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October 7, 2015

ADVISORY OPINION NO. 2015-14

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Use Of Office For Personal Gain/Member
Of Legislature Advocating For The Lesbian,
Gay, Bisexual, And Transgender (LGBT)
Community

A member of the Legislature may not
impermissibly lobby State officials or local
officials on behalf of her employer.

Use Of Office For Personal Gain/Member
Of Legislature Advocating At The County
And Municipal Levels Of Government

A member of the Legislature may be
permitted to engage in limited fundraising
for her employer as long as in doing so she
does not violate Sections 36-25-5, 5.1 or
23(c).

Mr. Edward A. "Ted" Hosp
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Dear Mr. Hosp:

The Alabama Ethics Commission is in receipt of your request for a formal Advisory Opinion of this Commission, and this opinion is issued pursuant to that request.

QUESTIONS PRESENTED

- 1) Is it a conflict of interest for a member of the Alabama House of Representatives to advocate for the Lesbian, Bisexual, Gay and Transgender (LBGT) community and sponsor and vote on legislation affecting the LBGT community while serving as the Director of Human Rights Campaign Alabama (HRC)?
- 2) Is it a conflict of interest for a member of the Alabama House of Representatives to advocate for the LBGT community while dealing with county and municipal governments?
- 3) May a member of the Alabama House of Representatives, who serves as the Director of HRC Alabama, be involved in fundraising activities on behalf of her employer?

FACTS AND ANALYSIS

This matter has come before the Commission on a joint request for reconsideration from the District Attorney's Association and the Office of the Attorney General of Alabama. Administrative Rule 340-X-1-.02 requires that requests for reconsideration be made within 30 days of the rendering of an Advisory Opinion. The present opinion was rendered on August 5, 2015. Thirty days ran on September 4, 2015. The Joint Request from the DAs and AG was hand delivered on September 10, 2015. For that reason, the Commission will not grant the movants' Request for Reconsideration because it was untimely filed.

That being said, there is no restriction on the ability of the Commission itself to modify its opinions or reverse them on its own initiative. The questions raised by the Attorney General and others illustrate that the Commission needs to more clearly and accurately state our conclusions as given in our original Opinion and we do so now.

First, we point out the limited legal impact of Advisory Opinions from the Commission. As the Court of Criminal Appeals stated, "Advisory opinions issued by the state of Alabama Ethics Commission are not law, but they may protect certain persons from liability under the Ethics Act." *Fitch v. State*, 851 So. 2d 103 (Ala. Crim. App. 2001). Moreover, the Code limits their impact to those at whose request the opinion was issued or those who reasonably rely in a

materially like circumstance..." Ala. Code § 36-25-4(a)(9). In the present case, a legislator, Patricia Todd, has asked for guidance as it relates to her actions as an employee of a non-profit. She is employed by HRC Alabama, a non-profit, policy based, advocacy organization, not a commercial enterprise. It is important, as well, for purposes of this modified opinion to reiterate that she stated she would not lobby for her employer, HRC. We never intended to give her that authority and that authority should not be inferred from our original opinion.

Second, **it is important to note that Representative Todd had been employed by HRC for several months when she requested the original opinion. Whether she could go to work for them was not an issue before us then and it is not now**, as the Commission may only give Advisory Opinions that are prospective in nature. This policy finds support in the clear language of the Code. If we were to address that issue after she had already accepted employment, then we would be condoning or condemning activity that has already occurred. The Ethics Act is a criminal statute and must be construed narrowly. Our concluding after the fact through an Advisory Opinion that conduct is proper or improper would be contrary to the manner in which the Code states we are to determine probable cause or the lack thereof. Ala. Code § 36-25-4 (1975).

Third, the opinion was drafted from the perspective of whether she could advocate human rights issues for the LGBT community, not advocate for specific commercial interests, because, again, that is what she asked, and there is a difference. Finally and most important, she stated in her request for an opinion that her job responsibilities were largely administrative and that she would not lobby State officials on behalf of HRC.

The backdrop against which this Opinion is given is important especially in light of how the movants and others have interpreted our original Opinion. The Supreme Court, and in fact the Code, require us to strike a reasonable balance between a legislator's personal life, including financial, and their official life. The Supreme Court's Advisory Opinion which we cited in our original Opinion provides the often-quoted dicta:

"[E]very legislator would have a personal interest in many bills. Should a legislator be prohibited from voting on a tax reduction bill because the legislator pays taxes? Should a legislator who is a bank officer be prevented from voting on a bill affecting interest rates? Should a legislator who owns real property be prohibited from voting on *ad valorem* taxation? These and similar hypotheticals show why Section 82 cannot reasonably be construed to prevent legislators from voting on any bills which will benefit them financially without regard to how many other persons similarly situated will similarly benefit."

The Court held, specifically, that an educator/legislator could vote on a pay raise for teachers, at least "so long as the bill does not affect the legislator in a way different from the way it affects the other members of the class to which he belongs." Opinion of the Justices No. 317.

The Supreme Court's opinion specifically concerned participating (voting) for shared financial interests, but the same logic would apply even though Representative Todd's questions were not directed to voting on issues with an obvious financial end. In fact, the current language of the Code incorporates this idea of balancing interests.

Ala. Code § 36-25-5(b)(1975) provides that "[u]nless prohibited by the Constitution of Alabama of 1901, nothing herein shall be construed to prohibit a public official from introducing bills, ordinances, resolutions, or other legislative matters...in the exercise of his or her duties as a public official. A member of a legislative body may not vote for any legislation in which he or she knows or should have known that he or she has a conflict of interest."

Conflict of Interest is specifically defined in terms of voting as voting on a matter 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." Ala. Code § 36-25-1(8)(1975)(emphasis added).

Based on the facts she supplied, Representative Todd has been an outspoken advocate for certain social and civil rights issues throughout her life, continuing into her tenure as an elected official. Her oft-stated opinions have closely mirrored those taken by her current employer, HRC Alabama. Her request for this opinion acknowledges limitations on her ability to advocate for her employer in light of her concurrent job as a legislator. In her request, she stated that she would not lobby State officials on behalf of HRC, but she wanted to carve out the ability to advocate for policy issues and legislation of importance to her personally, as a citizen with strongly held views on certain topics. She specifically stated in her request that not all the legislation she envisioned would originate with HRC. In fact, her proposal stated that proposed legislation "in many cases" would come from HRC, but clearly other bodies are capable of creating legislation for this advocacy position and the community is not dependent exclusively on HRC Alabama to do so. Moreover, she never asked whether she could represent HRC specifically before any local legislative bodies. Her questions were directed to advocacy, which invites a discussion of lobbying. Therefore, we will take those facts and questions as she presented them, and incorporate them herein by reference from her request and as set out in our original opinion, and attached hereto as Exhibit "A." Her first two questions are:

- 1) Is it a conflict of interest for a member of the Alabama House of Representatives to advocate for the Lesbian, Bisexual, Gay and Transgender (LBGT) community and

sponsor and vote on legislation affecting the LBGT community while serving as the Director of Human Rights Campaign Alabama (HRC)?

- 2) Is it a conflict of interest for a member of the Alabama House of Representatives to advocate for the LBGT community while dealing with county and municipal governments?

The limitation on a legislator's advocacy begins in Section 101 of the Constitution of 1901 which states:

"No state or county official shall, at any time during his term of office, accept, either directly or indirectly, any fee, money, office, appointment, employment, reward, or thing of value, or of personal advantage, or the promise thereof, to lobby for or against any measure pending before the legislature, or to give or withhold his influence to secure the passage or defeat of any such measure."

Lobbying is defined as "[t]he practice of promoting, opposing, *or in any manner* influencing or attempting to influence the introduction, defeat, or enactment of legislation before *any legislative body*; opposing or in any manner influencing the executive approval, veto, or amendment of legislation; or the practice of promoting, opposing, or in any manner influencing or attempting to influence the enactment, promulgation, modification, or deletion of regulations before any regulatory body. The term does not include providing public testimony before a legislative body or regulatory body or any committee thereof." Ala. Code § 36-25-1(20)(emphasis added). This definition does not limit its application to the state level of government.

"Lobbying includes promoting or attempting to influence the awarding of a grant or contract with any department or agency of the executive, legislative, or judicial branch of state government. No member of the Legislature, for a fee, reward, or other compensation, in addition to that received in his or her official capacity, shall represent any person, firm, corporation, or other business entity before an executive department or agency." Ala. Code § 36-25-1.1 (1975).

"No public official elected to a term of office shall serve for a fee as a lobbyist or otherwise represent a client, including his or her employer, before *any legislative body* or any branch of state or *local government*, including the executive and judicial branches of government, and including the Legislature of Alabama or any board, agency, commission, or department thereof, *during the term* or remainder of the term for which the official was elected. For 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." Ala. Code § 36-25-23(a)(1975).

Reading these definitions together, while serving as an elected official the official cannot be paid for the purpose of promoting or "in any manner" attempting to influence the introduction or defeat of legislation before "any legislative body" which includes local legislative bodies.

We cited these restrictions in our original opinion. Where our original opinion needs clarification and where we erred originally was in not specifically stating that from the position of her already being an employee of HRC when she presented her questions, she may not violate any of the clear terms of the above statutes. In light of the Supreme Court's Advisory Opinion referenced above, if either she or her employer is uniquely affected by proposed legislation, she cannot in any manner sponsor or seek to influence the legislation. Moreover, if the proposed legislation is drafted and comes directly from HRC Alabama or its staff, or if HRC Alabama endorses the bill in any respect, Ms. Todd cannot sponsor it or otherwise promote it or in any other way "lobby" for it. If the legislation comes from HRC, it gives them a unique interest in it. HRC Alabama is her employer; therefore, we conclude it gives her a sufficient financial interest in their legislation, as well, so as to preclude her ability to lobby for it. This action would present a conflict under Ala. Code §§ 36-25-1.1, 5 and 23(a) and we should have specifically said so earlier.

Our position on this point is consistent with previous Advisory Opinions from this office. In AO 98-40, with respect to whether a legislator could simultaneously serve as president of the Alabama Propane Gas Association, we held, "should the Alabama Propane Gas Association have any legislation pending, proposed or be interested in any legislation, the legislator, who serves as president of the Alabama Propane Gas Association, must abstain from voting, attempting to influence or in any manner participating in the legislation before the Legislature. For purposes of the Alabama Ethics Law, legislation will be considered proposed when it is submitted to the Legislative Reference Service, as required by House and Senate Rules." (emphasis added). We also added that the legislator "must abstain from not only voting but also discussing or participating in any manner in any legislation that may be pending or proposed before the Legislature that would affect the Alabama Propane Gas Association and its membership." The same restrictions apply to Representative Todd in the present matter as it pertains to lobbying both at the state level and locally under 23(a). Finally, it bears repeating that in no manner can Representative Todd vote or influence the vote on any matter directly and uniquely affecting HRC or herself.

The restriction under 23(a) creates possible issues with two other recent Advisory Opinions we gave, AO 2014-02 and AO 2015-01. In that regard, we refer to the limited application of our Opinions to those who request them or those who reasonably rely on them in materially similar circumstances and the Code's definition of "lobbying." AO 2014-02 involved a request by a state legislator who was already employed with Baptist Health System before she asked for our Opinion but who asked for the ability to be able to "attend city council and county commission meetings to educate respective officials on Baptist Health System and monitor

issues relative to both general and health care matters and those specifically affecting Baptist Health System." She did not ask if she could lobby for them. AO 2015-01 was, by its clear terms, drafted to apply solely to lawyers who represent clients before the courts and administrative agencies of the state, specifically by the request "in a non-lobbying capacity," while serving in the Legislature. We held that they could do so without violating 23(a). Neither opinion, however allowed the requestor to lobby, as that term is defined in the Code, local legislative bodies on behalf of their employer while concurrently serving as a legislator, and we reiterate herein that they cannot do so. In our view, it is unreasonable to construe either Opinion to invalidate the terms of 23(a), in its present form, which prohibits lobbying on behalf of one's employer before "any legislative body" during their term of office or to otherwise enlarge activities prohibited by 23(a) beyond the limited set of facts presented therein.

We are not telling Representative Todd, however, that within the restrictions outlined above she cannot sponsor, vote, or speak in favor of human rights legislation that is consistent with her ideals and consistent with the Supreme Court's guidance on the issue. For advocacy to be a lawful activity, however, that legislation must come from some person or organization other than her employer or another group in which she has a financial interest or which has the authority to hire or fire her; and it cannot come from an organization that has worked with HRC in a way that would circumvent the restrictions in this opinion. We do point out that specifically excepted from the definition of "lobbying" is "providing public testimony before a legislative body or regulatory body or any committee thereof." She may do this, as well, as long as there is no conflict as outlined above.

Her final question is:

- 3) May a member of the Alabama House of Representatives, who serves as the Director of HRC Alabama, be involved in fundraising activities on behalf of her employer?

Rep Todd does not ask whether she can directly solicit funds on behalf of HRC-Alabama. She asks whether she can be "involved in" fundraising activities on behalf of her employer. We address direct solicitation because that activity can reasonably be inferred from her question.

Ala. Code § 36-25-5.1(1975) prohibits a public official from soliciting or receiving a thing of value from lobbyists, subordinates of lobbyists, or principals.

Ala. Code § 36-25-23(c)(1975) prohibits a public official from soliciting anything, whether it is a thing of value or not, from a lobbyist other than a campaign contribution.

The issue that Representative Todd did not articulate but that her question raises is whether she is continually "using her official position" even when she is in her private life. The Code does not answer that question specifically. Case law does not answer that question as far as we can tell. Our Advisory Opinions do not directly answer that question. Moreover, if we were to assume that she is always using her position, then neither she nor any other legislator could ever realize personal gain from anything.

"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" Ala. Code § 36-25-5(a).

This issue must be viewed in terms of the specific language of the Code which states that "no public official...shall use or cause to be used his or her official position..." The language of the Code contemplates the use of the official position, not a person's private position, a dual identity all of our state legislators occupy, for the benefit of themselves, their family, or a business with which they are associated. The section can reasonably be paraphrased to prohibit a public official from using, or allowing others to use, the fact that she is a public official to confer the prohibited benefit.

For purposes of 1.1, 5.1 and 23, a public official is always a "public official" whether he or she is actually conducting official business or not. Whether they are always and continually "using their official position" in every aspect of their life that produces "personal gain" is much less clear, depends on the facts at the time, and is ultimately up to the public official to police. Her question raises an issue, however, as to how to draw the line in a reasonable manner. Is a lawyer legislator using his or her official position by advertising to get clients? Is he or she allowing others to do so if their firm states in the attorney's biography that he or she is a state representative? The same question could be asked of many other public officials in other job classifications.

Further complicating the issue for us, she has not stated how she intends to raise funds; and the term "fundraise" logically includes conduct in addition to direct solicitations such as general mail-outs, personal contacts or events which raise the profile of an organization while raising funds (e.g., a 5K race). Because of the broad and unspecific nature of the third question we read it to include all types of fundraising activities that could be considered, we reply by pointing Representative Todd to the relevant sections of the Code and some elaboration and guidance on what is clearly prohibited and clearly allowed:

1. As we stated in our original opinion, under Ala. Code § 36-25-5.1 (1975), 23(c) and our Advisory Opinions, Ms. Todd will continually be a "public official" and for that reason she is prohibited from soliciting donations to her employer through any method from:
 - a). Lobbyists, subordinates of a lobbyist and principals;
 - b). Individuals or entities that have matters pending before the Legislature in which Representative Todd, as a Legislator, will take official action; and,
 - c). Any other individual or entity that may feel coerced to contribute given her position.
2. She cannot fundraise in her official capacity or fundraise based on the fact that she is a public official, or allow others to do so on her behalf. Should Representative Todd, on behalf of HRC Alabama, sign a letter, even a generic one which merely informs members of the public as to the purpose of HRC Alabama but which suggests or requests a contribution, it must be done in such a way as to remove any type of pressure or coercion that may be perceived by individuals receiving the letter and so as to make it clear that she is not soliciting a thing of value from a lobbyist, subordinate of a lobbyist, principal or anything at all from a lobbyist, or from individuals or entities that have matters pending before the Legislature in which Representative Todd, as a Legislator, will take official action.

As we advised her in our original opinion, as well, in this scenario the recipient list should be thoroughly vetted to make certain that these categories of contributors do not receive letters. The letter should contain a disclaimer stating that if the individual receiving the letter is a lobbyist, subordinate of a lobbyist, a principal, or individuals or entities that have matters pending before the Legislature in which Representative Todd, as a Legislator, will take official action then it was not intended for them to receive the letter and they should, therefore, disregard it. If a principal, lobbyist, subordinate of a lobbyist, or individuals or entities that have matters pending before the Legislature in which Representative Todd, as a Legislator, will take official action contribute after receiving this solicitation which would be coming from HRC Alabama, the donation must be returned so that she will not have "received it," as we stated in our original opinion. If her name is on the letterhead, any designation signaling that she is a state representative must be removed. The preferred method would be for the letters not to go out over her signature.

3. She may participate in fundraising activities in which her use of public office could not reasonably be questioned which would include fundraising efforts where she works behind the scenes or directs the actions of others and does not directly or publicly solicit money. She may interact with individuals for whom her public

position is objectively irrelevant such as out-of-state individuals or other organizations whose members have no matters before the legislature and who could not reasonably have any during her tenure as a public official but she, and her office, will have to be the judge of the nature of those relationships.

While this list of allowed and prohibited activities is not intended to be exhaustive or complete, we hope it gives guidance to Representative Todd, her legislative staff and her employer. Because areas of judgment are required in these matters balancing the rights of the individual and the prohibitions against certain behaviors by public officials, we recommend Representative Todd seek specific guidance in the future before participating in specific fundraising activities not directly listed above as allowed or prohibited.

We recognize, as well, that this places a burden on her employer, but this must be the trade-off for their having hired a public official.

As we stated before, lobbyists and principals can contribute on their own initiative to whatever group they want to contribute to absent solicitations that violate the Act or for the purpose of corruptly influencing official action.

This modified opinion incorporates by reference the Questions and Facts which Representative Todd originally supplied, but to the extent the reasoning in that Opinion conflicts with the reasoning herein, this modified opinion is hereby substituted.

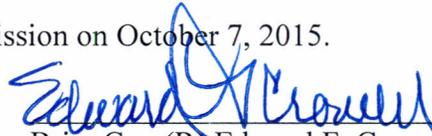
CONCLUSION

A member of the Legislature may not impermissibly lobby State officials or local officials on behalf of her employer.

A member of the Legislature may be permitted to be involved in limited fundraising for her employer as long as in doing so she does not violate Sections 36-25-5, 5.1 or 23(c).

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on October 7, 2015.



Brig. Gen (R) Edward F. Crowell (USAF)
Chair
Alabama Ethics Commission

EXHIBIT A

Facts Provided

Patricia Todd is a State Representative elected to serve District 54 in the Alabama House of Representatives. The District she represents is located in Jefferson County, and includes portions of the cities of Birmingham, Centerpoint and Irondale. She was first elected in 2006 and has been re-elected to two additional terms, most recently in 2014. Representative Todd is the only openly gay or lesbian member of the Alabama Legislature.

Since before being elected to office, Representative Todd has been an active advocate for the Lesbian, Gay, Bisexual and Transgender community (LGBT community) in Alabama – a community of which she is a member. Following her election to the House of Representatives, she continued to advocate for the LGBT community in the Statehouse. She has sponsored or co-sponsored numerous measures which sought to vindicate or protect the rights of the LGBT community, including:

- Legislation that would impose additional penalties for crimes that are based on a victim's sexual orientation (Hate Crimes Legislation):
 - HB513 (2010 Regular Session)
 - HB247 (2011 Regular Session)
 - HB28 (2012 Regular Session)
- Legislation that would require school boards to expand their anti-harassment policies to include protection for students based on sexual orientation and gender identity:
 - HB226 (2010 Regular Session)
- Legislation that would protect state employees and teachers from discrimination based on sexual orientation and gender identity:
 - HB273 (2011 Regular Session)
 - HB26 (2012 Regular Session)
- Legislation that would remove negative statements regarding homosexuality from the State's required sex education curriculum:
 - HB444 (2012) Regular Session)
 - HB22 (2013) Regular Session)
 - HB496 (2013 Regular Session)
 - HB252 (2015 Regular Session)
- Legislation to repeal the State's ban on same sex marriage:

- HB40 (2014 Regular Session)
- HB249 (2015 Regular Session)

Prior to April 2015, Representative Todd was employed by AIDS Alabama. In April 2015, Representative Todd was hired by The Human Rights Campaign of Alabama (HRC Alabama). Human Rights Campaign (HRC) is a national advocacy group with volunteer Steering Committees located in 21 states and offices and full-time staff located in three states: Alabama, Arkansas and Mississippi. HRC actively advocates for the LGBT community at the federal, state and local government levels. Representative Todd was hired as the Alabama HRC Director. HRC is a non-profit 501(c)(4) organization. It does not do business with, nor seek contracts with, governmental entities. Rather, it seeks to advance the interests and rights of the LGBT community.

In her role as a State Representative, Representative Todd intends to continue to advocate for the LGBT community, though she will not lobby state officials as a part of her job function as HRC Alabama Director. She expects, however, to introduce legislation that is supported and in many cases drafted and advocated for – by HRC. She anticipates seeking the votes of other members of the House and Senate in support of such legislation. She also expects to speak in favor of this legislation publicly, in committees and on the floor of the House of Representatives. Further, Representative Todd anticipates working against legislation that she views as harmful to the LGBT community, and expects to undertake all of the above activity (seeking votes, speaking out and voting) with regard to such legislation. This advocacy on behalf of the LGBT community is expected by her constituents and is consistent with her past work as an Alabama citizen and legislator.

In her role as HRC Alabama Director, Representative Todd will be expected to engage in several activities. She will be required to manage and supervise the HRC Alabama staff. She will be in charge of all administrative tasks for HRC Alabama. She will engage in educational work. She will be expected to seek contributions – i.e. fundraise – from private parties in Alabama. She will serve as the spokesperson for the group on issues affecting the LGBT community. She will seek local ordinances and resolutions that support and protect the rights of members of the LGBT community from county and municipal governments.

Representative Todd's duties as Director of HRC in Alabama specifically do not include lobbying for or against legislation on their behalf.

With regard to her compensation, Representative Todd was hired by HRC as a salaried employee. She is not eligible for any performance related bonuses. In fact, she is not eligible for any bonuses at all. Thus, to the extent that HRC Alabama under her leadership is successful or unsuccessful in advancing HRC's interest before local governments, she would not be entitled to either additional or decreased compensation. Representative Todd will be evaluated annually and the organization will make a determination each year – as all employers do – as to whether to continue her employment.

HRC's evaluation of Representative Todd will not include an evaluation of her ability to have particular measures adopted by any governmental entity or subdivision in Alabama. She

will be responsible for developing the organization's overall strategic plan, and she will be evaluated on her ability to develop that strategy and to manage and utilize the organization's resources to effectuate that plan. This will include managing the efforts of other staff members, consultants and volunteers in their efforts to achieve HRC's goals. However, Representative Todd's job performance will not be judged – and her continued employment will not be based - on the adoption (or failure) of measures sought by the organization at any level of Alabama government.