



STATE OF ALABAMA ETHICS COMMISSION



COMMISSIONERS

Jerry L. Fielding, Ret. Sr. Circuit Judge, Chair
Frank C. "Butch" Ellis, Jr., Esq., Vice-Chair
Stewart Hill Tankersley, M.D.
Charles Price, Ret. Circuit Judge
Beverly Brady

MAILING ADDRESS
P.O. BOX 4840
MONTGOMERY, AL
36103-4840

STREET ADDRESS
RSA UNION
100 NORTH UNION STREET
SUITE 104
MONTGOMERY, AL 36104

Thomas B. Albritton
Executive Director

TELEPHONE (334) 242-2997

FAX (334) 242-0248

WEB SITE: www.ethics.alabama.gov

August 16, 2017

ADVISORY OPINION NO. 2017-07

Mr. Bill Newton
Former Acting Finance Director
State Finance Department
1431 Midlane Court
Montgomery, Alabama 36106

Former Acting Finance Director/Assistant
Finance Director/Providing Consulting
Services Through His Law Firm

Judging by the facts Mr. Newton gave to the
Commission, his actions would not fall
within the definitions of lobbying.

Judging by the facts Mr. Newton gave the
Commission, his actions would not violate
Ala. Code §§ 36-25-13 (a) and (c).

Mr. Newton may not contact the Finance
Department for a period of two years after
leaving the Finance Department, even to
obtain publicly available information if he is
doing so to "aid, counsel, advise, consult or
assist" a client because that conduct would
be representing his new employer back
before his former Department.

Mr. Newton may not "aid, counsel, advise,
consult or assist" on contracts in which he
participated or for which he was ultimately
responsible as Finance Director for a period
of two years after leaving the Finance
Department. This restriction would apply to
any contract he signed while Finance
Director or otherwise participated in
"personally and substantially."

Additionally, this prohibition extends to matters “whether arising during or subsequent to the public official or public employee’s term of office or employment.”

Mr. Newton may contact public officials or public employees at other State agencies to obtain publicly available information. Moreover, he may act as attorney for himself or the state in a matter. He may consult, assist on matters in which the state is not a party or does not have a direct and substantial interest. He may aid, counsel, advise, consult or assist, in matters in which he did not participate personally and substantially as a public official or public employee and which was not within or under his official responsibility as a public official or public employee.

Mr. Newton may not use confidential information obtained by virtue of his public employment to benefit his private practice clients or anyone else.

Dear Mr. Newton:

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.

QUESTIONS PRESENTED

- 1) Would my providing the professional services of advice and consultation to clients be considered lobbying?
- 2) Would my requesting public information from public officials and public employees be considered lobbying?
- 3) Would I violate Ala. Code §§ 36-25-13(a) and (c) if I implemented my plan within a period of two years after I terminate my employment?

- 4) Would I violate Code Section 36-25-13(f)¹ if, under my plan and within the two-year period after termination from office or employment, I provided professional advice and consultation to clients in connection with a non-judicial matter?

FACTS AND ANALYSIS

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

Bill Newton, the former Acting Director of the State Finance Department, retired on December 1, 2016, having been appointed by Governor Robert Bentley to this position in June 2013 and after serving as Assistant Finance Director for 20 years. Mr. Newton acknowledges that by virtue of his positions with state government he was subject to the Alabama Ethics Act, and is now subject to the provisions of the “Revolving Door.” Since leaving state service, he plans to open a solo practice law office in Montgomery. His questions involve the definition of “lobbyist” and the application of the “Revolving Door” statute.

Mr. Newton intends to be the sole owner and employee of his law firm, which will be organized as a limited liability company. He will provide background, advice, and consultation to clients on issues that are before the Legislative and Executive branches of Alabama government. Specifically, he intends to provide background information and advice to clients who may then use his advice in matters before one of those branches of government. He has no clients at this point but intends to market his services to (1) companies that want to sell their goods and/or services to state government, (2) law firms that already represent these companies, (3) lobbying firms that already represent these companies, and (4) public or private entities that wish to receive funding/tax incentives from state government.

He intends, as well, to market his experience and expertise in knowing the state officials/employees who are responsible for performing certain functions within state government and how these certain functions get accomplished.

Mr. Newton asks the following questions:

- 1) Would my providing professional advice and consultation to clients be considered lobbying?
- 2) Would my requesting public information from public officials and public employees be considered lobbying?

¹ Due to the passage of Act 2017-364, the provision at issue is now subsection (g) not (f).

Ala. Code §§ 36-25-1 and 1.1 define “lobbying” as:

The 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.

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.

Answering the question of whether Mr. Newton engages in lobbying requires a factual analysis. Judging by the facts Mr. Newton gave to the Commission, his actions would not fall within these definitions of lobbying.

Mr. Newton next asks:

- 3) Would I violate Code Sections 36-25-13(a) and (c) if I implemented my plan within a period of two years after I terminate my employment?
- 4) Would I violate Code Section 36-25-13(f) if, under my plan and within the two year period after termination from office or employment, I provided professional advice and consultation to clients in connection with a non-judicial matter?

To avoid conflict with the “Revolving Door” provisions, for a period of two years after stepping down as a public official or retiring as a public employee, Mr. Newton agrees to limit his actions to supporting his clients with publicly available information and his interpretation thereof, and he agrees not to contact State officials and/or employees to influence legislative, executive, or regulatory actions. He further agrees not to represent any clients before any State officials and/or employees regarding legislative, executive or regulatory actions.

He acknowledges, as well, that several subsections of the “Revolving Door” statute, specifically Sections 13(a) and (c), restrict his ability to interact with state government. He agrees that he will not represent any clients before the Finance Department or before any State, Board, agency, commission, and/or department for which he, as Acting Director of Finance, was

a member or employee. In addition, he will not, on behalf of his clients, contact any such Board, agency, commission or department, or the employees thereof. Application of 13(a) and (c) require factual analysis, as well. Moreover, Mr. Newton may not contact the Finance Department even to obtain publicly available information if he is doing so to “aid, counsel, advise, consult or assist” a client because that conduct would be representing his new employer back before his former Department.

Judging by the facts Mr. Newton gave the Commission, his actions would not violate (a) and (c), but they could violate section (g) (formerly “f”). Mr. Newton likewise raises Section 36-25-13(g) which states:

(g) 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. (Emphasis added).

Mr. Newton asks the Commission to interpret the phrase “in connection with any judicial proceeding or other matter in which the state is a party or has a direct and substantial interest.” Mr. Newton states that judicial proceedings are not the issue for him as he will not be representing any clients in any judicial proceedings. Therefore, the issue is what are the limits of “other matters” within this section.

The purpose of an Advisory Opinion from the Commission is to protect the specific person at whose request the opinion was issued from liability, as well as anyone under materially similar circumstances who reasonably relies, in good faith, on the opinion. Ala. Code § 36-25-4 (1975). In this case, the requestor is an attorney who is a former public official. Therefore, his actions are covered by both the Ethics Act and the Rules of Professional Responsibility.

The Commission has addressed this subsection in five previous Advisory Opinions. The inference to be drawn from these opinions is that the Commission should focus on what the public official or employee actually did while in office. Section 13(g) prohibits a former public official like Mr. Newton from representing anyone before the Department of Finance, and he cannot aid, counsel, advise, consult, or assist people on any matter in which the state is a party or has a direct and substantial interest and in which he participated personally and substantially

while at the Department of Finance, the key being matters he personally participated in. A public official or employee is not otherwise prohibited from using historical and general knowledge learned through his or her public service once they are in the private sector (e.g., in his case how state budgets are put together or passed) except as limited above and by Ala. Code § 36-25-8. See Advisory Opinion 2005-19²; see also AO 2003-37³.

Although “matter” is not defined in the Ethics Act, “matter” is defined in The Rules of Professional Responsibility which governs the conduct of lawyers, in Rule 1.11.⁴ The Commission has previously cited to the Rules of Professional Responsibility, which are codified, in relation to this particular provision of the Ethics Act. See AO 98-35. Although application of those Rules is outside the jurisdiction of the Commission, the definition of “matter” in those Rules is persuasive as it relates to Mr. Newton, a lawyer, when the meaning of the phrase is open to separate interpretations and the legislative intent with respect to this particular section is unclear. The overall purpose of the Act, moreover, is to prevent corruption and this section must be interpreted in light of the overall purpose of the Act.

In the Rules of Professional Responsibility, “matter” includes “[a]ny judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties.” The Alabama State Bar has further recognized that the use of “matter” in their definition contemplates an isolatable transaction or set of transactions between identifiable parties. See Advisory Opinion from the Alabama State Bar 1994-14. Therefore, as relates to Mr. Newton, who is an attorney, the phrase “other matters” necessarily applies to certain contracts in addition to other categories of “matters” which may be non-judicial as referenced in 1.11. This interpretation is consistent with the State Bar’s apparent approach to the issue, with the language used in 13(g), and the Commission’s historical interpretation of 13(g).

Mr. Newton specifically questions whether 13(g) prohibits him from consulting with anyone about a matter “touched in any way by the State budget.” His question requires us to determine two things: whether the state has a “direct and substantial interest” in the matter about which he is consulting AND whether he participated personally and substantially in that matter while a public official or employee or was within his official responsibility while at the Finance Department.

² The former Deputy Director of the Department of Insurance could consult with insurance companies on historical matters involving insurance issues but not on matters he personally handled.

³ The Commission determined that the former General Counsel for the Department of Education could not provide general legal services to local schools in a system that required intervention by the Department of Education within the previous 2 years, even though he, himself, didn’t regulate them, but he was personally participating in the intervention. He was otherwise permitted to represent school districts with which he did not personally participate as General Counsel.

⁴ “Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee...”

The “Revolving Door” is limited in time and scope. We cannot determine in one Advisory Opinion all of the parameters in which the State may have a “direct and substantial interest.” Moreover, it is difficult to give general guidance on this issue because that would require the analysis of facts not before us, and this determination can only be made on a case-by-case basis.

With respect to the “official responsibility” prong of the test, the previous Advisory Opinions from the Commission reveal that historically the Commission has applied a narrow interpretation to the degree of “official responsibility” necessary to trigger this subsection’s restrictions. What comes through in these opinions is that the Commission has viewed “official responsibility,” as specific issues for which the official was ultimately responsible in his or her official capacity, not just general categories that might have fallen within the overall subject matter of the official’s job. Therefore, anything Mr. Newton actually worked on while the Director of Finance would be something he personally and substantially participated in and anything for which he was ultimately responsible would be his “official responsibility” for purposes of 13(g). Beyond that general guidance, we cannot give any further opinion on this issue because that conclusion, likewise, would require the analysis of facts not before us and scenarios he has not presented to us. This analysis can only be made on a case-by-case basis.

Therefore, as relates to Mr. Newton’s specific question of whether 13(g) prohibits him from consulting with anyone about a matter “touched in any way by the State budget,” the Legislature ultimately sets the budgets and they have the authority to alter the recommendation from the State Finance Director and approve whatever budgets it wants to approve. Agencies contribute input, as well. Therefore, Mr. Newton never had ultimate responsibility for any budget that passed. For that reason, prohibiting Mr. Newton from “consulting with anyone about a matter touched in any way by the State budget,” especially a budget passed after his tenure and without more, is too broad a prohibition and would not be a specific matter over which he had ultimate responsibility. It is conceivable that there are additional facts surrounding any matter that would point to the conclusion that 13(g) is implicated in this scenario, but we have not been given those facts here. Moreover, in a general sense giving historical information related to the state budgeting process would be materially similar to the activity allowed in AO 2005-19.

One of Mr. Newton’s specific job duties, however, included contracting on behalf of the State. The State has a direct and substantial interest in any contract to which it is a party. Therefore, Mr. Newton would be prohibited from aiding, counseling, advising, consulting or assisting on contracts in which he participated or for which he was ultimately responsible as Finance Director. This restriction would apply to any contract he signed while Finance Director

or otherwise participated in “personally and substantially.” Additionally, this prohibition extends to matters “whether arising during or subsequent to the public official or public employee’s term of office or employment.” Ala. Code § 36-25-13(g).

Finally, in addition, and just as important, Ala. Code § 36-25-8 prohibits former public officials and employees, such as Mr. Newton, “for a period consistent with the statute of limitations as contained in this chapter,” from disclosing “confidential information gained in the course of or by reason of his or her position or employment in any way that could result in financial gain” *for any person*. Therefore, Mr. Newton may not use confidential information obtained by virtue of his public position to assist his clients, or anyone else, for a period of four years. Ala. Code § 36-25-27.

CONCLUSION

Judging by the facts Mr. Newton gave to the Commission, his actions would not fall within the definitions of lobbying.

Judging by the facts Mr. Newton gave the Commission, his actions would not violate Ala. Code §§ 36-25-13 (a) and (c).

Mr. Newton may not contact the Finance Department for a period of two years after leaving the Finance Department, even to obtain publicly available information if he is doing so to “aid, counsel, advise, consult or assist” a client because that conduct would be representing his new employer back before his former Department.

Mr. Newton may not aid, counsel, advise, consult or assist on any contract in which he participated or for which he was ultimately responsible as Finance Director for a period of two years after leaving the Finance Department. This restriction would apply to any contract he signed while Finance Director or otherwise participated in “personally and substantially.” Additionally, this prohibition extends to matters “whether arising during or subsequent to the public official or public employee’s term of office or employment.”

Mr. Newton may contact public officials or public employees at other State agencies to obtain publicly available information. Moreover, he may act as attorney for himself or the state in a matter. He may consult or assist on matters in which the state is not a party or does not have a direct and substantial interest. He may aid, counsel, advise, consult or assist, in matters in which he did not participate personally and substantially as a public official or public employee and which was not within or under his official responsibility as a public official or public employee.

Mr. Bill Newton
Advisory Opinion No. 2017-07
Page Nine

Mr. Newton may not use confidential information obtained by virtue of his public employment to benefit his private practice clients or anyone else.

AUTHORITY

By 4-1 vote of the Alabama Ethics Commission on August 16, 2017.



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