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December 7, 2016

ADVISORY OPINION NO. 2016-37

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University Employees Soliciting Contributions As Part Of Job Responsibilities

Employees of the University of Alabama System or Auburn University who may be either public officials or employees may solicit contributions to their universities from principals provided neither the official nor employee nor a member of their family derives personal gain from the solicitation and does not use the solicitation as an opportunity to corruptly influence official action.

Ala. Code § 36-25-5(e) as related to vendors applies to solicitations for donations to public universities but does not prohibit solicitations from vendors in all instances.

Dear Gentlemen:

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

QUESTION PRESENTED

In light of recent Ethics Commission Advisory Opinions, are University employees and officials permitted to raise funds for their institutions as part of their job responsibilities?

FACTS AND ANALYSIS

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

Alabama and Auburn are institutions of higher education separately created and authorized under the 1901 Constitution of Alabama and recognized under the Alabama Code. They are public institutions created for educational purposes and are part of the State. In addition, Alabama and Auburn are both recognized by the IRS as tax exempt educational organizations, and both have nonprofit support organizations that exist solely to support their respective university and are recognized by the IRS as 501(c)(3) entities.

The Universities have long engaged in fundraising to obtain the funds needed for scholarships, faculty positions, university programs, general maintenance and operations, and capital improvements. In a time when state support has declined, donor assistance is essential to maintaining the quality of the instruction, research and outreach to the public without significantly increasing the cost of tuition.

The University presidents, development officers, other employees and trustees are essential to these fundraising efforts. The Universities' development officers often meet with individual and corporate donors to request donations and to provide donors with an understanding of how their gifts would be used to help the Universities. Their respective presidents, deans or other university employees and officials sometimes meet with prospective donors as part of their job duties.

As public funding for universities decreases, universities are increasingly seeking donors to fund budget shortfalls. Donors have become more sophisticated about their rights as donors and the compliance obligations of both the donor and the University. In an effort to ensure that their employees comply with the Ethics Act and with donor expectations, both universities have adopted fundraising policies. These policies govern gift acquisition and acceptance and both universities subscribe to the nationally accredited standards established by the Council for Advancement and Support of Education (CASE) all of which prohibit conversion of donated funds to personal use and prohibit an employee from soliciting in the face of a conflict of interest. The University policies separately provide penalties for violating these policies, as well, to include termination.

Both universities receive the majority of their funds through state appropriations, tuition and fees and self-generated sources. Approximately 78% of the UA System's projected revenue comes through appropriations, tuition and fees, and revenues generated from the University's hospital and auxiliary services. Similarly, with Auburn University, approximately 81.7% of the school's revenue comes through state appropriations, tuition, auxiliary services and other sales and services. Auxiliary revenue is derived from operation of housing, dining, bookstore operations, etc.

With respect to solicited and donated funds, in the UA System approximately 96% of the gifts received are in the form of restricted funds. Restricted funds may only be used for the express purpose for which they have been given. Even if restricted gift funds are pooled for investment purposes to preserve their corpus, the funds (and any income generated from their investment) may only be distributed back to the campus or foundation to which the gift was initially given, and spent in accordance with the donor's intent.

The primary fundraising foundations for AU are the Auburn University Foundation (academic programs) and Tigers Unlimited Foundation (athletics) and gifts are made directly to them. Gifts can also be made directly to the University. More than 90% of all gifts, whether outright or directed to the endowment, are restricted to specific purposes and may not be used for any purpose other than that identified by the donor. A gift cannot be directed to benefit a specific person.

Within the UA System, development officers are compensated through institutional salaries and any funds that could be available for raises would be made available through merit increases. Salaries and raises paid to development officers are paid through the operating budget that is approved annually by the Board of Trustees. If a development officer is dedicated to raise funds purely on behalf of a specific supporting foundation, however, the foundation may contribute funds to the campus through an affiliation agreement for services performed under the affiliation agreement, one of which might include use of a campus development officer. However, all UA System development officers are paid on a flat salary basis regardless of whether they are assigned to fundraise on behalf of an academic unit or an affiliated support organization.

At Auburn University, funding for salaries of development officers comes from the same pool of funds available to compensate all other university employees, principally tuition, state appropriations and auxiliary services. The funds they raise are not the funding source for their salaries.

Both universities point out that no university employees or officials are compensated based on the amount of funds they raise, nor are they incentivized by receiving a percentage of funds received from their solicitations. This includes those employees who are assigned fulltime

to fundraising. The Universities state that for development employees, like all university employees, performance is annually evaluated using standard review metrics. Development employees' metrics include cultivation factors such as the number of meetings conducted or calls made, and fundraising goals. Overall performance on all metrics establishes whether, assuming funds are available for merit raises for all university employees, their performance warrants an increase. Any increase is administered in the same manner as that of any other university employee not engaged in development activity.

Both universities state that recent opinions have raised concerns at the Universities that traditional fundraising by university employees and officials is not permitted because those individuals are public employees or officials under the Act. Specifically, their questions arise because these individuals are fundraising on behalf of their employer which arguably makes the Universities a "business" they are "associated with" for purposes of the Act's restrictions. Their questions are:

1. **University fundraising from principals**. The Universities ask whether it is permissible under the Ethics Act for university employees and officials to solicit donations and participate in activities to raise funds from individuals, organizations and businesses (including principals) for their university and their university's affiliated nonprofits and support organizations (which exclusively benefit their university) even when the University provides those employees with compensation or benefits where (a) all donations are ultimately for the benefit of the University, and (b) the employee is not paid a percentage of the amount raised or directly compensated based on the amount of money they raise.

2. **Employees fundraising for their university department**. Frequently, university fundraising incorporates the specific members of an academic unit or department who would ultimately utilize the resources being sought. For example, a dean or chairman or professor may raise funds for their department or a laboratory that provides them with resources to use. Other examples include donations to the University for enhanced facilities that are used by faculty and students, a professor's ability to host or travel to academic conferences, equipment the professor uses, research funding, or an endowed professorship that the faculty member may be eligible for. The argument is that the University employees helping to seek this type of donation are best situated to explain the value and ultimately encourage a donor to provide the requested resources for the University. They point out that any donation would ultimately benefit the University and the resulting use of university resources would be governed by university compliance policies that are consistent with § 36-25-5(c).

3. **Clarifying other fundraising restrictions**. The Universities ask whether § 36-25-5(e) applies to university employees and officials engaged in fundraising for their public university. Section 5(e) states,

> "No public official or public employee shall, other than in the ordinary course of business, solicit a thing of value from a subordinate or person or business with whom he or she directly inspects, regulates, or supervises in his or her official capacity."

The Universities state that neither of them directly inspects, regulates or supervises any potential donors. They point out that any dealings with vendors, as well as solicitations made of potential or current vendors, is done "in the ordinary course of business."

The applicable Code sections are Ala. Code §§ 36-25-1(34), 36-25-5(a), 36-25-5.1, 36-25-7 and 36-25-23(c). Ala. Code § 36-25-1(34) defines "thing of value" to include items of monetary value. Ala. Code § 36-25-5(a) prohibits public officials and public employees from using their official position for personal gain. Ala. Code § 36-25-5.1 states public officials and public employees cannot solicit or receive a "thing of value" from a lobbyist, subordinate of a lobbyist, or principal (and these three groups cannot offer or provide them either). Ala. Code § 36-25-7 prohibits anything, regardless of whether or not it is a thing of value, from being offered or solicited in an effort to corruptly influence official action. Finally, Ala. Code § 36-25-23(c) prohibits a public official or public employee from soliciting anything at all from a lobbyist, except a campaign contribution.

In answer to questions "1" and "2," therefore, Ala. Code § 36-25-5(a) prohibits these officials and employees from soliciting donations if by doing so they realize "personal gain" themselves, or provide "personal gain" to a member of their family or a business with which they are associated regardless of whom they solicit. Moreover, as the Court of Criminal Appeals has noted, whether someone has realized "personal gain" must be addressed on a case-by-case basis addressed as applied to those affected. State v. Turner, 96 So. 3d 876 (Ala. Crim. App 2011). Under the facts provided including the manner in which the employees and officials who solicit donations are compensated, however, these solicitations would not create personal gain for the employee as contemplated in 36-25-5(a). The remaining issue under the facts presented, therefore, is whether their efforts benefit a "business" they are "associated with" in violation of the Act. The Commission finds that they do not.

In the case of Lambert v. Wilcox County, 623 So. 2d 1065 (Ala. 1993), the Court recognized that county governmental agencies (in that case, the county school board) are not "businesses" as contemplated in the Act. The Supreme Court differentiated between a private employer and a public employer. The Court stated, "Under § 36-25-1(1), the enumerated classes of things preceding the general term 'any other legal entity' are in the nature of private enterprises, not county governmental agencies." The Commission has recognized this same distinction in previous Advisory Opinions, including as it relates to universities. See AO 2011-11 (University of North Alabama does not fit within the definition of "business."); see also, AO 2015-15.

In much the same way, as we have noted, a public university organized pursuant to the Alabama Constitution for the purpose of educating the public is not a "business" the employee is associated with when donations are sought to benefit that university. Therefore, the donations are not benefitting a "business" as contemplated in the Act or as recognized in Lambert. In the same way, donations to the nonprofit support organizations that exist solely to support their respective university, in other words if they simply direct all their funds to the University, are not "businesses" as contemplated in the Act for the purposes raised and under the specific facts given to the Commission. They cannot, however, operate as mechanisms through which public officials and employees can convert the funds to their personal use.

Finally, Ala. Code § 36-25-5.1's prohibitions do not prohibit these employees and officials from soliciting donations for the benefit of the Universities that employ them from principals. Ala. Code § 36-25-23(c), however, prohibits a lobbyist from being solicited for anything other than a campaign contribution. As the Universities recognize, Ala. Code § 36-25-7 prohibits anything from being solicited or given for the purpose of corruptly influencing official action, as well.

In answer to question "3," Section 5(e) in fact applies but does not prohibit solicitations from vendors in all instances. Ala. Code § 36-25-2(c) requires the Commission to liberally construe the Code to "insure that the public interest is fully protected." Accordingly, the Commission has interpreted Section 5(e) not only to include direct inspection, regulation or supervision, but any other activity, as well, where the public official or public employee is in a position to benefit a private entity either through recommendation, granting of a contract with the public entity or any other situation where the public official or public employee may be able to influence how the private entity does business.

What is meant to be avoided here is "pay to play." Therefore, the facts surrounding solicitations from these groups matter. Specifically, the relationship between the one soliciting and the vendor solicited matters as does whether the soliciting public official or public employee may be able to influence how the private entity does business with the University. In those situations, university officials and employees cannot coerce donations or solicit donations from a vendor and use the fact that the vendor wishes to either receive or maintain a contract with either university as leverage for the donation without violating Ala. Code §§ 36-25-5(e) and 7. University officials also cannot, as they inform us they do not, single out vendors as a group and seek university donations from them. Again, the facts matter in resolving this question, but there is no outright prohibition of the practice contained in 5(e).

The Universities also ask whether Commission interpretations of Section 5(e) which provide that a public official and employee cannot solicit donations from those with "matters pending before" them or their government body restrict university employees in fundraising for their university, and if so, to what does it apply. In fact, the referenced interpretation of Section

5(e) applies most often to other government agencies that are involved in the direct inspection, regulation, and supervision of professionals or businesses – not to universities dealing with students and alums. However, as noted above, Ala. Code § 36-25-7 prohibits any university fundraising activity from corruptly influencing official action by a University."

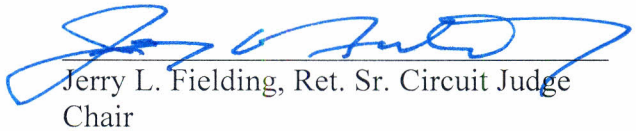
CONCLUSION

Employees of the University of Alabama System or Auburn University who may be either public officials or employees may solicit contributions to their universities from principals provided neither the official nor employee nor a member of their family derives personal gain from the solicitation and does not use the solicitation as an opportunity to corruptly influence official action.

Ala. Code § 36-25-5(e) as related to vendors applies to solicitations for donations to public universities but does not prohibit solicitations from vendors in all instances.

AUTHORITY

By 4-0-1 vote of the Alabama Ethics Commission on December 7, 2016.



Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair
Alabama Ethics Commission