STATE OF ALABAMA
ETHICS COMMISSION

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

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

James L. Sumner, Jr.
Director

TELEPHONE (334) 242-2997
FAX (334) 242-0248
WEB SITE www.ethics.alalinc.net

July 12, 2000

ADVISORY OPINION NO. 2000-20

The Honorable Oliver Robinson, Jr.
Member
Alabama House of Representatives
P. O. Box 370881
Birmingham, Alabama 35237-0881

Use Of Office For Personal Gain/Member Of Legislature Owning Interest In Investment Advisory Firm Doing Business With Public Entities.

An investment advisory firm owned in part by a member of the Alabama House of Representatives may do business with public entities; provided, that the member of the Alabama House of Representatives not be personally and directly involved in any aspect of a transaction with public entities within his sphere of influence including, but not limited to the solicitation or negotiation of contracts as well as personally making contact with public entities, regardless of the means of contact, as his direct contact with those public entities would be a use of office for personal gain.

Conflict Of Interests/Member Of Legislature Owning Interest In Investment Advisory Firm.

A member of the Alabama House of Representatives may be a part owner in an investment advisory firm doing business in the State of Alabama and competing for business in both the public and private sector; provided, he not use his position as a member of the legislature to exert influence over public entities which receive funding or other appropriations from the legislature or are otherwise within the legislator's sphere of influence in an effort to obtain business.

In addition, any contracts entered into by the legislator's business, which are paid in whole or in part by state, county or municipal funds, must be filed with the Ethics Commission within ten days after the contract has been entered into.

While this opinion is addressed to a member of the Alabama Legislature, it is applicable to all public officials and public employees in the State of Alabama wishing to do business with a public entity.

Dear Representative Robinson:

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.

QUESTION PRESENTED

May a member of the Alabama Legislature, who has an ownership interest in an investment advisory firm, make sales calls on government entities at all levels, as well as private sector businesses?

FACTS AND ANALYSIS

The facts as have been presented to this Commission are as follows:

Oliver Robinson is a member of the Alabama House of Representatives and is serving his first term representing District No. 58. He has an ownership interest in ABI Capital Management, LLC, which is an investment advisory firm, and is a working participant in the development of the firm.

ABI Capital Management is a firm registered with the Alabama Securities and Exchange Commission (SEC). Their primary focus is providing investment advice for individuals, public and private entities, where their expertise allows. They are allowed by the SEC as investment advisors to participate in any transactions where there is an investment banking firm or a broker dealer as the lead partner. ABI Capital Management is a minority-owned firm.

Representative Robinson is a majority partner in the business. Representative Robinson states that there will be no level of government or corporate contracts in America for which ABI will not compete. He states that any entity that floats bonds for revenue generation or that has revenue reserves designated for long-term investments will be called on by ABI. Currently, all ABI investment strategies will be implemented in partnership with a national money management firm. Entities such as municipalities, county commissions, school boards, universities and colleges will be called upon by members of the firm and Representative Robinson.

As relates to endowment funds, Representative Robinson states that this is mainly a university and/or college business arena. Endowment funds are private contributions to public and private institutions of learning.

Another area in which the company is interested in competing is the debt/bond issuance arena. ABI will partner with investment banks and financial institutions across the country to compete for city, county, state and federally bidden contracts.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(24), defines a public official as:

> "(24) 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 17-16-2."

Section 36-25-1(2) defines a business with which the person is associated as:

"(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."

Section 36-25-2(b) in pertinent part states:

"(b) An essential principle underlying the staffing of our governmental structure is that its public officials and public employees should not be denied the opportunity, available to all other citizens, to acquire and retain private economic and other interests, except where conflicts with the responsibility of public officials and public employees to the public cannot be avoided."

Section 36-25-1(8) defines a conflict of interest as:

"(8) CONFLICT OF INTEREST. 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."

Section 36-25-11 states:

"Unless exempt pursuant to Alabama competitive bid laws or otherwise permitted by law, no public official or public employee, or a member of the household of the public employee or the public official, and no business with which the person is associated shall enter into any contract to provide goods or services which is to be paid in whole or in part out of state, county, or municipal funds unless the contract has been awarded through a process of competitive bidding and a copy of the contract is filed with the commission. All such contract awards shall be made as a result of original bid takings, and no awards from negotiations after bidding shall be allowed. A copy of each contract, regardless of the amount, entered into by a public official, public employee, a member of the household of the public employee or the public official, and any business with which the person is associated shall be filed with the commission within 10 days after the contract has been entered into."

Section 36-25-5(a) 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."

Section 36-25-5(f) states:

"(f) A conflict of interest shall exist when a member of a legislative body, public official, or public employee has a substantial financial interest by reason of ownership of, control of, or the exercise of power over any interest greater than five percent of the value of any corporation, company, association, or firm, partnership, proprietorship, or any other business entity of any kind or character which is uniquely affected by proposed or pending legislation; or who is an officer or director for any such corporation, company, association, or firm, partnership, proprietorship, or any other business entity of any kind or character which is uniquely affected by proposed or pending legislation."

Section 36-25-4 states that:

"(a) The commission shall do all of the following:

(9) Issue and publish advisory opinions on the requirements of this chapter, based on a real or hypothetical set of circumstances. Such advisory opinions shall be adopted by majority vote of the members of the commission present and shall be effective and deemed valid until expressly overruled or altered by the commission or a court of competent jurisdiction."

In addition, Section 36-25-2(c) states that:

> " . . . This chapter shall be liberally construed to promote complete disclosure of all relevant information and to insure that the public interest is fully protected."

While the Alabama Ethics Law clearly states that public officials and public employees should not be denied the same opportunities as other individuals to acquire and retain private economic and other interests, provided, a conflict of interests does not exist, it is of the utmost importance that the public's interest is fully protected.

A conflict of interests, for purposes of this opinion, exists when public officials or public employees are in a position to use their office for personal gain.

In the case of Rampey v. State, 415 So.2d. 1184 (Ala. Cr. Appeals 1982), the Court held that:

> "The legislature passed this chapter to prevent public officials from using their offices to reap private gains. The conflicts of interests referred to in this section are conflicts between an official's private interest and his official duties."

Likewise, Muncaster v. Alabama State Ethics Commission, 372 So.2d. 853 (Ala. 1979), held that:

> "The state has (a) legitimate interest in seeing that its elected officials do not have conflicts between their private interest and their official duties."

It is without question that many public officials and public employees at the state, county and municipal levels of government are in positions whereby they are able to exert, either overtly or covertly, undue influence or pressure on a public entity in order to obtain that entity's business. This pressure can be exerted either through the legislative process or, in some instances, the mantle of that individual's public office is sufficient to influence the transaction.

Expressed differently, an individual, whose public office puts him in a position to influence matters that affect a public entity, should not be allowed to personally contact that public entity and solicit their business due to the covert pressure that may be present.

One area that must be examined is, what is that public official's "sphere of influence", i.e., jurisdiction? In other words, is that public official in a position to exert influence over a public entity with whom he or she seeks business?

The sphere of influence (jurisdiction) should be viewed as a downward pyramid, in that a state legislator's sphere of influence is much broader than, for example, a member of a local water authority. A legislator is in a position to influence matters that directly affect entities falling under the legislature's jurisdiction—municipalities, counties, school boards, water authorities, etc., i.e., all public entities at the state, county and municipal levels of government. At the same time, a member of a local water authority is only in a position to influence matters within the jurisdiction of the water authority. That is, a member of County A's water authority is not in a position to have any influence over County B's school board, as the water board member's authority would not extend into school board matters, and he or she would not be in a position to influence matters affecting the school board. Therefore, it would not violate the Ethics Law for a member of County A's water authority to personally solicit public business from County B's school board.

It should be pointed out that this prohibition relating to personal contact, applies solely to public officials seeking the business on behalf of their firm and not to the firm itself, as the Ethics Commission has no jurisdiction over a business with which a public official is associated. The law is designed to prohibit public officials from using their position to benefit that business and ultimately themselves. The use of office for personal gain arises when the public official becomes personally involved in the solicitation of the business. This solicitation or contact can be direct, either through personal, telephonic or written contact or indirect, by the use of the influence inherent in the office held. The Alabama Ethics Law does not prohibit other members of his or her firm from making contact; it merely prohibits the public official, himself/herself, from making the contact, either personally, telephonically or through correspondence.

Based on the facts as provided and the above law, an investment advisory firm, owned in-part by a member of the Alabama House of Representatives, may do business with public entities; provided,

1) that the member of the Alabama House of Representatives not be personally and directly involved in any aspect of a transaction with public entities within his sphere of influence including, but not limited to the solicitation or negotiation of contracts as well as personally making contact with public entities, regardless of the means of contact, as his direct contact with those public entities would be a use of office for personal gain;

2) that he not use his position as a member of the legislature to exert influence over public entities which receive funding or other appropriations from the legislature or are otherwise within the legislator's sphere of influence in an effort to obtain business; and,

3) that any contracts entered into by the legislator's business, which are paid in whole or in part by state, county or municipal funds, are filed with the Ethics Commission within ten days after the contract has been entered into.

CONCLUSION

An investment advisory firm owned in part by a member of the Alabama House of Representatives may do business with public entities; provided, that the member of the Alabama House of Representatives not be personally and directly involved in any aspect of a transaction with public entities within his sphere of influence including, but not limited to the solicitation or negotiation of contracts as well as personally making contact with public entities, regardless of the means of contact, as his direct contact with those public entities would be a use of office for personal gain.

A member of the Alabama House of Representatives may be a part owner in an investment advisory firm doing business in the State of Alabama and competing for business in both the public and private sector; provided, he not use his position as a member of the legislature to exert influence over public entities which receive funding or other appropriations from the legislature or are otherwise within the legislator's sphere of influence in an effort to obtain business.

In addition, any contracts entered into by the legislator's business, which are paid in whole or in part by state, county or municipal funds, must be filed with the Ethics Commission within ten days after the contract has been entered into.

While this opinion is addressed to a member of the Alabama Legislature, it is applicable to all public officials and public employees in the State of Alabama wishing to do business with a public entity.

AUTHORITY

By 4-1 vote of the Alabama Ethics Commission on July 12, 2000.

John H. Watson
Chair
Alabama Ethics Commission