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ADVISORY OPINION NO. 2003-48

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Conflict Of Interest/Deputy Attorney General With Department Of Agriculture And Industries Performing Mediation Or Dispute Resolution Consulting Services

A Deputy Attorney General assigned to the Department of Agriculture and Industries may provide mediation or dispute resolution consulting services; provided, that all work is done on his own time; that no public equipment, facilities, time, materials, human labor or other public property under his discretion or control are used in the mediation/dispute resolution process; that the entities to which he will provide services are not entities which are regulated by the Department of Agriculture and Industries; and that he does not use his position as Deputy Attorney General or the mantle of the office to obtain the opportunities.

Dear Mr. DeBray:

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 Deputy Attorney General assigned to the Department of Agriculture and Industries provide mediation or dispute resolution consulting services on his own time?

FACTS AND ANALYSIS

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

Thomas R. DeBray represents John Hagood, who is employed as a Deputy Attorney General assigned to the Department of Agriculture and Industries. Before accepting the position of Deputy Attorney General assigned to the Department of Agriculture and Industries in June of 2003, Mr. Hagood was engaged in the private practice of law. While engaged in private practice, Mr. Hagood became a licensed mediator, licensed by the Alabama Alternative Dispute Resolution Center. Mr. Hagood has been approached by different individuals who have asked whether he may now perform mediation or dispute resolution consulting services.

The services as a private mediator would be offered and performed on Mr. Hagood's own time while using no equipment or personnel of the State of Alabama. In no way would Mr. Hagood use his position as a Deputy Attorney General to influence any party or to gain opportunity. The mediation and dispute resolution consulting services are the same as Mr. Hagood offered while a private attorney, and his experience and contacts in these were gained solely through his private law practice. Mr. Hagood further understands and acknowledges the inherent conflict of interest in performing any of the mediation or dispute resolution consulting services for parties who are in dispute involving the State of Alabama.

In light of this, Mr. Hagood requests a formal opinion from the Commission.

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(2) states:

"(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 36-25-1(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 36-25-5(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 36-25-2(b) 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."

On May 14, 1997, the Commission rendered Advisory Opinion No. 97-31, which dealt with the same issue. The Commission opined that:

> "An attorney with the Alabama Department of Insurance may provide arbitration services on automobile questions to the National Center for Dispute Resolution; provided, that all work is done on her own time; that no public equipment, facilities, time, materials, human labor, or other public property under her discretion or control are used in the arbitration process; that the entities she is providing arbitration services to, are not entities that are regulated by the Alabama Department of Insurance; that she not use her position as Associate Counsel for the Department of Insurance or the mantle of the office to obtain the arbitration contract; and provided further, that she not arbitrate a dispute involving individuals or businesses with whom she directly regulates in her official capacity with the Department of Insurance."

The Ethics Law provides that public officials and public employees should have the same opportunities as individuals in the private sector, provided a conflict of interest does not exist.

In the facts before the Commission, while the Deputy Attorney General may perform mediation or dispute resolution services on his own time, he may not perform these services for any entity or individual who is regulated by the Department of Agriculture and Industries.

Based on the facts as provided and the above law, a Deputy Attorney General assigned to the Department of Agriculture and Industries may provide mediation or dispute resolution consulting services; provided, that all work is done on his own time; that no public equipment, facilities, time, materials, human labor or other public property under his discretion or control are used in the mediation/dispute resolution process; that the entities to which he will provide services are not entities which are regulated by the Department of Agriculture and Industries; and that he does not use his position as Deputy Attorney General or the mantle of the office to obtain the opportunities.

CONCLUSION

A Deputy Attorney General assigned to the Department of Agriculture and Industries may provide mediation or dispute resolution consulting services; provided, that all work is done on his own time; that no public equipment, facilities, time, materials, human labor or other public property under his discretion or control are used in the mediation/dispute resolution process; that the entities to which he will provide services are not entities which are regulated by the Department of Agriculture and Industries; and that he does not use his position as Deputy Attorney General or the mantle of the office to obtain the opportunities.

AUTHORITY

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

J. Harold Sorrells
Chairman
Alabama Ethics Commission