth of stock in Duke Energy. In addition to listing Duke Energy on my form, I would also have to disclose every other company with which Duke does business, and even all the businesses with which Duke's millions of customers do business. And, again following the same logic, you would have had a duty to list all the clients of your financial services firm and all the companies with which those clients do business.

Factual and Interpretation Errors to Correct

I would also like to correct a factual error your review contains about my role with Nesbitt Racing. On page 2, second paragraph, the report implies that the annual reports for Nesbitt Racing Enterprises, Inc. (Nesbitt Racing) had shown me as a vice president regularly for several years before a correction was made in 2007. That is not correct. The incorrect reports for all these years were incorrectly filed either in June or July, 2007, and corrected in July, 2007 as soon as the accountant's mistake was realized. As your report noted, after your staff spoke with Nesbitt Racing's accountant they were satisfied that this mistake was the accountant's error.

Your report quotes excerpts of my interview with your staff that lead to inaccurate and wrongful impressions. One such excerpt refers to me saying that I could receive payments directly from Blue Cross without having to report it on the disclosure form, if those payments were provided to my law firm. This comment was made by me during my attempt to explain the ethics law to your staff, after they admitted not understanding the law. I was merely referring to the fact that the law does not require attorneys to disclose clients of their law firm – but your report seems to imply that I should disclose these clients. However, disclosing specific clients would be an ethics violation under the State Bar's Rules of Professional Conduct which, by virtue of the attorney-client privilege between me and my clients, protects my clients' identities.

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The ethics law requires attorneys to list the areas of their practices, but not the specific clients they represent. A more detailed explanation of this is found in the enclosed legal analysis.

Another comment which I believe was mischaracterized in your report is the one in which I discuss my son's business being harmed by this investigation. Let me see if I can better explain how the actions of your office in this regard have been destructive. Let me use as an example, your situation in terms of formerly being in business with your son. Your disclosure form does not list the clients of that business – and your political opposition calls for an investigation. Even though the law does not require disclosure and even though the Ethics Commission has confirmed your compliance with the law, an investigation is launched. These investigators hide in the bushes outside your son's office. They take pictures of his property and his clients. They contact his clients and ask them suspicious questions. All of this will obviously be detrimental to your son's business. Your son's clients have a simple business relationship with him, and they don't want their private affairs exposed to the world. So they will begin looking for another financial services provider who does not have to endure unfounded investigations, political attacks or other hassles due to the fact that you, his father, have chosen to seek public office to serve the people of North Carolina. As a public official, I expect to be scrutinized to some measure – even though these allegations have already been deflated by my compliance with the law and by the advice of the Ethics Commission. But my son and his livelihood have become unintended victims of politics, and in turn of your investigation of these baseless claims.

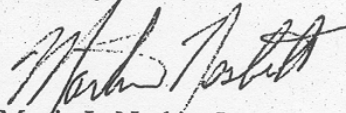
Political Motivations at Play

Large newspapers across the state have written articles about my involvement in my son's racing team, my son has competed in more than 100 televised races, and his hauler, which is emblazoned with all his advertisers, travels more than 40,000 miles per year. His racing sponsors have been publicly known for years – that is the point of the advertising, after all – and my role on my son's team is equally well known. However, my political opponents have been trying to make Blue Cross' advertising an issue for more than a year. In fact, the very reason I initially sought the advice of the State Ethics Commission is because my political opponent and his supporters have been writing blogs and distributing emails attempting to use this as an issue against me. I have nothing to gain from not disclosing something that has been in the public domain for years. And although I was confident that no conflict existed, I wanted the Ethics Commission to officially confirm that fact given the political circumstances. This is simply an issue of what is required to be disclosed, and as I mentioned at the start of my letter, I had already complied with the law – and, incidentally, your recommendations – well before your review even began.

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I sincerely hope that the confirmation from the Ethics Commission will enable you to close your investigation of these unfounded allegations and dismiss your draft report in its entirety. The Office of the State Auditor and its Hotline are so important in making sure government is operating effectively and honestly. I don't want to see them compromised in any way – but I am deeply concerned that by investigating unfounded complaints of this nature, your office could become a new “smear tactic” in increasingly negative and cynical campaigns. This is a waste of tax dollars that I think we would all find objectionable as taxpayers and public servants. Just as important, it discredits your efforts to keep your office above partisan politics – and discredits our ethics process as a whole. This is precisely why an independent Ethics Commission was created – not only does it have vast expertise and knowledge of our ethics laws and their complexities, but it also provides independent, bipartisan oversight shielded from political misuse by others.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Martin L. Nesbitt, Jr.", written in a cursive style.

Martin L. Nesbitt, Jr.
State Senator

Enclosures: State Ethics Commission Informal Opinion
Legal Analysis of State Government Ethics and Authority of the State Auditor