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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](http://www.ethics.alalinc.net)

August 6, 2003

**ADVISORY OPINION NO. 2003-37**

Mr. Michael R. White  
Attorney at Law  
4162 Carmichael Court  
Montgomery, Alabama 36106

Revolving Door/Former General Counsel  
For Alabama Department Of Education  
Serving As Appointed Hearing Officer/  
Administrative Law Judge For The Alabama  
Department Of Education In Due Process  
Hearings At The Local School Board Level

The former General Counsel for the  
Alabama Department of Education may  
serve as an appointed hearing officer/  
administrative law judge for the Alabama  
Department of Education when he will not  
be representing clients or other individuals  
before the Alabama Department of  
Education, but will be serving as a hearing  
officer/administrative law judge at the local  
level.

Revolving Door/Former General Counsel  
For Alabama Department Of Education  
Continuing To Represent Alabama  
Department Of Education In Litigation In  
Which He Was Involved Prior To Leaving  
The Position Of General Counsel

The former General Counsel for the  
Alabama Department of Education may,  
upon leaving the position of General

Counsel, continue to assist and represent the Alabama Department of Education in litigation in which he was involved prior to his leaving the position of General Counsel.

Revolving Door/Former General Counsel  
For Alabama Department of Education  
Representing Local School Districts And/Or  
Other Educational Institutions

The former General Counsel for the Alabama Department of Education may represent local school districts and/or other educational institutions after leaving the position of General Counsel, provided, he does not represent those school districts that had been taken over by the Alabama Department of Education within the last two years.

Dear Mr. White:

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.

#### **QUESTIONS PRESENTED**

- 1) May the former General Counsel for the Alabama Department of Education, upon leaving the position of General Counsel, serve as a hearing officer/administrative law judge, when he served as a hearing officer/administrative law judge before being hired as General Counsel?
- 2) May the former General Counsel for the Alabama Department of Education continue to represent the state in matters he was working on and which were pending prior to his leaving the position?
- 3) May the former General Counsel for the Alabama Department of Education represent local school districts or other educational institutions?

### FACTS AND ANALYSIS

The facts as have been provided are as follows:

Michael R. White is an attorney in Montgomery, Alabama. He served as a hearing officer/administrative law judge for the Alabama Department of Education beginning in 1984. He was in private law practice in Montgomery and was invited by the Director of Special Education to become a hearing officer along with other attorneys within the state. The hearings are a requirement of federal and state laws to provide due process to students with special needs in their education environment. These laws require that the person conducting the due process hearing have specific training and experience in the area. Mr. White completed the training and became a hearing officer/administrative law judge for the Alabama Department of Education. The hearings are held at the local school system level and are to ensure that children are appropriately served in their education programs. The hearing officers are assigned on a rotational basis, as the result of litigation that took place in the 1980's. From 1984 until 1997, Mr. White conducted many hearings throughout the state in these areas. In 1997, he was invited to become the General Counsel for the Alabama Department of Education. Mr. White accepted Dr. Richardson's invitation and joined the Department in February of 1997. For approximately six years he served in this capacity. He represented the Department in various legal matters and provided counsel during the time in which the major educational reforms passed in 1995 were implemented.

Mr. White was not in a merit position, and in December 2002, Dr. Richardson decided that he wanted to make a change in his legal staff. From January 1, 2003 until June 30, 2003, Mr. White was assigned to the Office of Attorney General and handled administrative matters for other agencies. The funding of his position was terminated on June 30, 2003, and due to state-wide funding concerns, he was not able to find another position in state government.

Mr. White has returned to private law practice in Montgomery and would like to resume his previous activities as a hearing officer/administrative law judge for the Alabama Department of Education on a case-by-case basis.

Mr. White states that he places that case-by-case restriction on his activities because other legal, ethical considerations may require his recusal from some matters due to personal relationships or other concerns if he is fortunate and the Commission were to approve his undertaking the herein described activities.

The Department has indicated that there is no problem in his resuming these activities if the Commission finds it permissible. Mr. White emphasizes that these hearings are not before the State Board of Education or the State Superintendent. While the procedure is overseen and

monitored by the Alabama Department of Education, all activity takes place at the local level. The hearing officers/administrative law judges are responsible for conducting hearings and issuing the final rulings on due process requests. Again, they are conducted at the local school board level.

The decision of the hearing officer/administrative law judge may be appealed to a court of appropriate jurisdiction. The Alabama Department of Education is responsible only for the facilitation of the due process hearing and enforcement of the hearing officer in the local school system, absent any pending appeal. The point being, that this is an "independent" hearing involving parents and local school officials. The Department does not have an administrative review of the decision.

Mr. White states that these cases have become increasingly complex, and the need for experienced hearing officers/administrative law judges in the area is significant. He would like to use his experience to once again handle these matters as a hearing officer/administrative law judge.

Mr. White states additionally, that there may be a need for his continuing representation of the Alabama Department of Education in cases which were pending during his time as General Counsel. In the event that the Department wishes to utilize his services as an attorney in cases that were pending during his tenure, he asks for an Advisory Opinion on this question also.

Finally, Mr. White asks whether or not he would be prohibited under the "Revolving Door" provisions of the Ethics Law from providing legal representation to local school districts or other educational institutions. He states that his responsibilities at the Alabama Department of Education did not include the representation of local school districts or other educational institutions. Except for the extreme circumstances of intervention, his office did not involve itself in local school district litigation representation. He states that general supervision of schools within the state is vested in the State Board of Education. However, the Office of General Counsel did not represent local districts, absent some extraordinary situation such as financial intervention. He states that the mission of the Office of the General Counsel is to provide legal representation to the Alabama Department of Education, the State Superintendent of Education and the State Board of Education.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(23) defines a public employee as:

"(23) PUBLIC EMPLOYEE. Any person employed at the state, county, or municipal level of government or their instrumentalities, including governmental corporations and authorities, but excluding employees of hospitals or other health

care corporations including contract employees of those hospitals or other health care corporations, who is paid in whole or in part from state, county or municipal funds. For purposes of this chapter, a public employee does not include a person employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee's income."

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 36-25-5(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 36-25-13(b) states:

"(b) No public employee shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer before the board, agency, commission, or department, of which he or she is a former employee for a period of two years after he or she leaves such employment. For the purposes of this subsection, such prohibition shall not include a former employee of the Alabama judiciary who as an attorney represents a client in a legal, non-lobbying capacity."

Section 36-25-13(c) states:

“(c) No public official, director, assistant director, department or division chief, purchasing or procurement agent having the authority to make purchases, or any person who participates in the negotiation or approval of contracts, grants, or awards or any person who negotiates or approves contracts, grants, or awards shall enter into, solicit, or negotiate a contract, grant, or award with the governmental agency of which the person was a member or employee for a period of two years after he or she leaves the membership or employment of such governmental agency.”

Section 36-25-13(d) states:

“(d) No public official or public employee who personally participates in the direct regulation, audit, or investigation of a private business, corporation, partnership, or individual shall within two years of his or her departure from such employment solicit or accept employment with such private business, corporation, partnership, or individual.”

Section 36-25-13(e) states:

“(e) No former public official or public employee of the state may, within two years after termination of office or employment, act as attorney for any person other than himself or herself or the state, or aid, counsel, advise, consult or assist in representing any other person, in connection with any judicial proceeding or other matter in which the state is a party or has a direct and substantial interest and in which the former public official or public employee participated personally and substantially as a public official or employee or which was within or under the public official or public employee's official responsibility as an official or employee. This prohibition shall extend to all judicial proceedings or other matters in which the state is a party or has a direct and substantial interest, whether arising during or subsequent to the public official or public employee's term of office or employment.”

The position of General Counsel for the Alabama Department of Education would be considered a position of authority, thereby prohibiting Mr. White from returning to work directly for the Alabama Department of Education on a contract basis as a consultant, etc. Under the due process hearing scenario, however, the Alabama Department of Education serves to facilitate and monitor the hearing process, and Mr. White would serve as an appointed hearing officer/ administrative law judge, hearing grievances and other complaints at the local level, and would

not be representing clients before and/or dealing directly with the Alabama Department of Education. In addition, this is a position that Mr. White held prior to his becoming General Counsel for the Alabama Department of Education.

On May 1, 2002, the Ethics Commission rendered Advisory Opinion No. 2002-18, which held that:

“The Deputy Commissioner for Field Administration with the State of Alabama Department of Human Resources, who is also a licensed attorney, may, upon his retirement and entering into the private practice of law, continue to assist and represent the State Department of Human Resources in litigation in which he was involved prior to his retirement.”

Based on the above, as an attorney, Mr. White may continue to represent the Alabama Department of Education in litigation and other legal matters in which he was involved prior to his leaving the Alabama Department of Education.

In Advisory Opinion No. 2002-18, the Commission opined that:

“From a practical matter, it is more efficient and less costly for the State of Alabama to have an attorney who is familiar with the litigation to continue to represent the state after his or her retirement than it is to retain new counsel who would have to familiarize himself/herself with the litigation and basically start over.”

While the “Revolving Door” prohibits Mr. White from representing clients before the Alabama Department of Education for a period of two years, there is no such prohibition on his representing clients before school boards at the local level or in representing the local school board itself. The only prohibition would be that Mr. White may not represent a school board with which the Alabama Department of Education had intervened and taken over the day-to-day handling of that school system, as this would amount to regulating, investigating, etc.

Based on the facts as provided and the above law, the former General Counsel for the Alabama Department of Education may serve as an appointed hearing officer/administrative law judge for the Alabama Department of Education when he will not be representing clients or other individuals before the Alabama Department of Education, but will be serving as a hearing officer/administrative law judge at the local level.

Additionally, the former General Counsel for the Alabama Department of Education may, upon leaving the position of General Counsel, continue to assist and represent the Alabama

Department of Education in litigation in which he was involved prior to his leaving the position of General Counsel.

Further, the former General Counsel for the Alabama Department of Education may represent local school districts and/or other educational institutions after leaving the position of General Counsel, provided, he does not represent those school districts that had been taken over by the Alabama Department of Education within the last two years.

### CONCLUSION

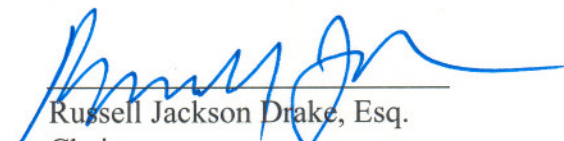
The former General Counsel for the Alabama Department of Education may serve as an appointed hearing officer/administrative law judge for the Alabama Department of Education when he will not be representing clients or other individuals before the Alabama Department of Education, but will be serving as a hearing officer/administrative law judge at the local level.

The former General Counsel for the Alabama Department of Education may, upon leaving the position of General Counsel, continue to assist and represent the Alabama Department of Education in litigation in which he was involved prior to his leaving the position of General Counsel.

The former General Counsel for the Alabama Department of Education may represent local school districts and/or other educational institutions after leaving the position of General Counsel, provided, he does not represent those school districts that had been taken over by the Alabama Department of Education within the last two years.

### AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on August 6, 2003.



Russell Jackson Drake, Esq.  
Chair  
Alabama Ethics Commission