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September 3, 2003

**ADVISORY OPINION NO. 2003-38**

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Conflict Of Interest/Member Of Law Firm  
Serving On Industrial Development  
Authority (IDA) And That Law Firm  
Representing Clients Before The Industrial  
Development Authority

A member of a law firm may serve on an  
Industrial Development Authority when his  
or her law firm represents clients before the  
Industrial Development Authority; however,  
that member may not vote, attempt to  
influence or otherwise participate in any  
matter that comes before the Industrial  
Development Authority that involves his or  
her law firm.

In addition, within ten (10) days of the  
representation having taken place, the law  
firm must notify the Ethics Commission of  
that representation, pursuant to Section 36-  
25-10.

Conflict Of Interest/Member Of Law Firm  
Serving As Member Of Industrial  
Development Authority And His Or Her  
Law Firm Representing The Authority Itself

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A law firm, a member of which serves on an Industrial Development Authority, may not represent the Authority itself, as any action taken by the member of the Industrial Development Authority involving the firm's representation would provide a benefit to his or her law firm, and the firm's representation would prohibit the IDA member from performing the duties of his position.

Conflict Of Interest/Law Firm Of Former Member Of Industrial Development Authority Representing Clients Before The Industrial Development Authority Or Representing The Board Itself After The Member Is No Longer On The Board

The law firm of a former member of an Industrial Development Authority may represent clients before the Industrial Development Authority Board; however, the former member of the Industrial Development Authority may not appear before the Board on his or her firm's behalf for a period of two years after leaving the Industrial Development Authority.

The law firm of a former member of an Industrial Development Authority Board may represent the Industrial Development Authority Board after his or her service on the Board is concluded.

Dear Mr. Anderson:

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) Can a member of a law firm serve on an Industrial Development Authority as a member and/or officer and have his or her law firm represent clients in matters before the Industrial Development Authority?
- 2) Can a member of a law firm serve as a member and/or officer of an Industrial Development Authority and have his or her law firm represent the Industrial Development Authority itself?
- 3) Can a law firm of a former member and/or officer of an Industrial Development Authority Board represent clients before the Industrial Development Authority Board or represent the Board itself after the member and/or officer is no longer on the Board and be in compliance with Section 36-25-13(c)? In other words, if that individual lawyer does not represent clients and/or the Board, can his or her firm do so during the two-year period after his or her time on the Board?

### **FACTS AND ANALYSIS**

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

James Anderson represents a law firm, a member of which has been approached about being appointed to the Industrial Development Authority (IDA) for Tuscaloosa County. They are concerned about whether or not the law firm may continue to represent clients before the IDA, should the member be appointed.

An Industrial Development Authority has been formed by Tuscaloosa County for the purpose of recruiting industries. The members of the Authority are appointed by the various governmental entities within Tuscaloosa County. The members are not compensated but serve as volunteers.

The Tuscaloosa Industrial Development Authority has the power to grant tax abatements for, obtain grants for, and sell land to industries that locate in this county. The industries typically make no public announcement of their intent to locate in the county until appearing at the public meeting of the Industrial Development Authority. It is at this public meeting on which the incentives mentioned above are voted. Prior to the meeting, negotiations are conducted by the officers and staff of the IDA on a confidential basis. None of the incentives offered are automatic and, at times, the Authority declines to grant any incentives, or grants only partial incentives.

Typically, an industry is represented by a law firm when it comes before the Industrial Development Authority for formal action approving the incentives, land purchases, and the like.

On March 5, 2003, the Commission rendered Advisory Opinion No. 2003-15. That opinion held:

“A member of a law firm may serve on an Industrial Development Authority; however, his law firm may not represent clients in matters before the Industrial Development Authority on a continuing basis, as there would be an unresolvable conflict of interest.”

“A law firm, a member of which serves on an Industrial Development Authority, may not represent the Authority itself, as any action taken by the member of the Industrial Development Authority involving the firm’s representation would provide a benefit to his or her law firm, and the firm’s representation would prohibit the IDA member from performing the duties of his position.”

“The law firm of a former member of an Industrial Development Authority may represent clients before the Industrial Development Authority Board; however, the former member of the Industrial Development Authority may not appear before the Board on his or her firm’s behalf for a period of two years after leaving the Industrial Development Authority.”

“The law firm of a former member of an Industrial Development Authority Board may represent the Industrial Development Authority Board after his or her service on the Board is concluded.”

That opinion was rendered based in large part on an informal opinion rendered by the Alabama State Bar Association on February 10, 2003. That informal opinion stated:

“It is conclusively obvious that, if an attorney in your firm becomes a member of the IDA, that attorney would have a clear conflict of interest should he attempt to represent an industry in negotiations with the IDA . . .”

The opinion cites Rule 1.10 of the Rules of Professional Conduct, which states:

“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.”

The Bar opinion went on to state:

“Another significant consideration is the fact that, if the attorney must recuse himself every time an industry represented by your firm is engaged in negotiations with the IDA, the attorney would not be fulfilling the obligations which his appointment to the IDA entails. . .”

“There is also a significant concern that recusal would not adequately preclude the attorney from influencing the other IDA members in the negotiation and decision-making process. Even if the attorney scrupulously avoided even the most informal discussions of the firm’s clients with the other IDA members, he would still be in a position to have influence over them simply by being a fellow member. The other members would be well aware that a fellow member’s law firm has a financial interest in the outcome of the recruitment process. This fact would almost certainly have some influence on the other members. An additional concern is the possibility that in exchange for a vote favorable to the attorney’s law firm, the other members would expect a reciprocal favor when they have to recuse themselves. . .”

“Finally, the public perception of an attorney serving on the IDA while his firm represents clients in negotiations with the IDA would inevitably be one of impropriety. Not only would the public have the impression that the firm’s clients would receive preferential treatment, but also that the attorney’s service on the IDA was the reason the firm was able to obtain the clients in the first place.”

On July 24, 2003, the Alabama State Bar Association withdrew the prior informal opinion. That withdrawal stated:

“Following significant debate and discussion of these materials in your opinion request, the Disciplinary Commission has determined that it will withdraw the informal opinion from Mr. Kendrick to Mr. Guin and defer jurisdiction over this matter and interpretation of any proposed hypothetical or fact situation to the State of Alabama Ethics Commission.”

“The reasoning for the Commission is as follows: The possibility that Mr. Kendrick’s informal opinion to Mr. Guin might be further interpreted by lawyers who could possibly be impacted by that opinion, as well as their law firms, could create problems of misinterpretation and misapplication which the Commission seeks to avoid. Additionally, the State Ethics Law, as interpreted by the State Ethics Commission, would apply not only to lawyers but any individuals covered

by the provisions of Alabama statutes with regard to ethics and possible conflicts and violations which might arise under those applicable State laws.”

“Rather than create an opportunity for misapplication and misinterpretation of an informal opinion of the Office of General Counsel, the Disciplinary Commission will withdraw the previous informal opinion from Mr. Kendrick to Mr. Guin, and encourage lawyers confronted with this ethical dilemma to consult with and seek opinions from the State of Alabama Ethics Commission. The State Ethics Commission’s interpretation of applicable State law would then apply uniformly across the board to all individuals, not only lawyers, who may be covered by the provisions of that statute and subject to prosecution thereunder.”

Subsequent to the withdrawal of the informal opinion, Robert D. Segall, Esquire, and Pam Slate, Esquire, requested the Ethics Commission reconsider Advisory Opinion No. 2003-15.

On August 6, 2003, the Ethics Commission voted to withdraw Advisory Opinion No. 2003-15.

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 36-25-9(c) states:

“(c) No member of any county or municipal agency, board, or commission shall vote or participate in any matter in which the member or family member of the member has any financial gain or interest.”

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(c) states:

“(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.”

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 36-25-13(a) states:

“(a) No public official shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer before the board, agency, commission, department, or legislative body, of which he or she is a former member for a period of two years after he or she leaves such membership. For the 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.”

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(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.”

Section 36-25-10 states:

“If a public official or public employee, or family member of the public employee or family member of the public official, or a business with which the person is



associated, represents a client or constituent for a fee before any quasi-judicial board or commission, regulatory body, or executive department or agency, notice of the representation shall be given within 10 days after the first day of the appearance. Notice shall be filed with the commission in the manner prescribed by it. No member of the Legislature shall for a fee, reward, or other compensation represent any person, firm, or corporation before the Public Service Commission or the State Board of Adjustment.”

The Commission has addressed this issue as relates to non-lawyers on several occasions.

In February of 1996, the Commission rendered Advisory Opinion No. 96-18, which held that:

“A member of the State Health Planning and Development Agency CON Board may not vote or otherwise participate in a matter in which the public official, a family member or a business with which the public official is associated has a financial interest in the outcome of any official action taken by the agency on which the public official serves.”

“A member of the State Health Planning and Development Agency CON Board may vote and participate in matters in which the public official, a family member or a business with which the public official is associated does not have a financial interest or a potential financial interest.”

“A member of the CON Board, a family member of the public official or a business with which the public official is associated, who has a financial interest in one health care facility may not vote or otherwise participate in a hearing for an application for a CON for a facility that will provide competitive services in a competitive geographic market.”

Likewise, in September of 2002, the Commission rendered Advisory Opinion No. 2002-37, which held that:

“A member of the Mobile Architectural Review Board, whose spouse is employed by another member of the Architectural Review Board, may not vote, attempt to influence, or otherwise participate in a matter that comes before the Architectural Review Board that involves the Architectural firm employing his spouse.”

“A member of the Mobile Architectural Review Board may not vote, attempt to influence, or otherwise participate in any matter that comes before the Architectural Review Board that involves his employer.”

“When a business associated with the spouse of a member or a member of the Mobile Architectural Review Board presents a matter to the Architectural Review Board, notice of that representation must be made to the Ethics Commission within ten days of the representation having taken place.”

“The notification requirement contained in Section 36-25-10 applies not only to the Mobile Architectural Review Board, but to any other quasi-judicial or regulatory body.”

Based on the prior precedent set by the Commission, a law firm employing a member of the Industrial Development Authority, may represent clients before that Authority; however, the member who serves on the Authority, may not vote, attempt to influence or in any manner participate in a matter that comes before the IDA that involves his or her law firm.

In addition, within ten (10) days of the representation having taking place, the law firm must notify the Ethics Commission of that representation, pursuant to Section 36-25-10.

As to questions two and three, Section 36-25-13 would prohibit the IDA member, subsequent to his term of service ending, representing clients or his or her firm back before the IDA.

In June of 1996, the Commission rendered Advisory Opinion No. 96-56, which stated that:

“Subsequent to June 19, 1996, a former member of the Alabama Environmental Commission may not personally represent clients, including his own business, before the Environmental Management Commission or the Alabama Department of Environmental Management for a period of two years after his service on the Commission is completed.”

“The prohibition contained in Section 36-25-13 does not extend to an employee or co-worker of the former board member, but is strictly limited to the former board member; provided however, that the former board member not participate in the representation, nor attempt to influence its outcome.”

Based on the facts as provided and the above law, a member of a law firm may serve on an Industrial Development Authority when his or her law firm represents clients before the Industrial Development Authority; however, that member may not vote, attempt to influence or otherwise participate in any matter that comes before the Industrial Development Authority that involves his or her law firm.

In addition, within ten (10) days of the representation having taken place, the law firm must notify the Ethics Commission of that representation, pursuant to Section 36-25-10.

However, a law firm, a member of which serves on an Industrial Development Authority, may not represent the Authority itself, as any action taken by the member of the Industrial Development Authority involving the firm's representation would provide a benefit to his or her law firm, and the firm's representation would prohibit the IDA member from performing the duties of his position.

Further, the law firm of a former member of an Industrial Development Authority may represent clients before the Industrial Development Authority Board; however, the former member of the Industrial Development Authority may not appear before the Board on his or her firm's behalf for a period of two years after leaving the Industrial Development Authority.

Finally, the law firm of a former member of an Industrial Development Authority Board may represent the Industrial Development Authority Board after his or her service on the Board is concluded.

### CONCLUSION

A member of a law firm may serve on an Industrial Development Authority when his or her law firm represents clients before the Industrial Development Authority; however, that member may not vote, attempt to influence or otherwise participate in any matter that comes before the Industrial Development Authority that involves his or her law firm.

In addition, within ten (10) days of the representation having taken place, the law firm must notify the Ethics Commission of that representation, pursuant to Section 36-25-10.

A law firm, a member of which serves on an Industrial Development Authority, may not represent the Authority itself, as any action taken by the member of the Industrial Development Authority involving the firm's representation would provide a benefit to his or her law firm, and the firm's representation would prohibit the IDA member from performing the duties of his position.

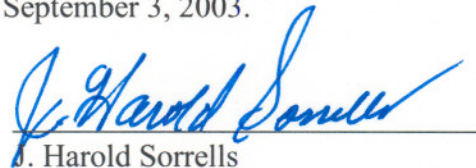
The law firm of a former member of an Industrial Development Authority may represent clients before the Industrial Development Authority Board; however, the former member of the Industrial Development Authority may not appear before the Board on his or her firm's behalf for a period of two years after leaving the Industrial Development Authority.

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The law firm of a former member of an Industrial Development Authority Board may represent the Industrial Development Authority Board after his or her service on the Board is concluded.

**AUTHORITY**

By 4-0 vote of the Alabama Ethics Commission on September 3, 2003.



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J. Harold Sorrells  
Chair  
Alabama Ethics Commission