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April 7, 2010

ADVISORY OPINION NO. 2010-05

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Conflict Of Interest/Appointed Member Of
Municipal Agency, Board Or Commission
Representing Clients Before The Agency,
Board Or Commission On Which He Or She
Serves

An appointed member of a municipal
agency, board or commission may not
represent clients before the municipal
agency, board or commission on which he or
she serves, regardless of whether he or she
recuses himself or herself.

Conflict Of Interest/Employer Of Appointed
Member Of Municipal Agency, Board or
Commission Representing Clients Before
The Municipal Agency, Board Or
Commission On Which An Employee
Serves

The employer of a member of a municipal
agency, board or commission may represent
clients before the municipal agency, board
or commission on which that employee
serves; provided, the member recuses
himself or herself from all activities relating

to that matter, including but not limited to voting, attempting to influence or in any manner participating in the issue.

Revolving Door/Former Member Of
Municipal Agency, Board Or Commission
Representing Clients Before The Municipal
Agency, Board Or Commission On Which
He Or She Formerly Served

For a period of two years after their term expires, former members of a municipal agency, board or commission may not represent clients, including their employer, before the municipal agency, board or commission on which they served.

For purposes of the Alabama Ethics Law, it does not matter whether an individual appointed to serve on a municipal agency, board or commission is compensated for that service for the provisions of the Ethics Law to apply.

A member of a municipal agency, board or commission may not use his or her position as a member of that municipal agency, board or commission to solicit clients without violating the Alabama Ethics Law.

Dear Mr. Ennis:

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 an appointed member of a municipal agency, board or commission, who serves without compensation, represent his or her employer, clients of his or her employer or if self employed, his or her clients in any matter that comes before the agency, board or commission for a fee if such member recuses himself/herself as an appointed board member, does actively represent the client before the entity, and does not participate as an appointed member in any manner regarding the clients' petition or case, and likewise, does not vote on the matter?
- 2) May an appointed member of a municipal agency, board or commission, who serves without compensation, represent his or her employer, clients of his or her employer or if self-employed, his or her clients in any matter that comes before the agency, board or commission for a fee if the petition or case is not presented by the member but by the client of a business or firm associate of the member, provided that such member recuses himself/herself, and does not directly represent or participate in any manner regarding the clients' petition or case, and likewise, does not vote on the matter?
- 3) What procedure should be followed in the event that a case or petition comes before a municipal agency, board or commission where a member serves without compensation, which involves his or her employer or clients of his or her employer where the employer is being paid a fee?
- 4) What procedure should be followed in the event that a case or petition comes before a municipal agency, board or commission where a member serves without compensation, which involves the client of a business or firm associate of the member where the business or firm associate is being paid a fee, but the member's compensation is not dependent upon the representation?
- 5) Does the "Revolving Door Statute" as found in Ala. Code § 36-25-13(a) that prohibits a public official from representing for a fee 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 apply to non-compensated individuals who are appointed to municipal agencies, boards and commissions?

FACTS AND ANALYSIS

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

Robert W. Ennis, IV, is the City Attorney for the City of Tuscaloosa, Alabama. The issues he presents involve whether members of non-compensated City-appointed boards, agencies or commissions may accept employment from a client, or represent such clients before such boards, agencies or commissions if the members recuse themselves from the discussion and vote.

Mr. Ennis states that the issue specifically involves the City's Historic Preservation Commission (HPC). There are Commission members who are architects that have undertaken commissions in the historic districts. The architects have prepared the architectural drawings and submitted the applications for their clients in matters which require HPC approval. The City's current practice allows such matters to come before a board, agency or commission, provided the member of such board or commission recuses himself/herself and does not participate in the representation, presentation or vote in any manner.

Mr. Ennis states that a recent issue arose when a member of the HPC, who is an architect, subsequently represented an individual who had come before the HPC for guidance and information regarding questions for the demolition and reconstruction of a home in a historic district. The architect's knowledge of the case was from the HPC meeting in which he was sitting as a member of the HPC in his official capacity.

The issue is not limited to the HPC, but relates to all City of Tuscaloosa agencies, boards and commissions where such members are appointed by the City Council and serve without compensation. Based upon this situation concerning the current practices which are employed by the City related to matters which may come before City boards and commissions, the City Attorney is requesting a formal opinion on the above-stated issues.

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 36-25-5(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 36-25-9(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 36-25-13(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.”

Regardless of whether or not an individual is compensated for his or her service, anyone appointed by a municipal governing body to a municipal board, agency or commission is a public official and subject to the dictates of the Alabama Ethics Law.

The Ethics Law prohibits a public official from using his or her public position in any manner that would provide a personal benefit to himself/herself, a member of his or her family or a business with which he or she is associated.

Just as they cannot use their official position for personal benefit, they may not vote, attempt to influence or in any manner participate in a matter which affects themselves or their employer.

In addition, it is improper for a board member to accept private work from a client with a matter pending before the body on which he sits.

The first four questions may be answered jointly.

The prohibitions contained in the Alabama Ethics Law are personal to the public official/public employee and do not apply to the public official/employee’s business, employer or family member. In these instances, public officials must not only recuse themselves from any matters being presented to the board, commission or agency on which they serve by an employer, business or family member, but he or she must also abstain from any type of participation in the proceedings. The business is not prohibited from representing clients before the board. The board member is merely prohibited from participating in the matter.

Clearly, board members may not represent their own clients before the board, agency or commission on which they serve, regardless of whether or not they plan to recuse themselves from taking action as a member of the board. They may not appear before the board on which they serve.

The Commission has addressed these issues several times in the past.

On March 31, 2004, the Commission rendered Advisory Opinion No. 2004-07, which held that:

“Members of the Tuscaloosa City Council may not vote, attempt to influence or otherwise participate in any matters coming before the Tuscaloosa City Council

involving a client of their employer, if either the employer or they stand to benefit from the Council action.”

On September 3, 2003, the Commission rendered Advisory Opinion No. 2003-38, which held that:

“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.”

As regards to representation, on November 1, 1995, the Commission rendered Advisory Opinion No. 95-96, which held that:

“A Legislator may not represent employees before a civil service board to which said legislator makes recommendations for appointments to the board.”

CONCLUSION

An appointed member of a municipal agency, board or commission may not represent clients before the municipal agency, board or commission on which he or she serves, regardless of whether he or she recuses himself or herself.

The employer of a member of a municipal agency, board or commission may represent clients before the municipal agency, board or commission on which that employee serves; provided, the member recuses himself or herself from all activities relating to that matter, including but not limited to voting, attempting to influence or in any manner participating in the issue.

For a period of two years after their term expires, former members of a municipal agency, board or commission may not represent clients, including their employer, before the municipal agency, board or commission on which they served.

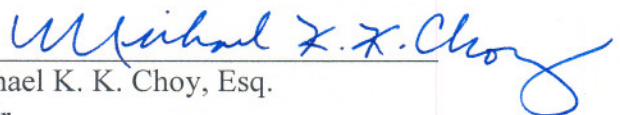
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AUTHORITY

By 4-0 vote of the Alabama Ethics Commission on April 7, 2010.



Michael K. K. Choy, Esq.
Chair
Alabama Ethics Commission