



STATE OF ALABAMA  
**ETHICS COMMISSION**



**COMMISSIONERS**

Jerry L. Fielding, Ret. Sr. Circuit Judge, Chair  
Frank C. "Butch" Ellis, Jr., Esq., Vice-Chair  
Charles Price, Ret. Circuit Judge  
Beverlye Brady, Esq.  
John Plunk, Esq.

MAILING ADDRESS  
P.O. BOX 4840  
MONTGOMERY, AL  
36103-4840

STREET ADDRESS  
RSA UNION  
100 NORTH UNION STREET  
SUITE 104  
MONTGOMERY, AL 36104

Thomas B. Albritton  
Executive Director

TELEPHONE (334) 242-2997  
FAX (334) 242-0248  
WEB SITE: [www.ethics.alabama.gov](http://www.ethics.alabama.gov)

June 6, 2018

**ADVISORY OPINION NO. 2018-06**

Mr. Neil Rafferty  
Birmingham Aids Outreach  
205 32nd Street South  
Birmingham, AL 35233

Member of Legislature/Conflict of Interest

An employee of Birmingham Aids Outreach may retain his employment with that nonprofit organization if elected to the Alabama House of Representatives but must remain aware of conflicts of interests as they arise and may not violate the lobbying restrictions of Ala. Code § 36-25-23(a) while he serves.

Dear Mr. Rafferty:

The Alabama Ethics Commission is in receipt of your request for an Advisory Opinion of this Commission, and this opinion is issued pursuant to that request.

**FACTS**

Neil Rafferty is running for Alabama House District 54 in Birmingham, Alabama. Currently, he is employed at Birmingham AIDS Outreach (BAO), a 501(c)(3) nonprofit. BAO does not have a 501(c)(4) component and does not lobby or seek to lobby or influence legislation. The program he manages at BAO receives direct funding from the federal government, not the State. However, there are programs within the agency that he does not manage but that do receive funding from the Alabama Department of Public Health (ADPH).

### **QUESTION PRESENTED**

Does his employment with BAO present an irreconcilable conflict of interest if he were elected to the Alabama House of Representatives?

### **ANALYSIS**

Mr. Rafferty's employment with BAO does not present an irreconcilable conflict of interest if he were elected to the Alabama House of Representatives. The Code defines a public official and a business with which the person is associated as follows:

(27) PUBLIC OFFICIAL. Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal level of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal level of government or their instrumentalities, including governmental corporations. For purposes of this chapter, a public official includes the chairs and vice-chairs or the equivalent offices of each state political party as defined in Section 17-13-40.<sup>1</sup>

(2) BUSINESS WITH WHICH THE PERSON IS ASSOCIATED. Any business of which the person or a member of his or her family is an officer, owner, partner, board of director member, employee, or holder of more than five percent of the fair market value of the business.<sup>2</sup>

Ala. Code §36-25-5(a) to (c) states,

(a) No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain.

(b) Unless prohibited by the Constitution of Alabama of 1901, nothing herein shall be construed to prohibit a public official from introducing bills, ordinances, resolutions, or other legislative matters, serving on committees, or making statements or taking action in the exercise of his or her duties as a public official. A member of a legislative body may

---

<sup>1</sup> See Ala. Code §36-25-1(27)

<sup>2</sup> See Ala. Code §36-25-1(2)



not vote for any legislation in which he or she knows or should have known that he or she has a conflict of interest.

(c) No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or principal campaign committee as defined in Section 17-22A-2, which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy. Provided, however, nothing in this subsection shall be deemed to limit or otherwise prohibit communication between public officials or public employees and eleemosynary or membership organizations or such organizations communicating with public officials or public employees.

Ala. Code §36-25-8 states,

No public official, public employee, former public official or former public employee, for a period consistent with the statute of limitations as contained in this chapter, shall use or disclose confidential information gained in the course of or by reason of his or her position or employment in any way that could result in financial gain other than his or her regular salary as such public official or public employee for himself or herself, a family member of the public employee or family member of the public official, or for any other person or business.

Ala. Code §36-25-23(a) states,

(a) No public official elected to a term of office shall serve for a fee as a lobbyist or otherwise represent a client, including his or her employer, before any legislative body or any branch of state or local government, including the executive and judicial branches of government, and including the Legislature of Alabama or any board, agency, commission, or department thereof, during the term or remainder of the term for which the official was elected. For purposes of this subsection, such prohibition shall not include a former member of the Alabama Judiciary who as an attorney represents a client in a legal, non-lobbying capacity.

Mr. Rafferty may continue his employment with BAO if he is elected as the Representative for District 54, but there are issues about which he should be aware. First, the Code mandates that public officials have the same right to retain “private economic and other interests, except where conflicts with the responsibility of public officials and public employees to the public cannot be avoided.” Ala. Code § 36-25-2(b). Conflict of Interest is defined as follows:

A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust. A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official duties which would materially affect his or her financial interest or those of his or her family members or any business with which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs. §36-25-1(8)

If Mr. Rafferty is elected to the legislature, he will be a public official.<sup>3</sup> Because he is employed with BAO, it is a business with which he is associated.<sup>4</sup> As a public official, Mr. Rafferty would not be permitted to take any official action that would materially affect his financial interest or that of BAO.<sup>5</sup> This means that he would not be allowed to participate in any vote, discussion, or debate regarding any legislation or issue that could uniquely affect BAO or in which BAO has a unique interest by way of sponsoring or endorsing legislation.<sup>6,7</sup> He may sponsor and vote on legislation that affects all nonprofits equally, however. He may not use any confidential information that he might gain during his service as a legislator to benefit anyone or any business, including BAO.<sup>8</sup>

Even though the facts Mr. Rafferty presented state that BAO “does not lobby or seek to lobby or influence legislation,” he should remain aware of restrictions placed on public officials regarding lobbying and what conduct constitutes “lobbying.” The definition of lobbying is as follows:

The practice of promoting, opposing, or in any manner influencing or attempting to influence the introduction, defeat, or enactment of legislation before any legislative body; opposing or in any manner influencing the executive approval, veto, or amendment of legislation; or the practice of promoting, opposing, or in any manner influencing or attempting to influence the enactment, promulgation, modification, or deletion of regulations before any regulatory body. The term does not include providing public testimony before a legislative body or regulatory body or any committee thereof. Ala. Code §36-25-1(20).

---

<sup>3</sup> See Ala. Code §36-25-1(27)

<sup>4</sup> See Ala. Code §36-25-1(2)

<sup>5</sup> See Ala. Code §36-25-1(8)

<sup>6</sup> See Ala. Code §§36-25-1(8), 36-25-5(a) & (b)

<sup>7</sup> Ethics Advisory Opinion 2015-14 (Hosp)

<sup>8</sup> See Ala. Code §36-25-8



Lobbying includes promoting or attempting to influence the awarding of a grant or contract with any department or agency of the executive, legislative, or judicial branch of state government.

No member of the Legislature, for a fee, reward, or other compensation, in addition to that received in his or her official capacity, shall represent any person, firm, corporation, or other business entity before an executive department or agency. Ala. Code §36-25-1.1

This definition does not require there to be a particular bill pending that Mr. Rafferty promotes, opposes, or influences. The definition includes any attempt to influence even the introduction of legislation before any legislative body.<sup>9</sup> *Emphasis added.* Ala. Code §36-25-23(a) prohibits a public official from lobbying or otherwise representing their employer before “any legislative body or any branch of state or local government.” Ala. Code §36-25-23(a). Therefore, any part of the job description that requires Mr. Rafferty to promote or request any government body to legislate or consider legislation, whether pending or not, is prohibited. In addition, he may not represent BAO before “any legislative body or branch of state or local government.” We have addressed this Code section previously in Advisory Opinion 2016-31 (Clyde Chambliss) when we recognized, “What is clear from the language of the entire statute, therefore, is that the Legislature intended to prohibit public officials from lobbying while in office and for the remainder of the term for which they were elected should they leave office early.” We also addressed this issue in Advisory Opinion 2015-14 (Hosp) stating, “[w]hile serving as an elected official the official cannot be paid for the purpose of promotion or ‘in any manner’ attempting to influence the introduction or defeat of legislation before ‘any legislative body’ which includes local legislative bodies.” The guidance issued in AO 2015-14 applies equally to Mr. Rafferty’s position with BAO if he is elected.

### CONCLUSION

An employee of Birmingham Aids Outreach may retain his employment with that nonprofit organization if elected to the Alabama House of Representatives but must remain aware of conflicts of interests as they arise and may not violate the lobbying restrictions of Ala. Code § 36-25-23(a) while he serves.


---

<sup>9</sup> Ala. Code §36-25-1(20)

Mr. Neil Rafferty  
Advisory Opinion 2018-06  
Page 6

**AUTHORITY**

By 4-0 vote of the Alabama Ethics Commission on June 6, 2018.

  
Jerry L. Fielding, Ret. Sr. Circuit Judge  
Chair  
Alabama Ethics Commission