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ETHICS COMMISSION



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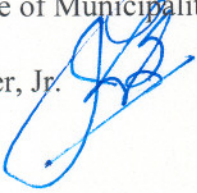
James L. Sumner, Jr.
Director

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MEMORANDUM

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TO: The Honorable Fob James, Governor
The Honorable Don Siegelman, Lieutenant Governor
The Honorable James S. Clark, Speaker of the House
The Honorable Bill Pryor, Attorney General
Members, Alabama Legislature
Cabinet Officials
Department Heads
Board, Agency and Commission Directors
Association of County Commissioners of Alabama
Alabama League of Municipalities

FROM: James L. Sumner, Jr. 

DATE: July 6, 1998

RE: Opinion of the Alabama Ethics Commission interpreting the "Revolving Door Provision"

The 1995 revision of the Alabama Ethics Law included a brand new section entitled the "Revolving Door Provision." The effective date of that section was June 19, 1996. In view of the fact that the Legislature has passed retirement incentives which are in place and will allow a number of people to retire from State service between now and September 1st and the fact that we are going through the first major election cycle since the section became effective, the Alabama Ethics Commission felt that it was incumbent upon us to issue guidelines interpreting the section to assist all of those who would be affected by the law as they leave their public office or public employment. The attached Opinion, Advisory Opinion No. 98-35, was rendered by unanimous vote of the Ethics Commission in its meeting on July 1, 1998. I would like to ask that you give this Opinion the broadest possible distribution among the people who work for you.

As always, we appreciate your cooperation in this matter and we stand ready to respond to any questions or inquiries that you may have with regard to our Opinion.

Attachment



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James L. Sumner, Jr.
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July 1, 1998

TELEPHONE (334) 242-2997
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ADVISORY OPINION NO. 98-35

James L. Sumner, Jr.
Director
Alabama Ethics Commission
Post Office Box 4840
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Revolving Door/Public Officials And Public Employees Prohibited From Engaging In Certain Activities For Two Years After Leaving Public Service.

This opinion is designed to discuss and interpret as completely as possible, the various Sections of the "Revolving Door provision" of the Alabama Ethics Law in an effort to apprise those individuals leaving public service and entering the private sector as to what activities are permissible and what activities are barred by the Ethics Law.

While this opinion has attempted to cover as many fact situations and scenarios as possible, there still may be situations that arise which are not adequately covered by this opinion. In that situation, it is suggested that the Ethics Commission be contacted for further clarification.

James L. Sumner, Jr.
Advisory Opinion No. 98-35
Page two

Dear Mr. Sumner:

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

What are the ramifications of the "Revolving Door provision" in light of the Retirement Incentive Program recently passed by the Alabama Legislature, as well as the fact that many legislators and other elected officials will not be returning to office?

FACTS AND ANALYSIS

In October of 1995, the revised Ethics Law went into effect which instituted sweeping changes in the Ethics Law. Contained in the Ethics Law for the first time was a "Revolving Door provision," which became effective on June 19, 1996, and affects the actions of former public officials and public employees for a period of two years after their departure from public service.

It should be pointed out that the "Revolving Door statute" applies to all levels of government, State, County and Municipal and includes the Legislature, City Councils, County Commissions and other arms of State, County and Municipal governments, such as Planning Commissions, Water Boards, Housing Authorities, etc.

Since the "Revolving Door provision" went into effect, the Commission has rendered numerous Advisory Opinions on this subject matter relating to specific fact situations. However, this year, with the Retirement Incentive Program passed recently by the Legislature, it is anticipated that a large number of State employees will take advantage of the retirement incentives and will leave State service this year, as well as many members of the Legislature who will not be returning to the seat they formerly held, many of whom may be interested in going to work for entities that do business with the agency with which they were formerly employed or the body on which they served.

The purpose of this opinion is to more fully define and interpret the various Sections contained in Section 36-25-13, "The Revolving Door provision" of the Alabama Ethics Law.

This opinion will frequently use the terms "work for" or "accept employment with." These terms should be understood to include any situation where the former public official or public employee serves as a consultant or independent contractor or for which compensation of any type, including but not limited to, salary, expenses, gifts, etc., is received.

Before interpreting Section 36-25-13, there are several definitions that need to be understood. They are as follows:

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(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(13) defines governmental corporations and authorities as:

"(13) GOVERNMENTAL CORPORATIONS AND AUTHORITIES. Public or private corporations and authorities, including but not limited to, hospitals or other health care corporations, established pursuant to state law by state, county or municipal governments for the purpose of carrying out a specific governmental function. Notwithstanding the foregoing, all employees, including contract employees, of hospitals or other health care corporations and authorities are exempt from the provisions of this chapter."

Section 36-25-1(16) defines a legislative body as:

“(16) LEGISLATIVE BODY. The Senate of Alabama, the House of Representatives of Alabama, a county commission, city council, city commission, town council, or municipal council or commission, and any committee or subcommittee thereof.”

Sections 36-25-13(a) and 36-25-13(b) take into consideration situations where a public official or public employee leaves government employment or service, and then desires to lobby or represent clients, including his or her employer, before that agency or department with which he or she was formerly employed or served. Those two Sections state as follows:

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.”

Section 36-25-13(b) states:

“(b) No public employee shall serve for a fee as a lobbyist or otherwise represent clients, including his or her employer before the board, agency, commission, or department, of which he or she is a former employee for a period of two years after he or she leaves such employment. For the purposes of this subsection, such prohibition shall not include a former employee of the Alabama judiciary who as an attorney represents a client in a legal, non-lobbying capacity.”

The Ethics Law defines lobbying as:

“(17) LOBBYING. 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; provided, however, that providing public testimony before a

legislative body or regulatory body or any committee thereof shall not be deemed lobbying.”

In addition, a lobbyist is defined as:

“(18) LOBBYIST.

a. The term lobbyist includes any of the following:

1. A person who receives compensation or reimbursement from another person, group, or entity to lobby.
2. A person who lobbies as a regular and usual part of employment, whether or not any compensation in addition to regular salary and benefits is received.
3. A person who expends in excess of one hundred dollars (\$100) for a thing of value, not including funds expended for travel, subsistence expenses, and literature, buttons, stickers, publications, or other acts of free speech, during a calendar year to lobby.
4. A consultant to the state, county, or municipal levels of government or their instrumentalities, in any manner employed to influence legislation or regulation, regardless whether the consultant is paid in whole or part from state, county, municipal, or private funds.
5. An employee, a paid consultant, or a member of the staff of a lobbyist, whether or not he or she is paid, who regularly communicates with members of a legislative body regarding pending legislation and other matters while the legislative body is in session.”

Based on these two provisions, a public official or public employee may not be paid to represent his or her employer or a client as a lobbyist or representative before the department or agency or legislative body with which he or she was formerly employed or on whose legislative body, commission or board he or she sat, for any purposes.

In other words, a public official or public employee may not lobby for the enactment or defeat of legislation before the department or agency with which he or she was formerly employed or on whose legislative body or board he or she served, nor may he or she otherwise represent his or her present employer before that entity on any matter.

This prohibition extends to former members of the Legislature and other legislative bodies as previously defined, from appearing before the Legislature or the legislative body on which they sat, as either a lobbyist or in any type of representative capacity for their new employer or other clients.

There has been much confusion about the term "represent" and many individuals have incorrectly interpreted the term "represent" to be limited to the concept of attorney representation and/or lobbying and not as an employee conducting business with the public agency with which he or she was formerly employed.

Blacks Law Dictionary, Fifth Edition defines the term "represent" as:

"To appear in the character of; personate; to exhibit; to expose before the eyes. To represent a thing is to produce it publicly. To represent a person is to stand in his place; to speak or act with authority on behalf of such person; to supply his place; **to act as his substitute or agent.**"

Clearly, the Legislature intended the term "represent" to mean more than just attorney representation or lobbying, but also acting as the agent of the employer. Under this definition, a public official or public employee cannot leave the public sector, go to work for a private entity and then perform services for that private entity with the department of which he or she was formerly employed or the legislative body on which he or she sat, as he or she would be acting as the employer's substitute or agent; thereby, being its representative. For example, an accountant could not leave State service, go to work for a private accounting firm and then provide accounting services to the Department with which he or she was formerly employed. Likewise, an employee with the Department of Mental Health/Mental Retardation cannot leave State service and then, in turn, accept employment in the private sector and represent his or her new employer before the Department of Mental Health, or a former legislator or City Councilman could not appear before the Legislature or City Council and represent a client or employer. This would also apply to any other services or work which could be performed on behalf of an employer or client with the public entity.

The Ethics Commission is aware of many instances where, because of the Retirement Incentive Program, many State employees desire to leave State employment and contract back with the State to provide certain services to their Department. This is exactly what the "Revolving Door statute" was designed to prevent, as it would be a subterfuge of the law.

Section 36-25-13(c) states:

“(c) No public official, director, assistant director, department or division chief, purchasing or procurement agent having the authority to make purchases, or any person who participates in the negotiation or approval of contracts, grants, or awards or any person who negotiates or approves contracts, grants, or awards shall enter into, solicit, or negotiate a contract, grant, or award with the governmental agency of which the person was a member or employee for a period of two years after he or she leaves the membership or employment of such governmental agency.”

Section (c) of the “Revolving Door statute” prohibits individuals who hold certain positions, such as directors and assistant directors of State agencies, or department or division chiefs of State agencies, as well as individuals who have certain authority, such as making purchases or having the authority to expend public funds, or negotiate contracts, grants and awards, from leaving the department for which they work and subsequent to that, entering into a contract with the department or agency with which they were formerly employed. In addition, the law prohibits a public official, once his term of office is over or he retires, from doing the same.

This Section is designed to prevent those individuals who have the authority to make purchases, i.e., expend public funds, and those individuals who have the authority to negotiate or approve contracts, grants or awards, from leaving public service and in turn, negotiating a contract for themselves or their employer for a period of two years after leaving public employment.

Looking at the Section from another viewpoint, it is designed to prevent individuals with the authority to expend funds, award or negotiate contracts, etc., from using their position as leverage in awarding a contract, grant or award to a private-sector business, then going to work for that private-sector business and in turn, negotiating contracts, grants or awards back with the department or public agency with which they were formerly employed.

Another question arises when an individual with the authority to negotiate a contract or award a grant seeks employment with an entity with which he or she has contracted. Section 36-25-7(b) states that:

“(b) No public official or public employee shall solicit or receive a thing of value for himself or herself or for a family member of the public employee or family member of the public official for the purpose of influencing official action.”

Combining Sections 36-25-13(a) & (b) with 36-25-13(c) and 36-25-7(b), a public official or public employee, who is in a position to award or grant contracts, may not award or grant a contract to a private entity, and then resign his or her public service and go to work for that entity with which he or she has recently awarded or negotiated a contract as this would create a quid pro quo.

One of the most frequently interpreted Sections of the "Revolving Door provision" is Section 36-25-13(d) which states as follows:

"(d) No public official or public employee who personally participates in the direct regulation, audit, or investigation of a private business, corporation, partnership, or individual shall within two years of his or her departure from such employment solicit or accept employment with such private business, corporation, partnership, or individual."

In March of 1998, the Ethics Commission addressed Section 36-25-13(d) of "The Revolving Door Statute" and held that a public official or a public employee may not, for a period of two years after leaving public employment or within two years after personally participating in the direct regulation, audit or investigation of a private entity, whichever time period is longer, accept employment with that private entity.

That opinion was designed to address those situations whereby an individual may have personally participated in the direct regulation of a business in the past, but had not done so for more than two years and to impose an additional two-year time period would be unduly burdensome. It should be pointed out that this interpretation of Section (d) applies only to that Section and does not relate to the other Sections under Section 36-25-13.

The purpose of this Section is to prevent an individual who has regulatory authority, from using his or her position to obtain employment opportunities with businesses which he or she has regulated or currently regulate, the gist of which is to prevent an individual with regulatory authority from soliciting or accepting employment with a business that he or she regulates in exchange for official action.

By way of example, the law is designed to prevent the ADEM employee, who inspects and permits the landfill at Emelle, from using his position as a regulator, to solicit or accept a high-paying job with the landfill in exchange for a renewed permit, satisfactory report, etc.

A question arises, particularly with department heads, who, in effect, are the final authority for all regulatory activities. Is their function ministerial or are they personally participating in the direct regulation, audit or investigation of that private entity.

To analyze this question, several considerations come into play.

- 1) Is this individual merely rubber-stamping permits, plat developments, etc.; or
- 2) Does this individual approve or deny all requests, licenses, permits, etc. that come through the office?

If the functions are purely ministerial, in that no discretion is involved, that individual is not prohibited from going to work within that industry. On the other hand, if that individual is the ultimate authority as to what official action is taken, he or she would be prohibited for a period of two years from accepting employment in that industry. These determinations must, by their nature, be extremely fact-specific.

While this interpretation may appear harsh, there are many situations whereby a director will merely sign-off or approve the recommendation of a subordinate; however, the subordinate will have taken that into consideration and will have geared his or her recommendation towards the action he or she anticipates the director taking.

In dealing with the "Revolving Door provision" of the Alabama Ethics Law, there is often confusion over what the word "regulate" actually means. Blacks Law Dictionary, Fifth Edition defines "regulate" as follows:

"To fix, establish or control; to adjust by rule, method or establish mode; to direct by rule or restriction; to subject to governing principles or laws. Regulate means to govern or direct according to rule or to bring under control of constituted authority to limit and prohibit, to arrange in proper order and to control that which already exists."

In addition, Blacks Law Dictionary, Fifth Edition defines the term "audit" as:

"Systematic inspection of accounting records involving analysis, tests and confirmations."

Further, the term "investigate" as defined by Blacks is:

"To follow-up step-by-step by patient inquiry or observation; to trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence or legal inquiry."

Section 36-25-13(e) states:

“(e) 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.”

This Section is designed to prevent those individuals employed in the public sector as attorneys, from leaving the public sector and representing clients adverse to the State, County or Municipality in matters in which they substantially participated in while working in the public sector. This Section does not prevent an attorney, who has handled litigation on behalf of the State, from leaving State service and continuing to handle that litigation for the State as a private attorney. In addition, Rule 1.9 of The Rules of Professional Conduct as promulgated by the Alabama Bar Association, states that:

“A lawyer who has formerly represented a client in a matter shall not thereafter,

- a) Represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interest of the former client, unless the former client consents after consultation, or
- b) Use information relating to the representation to the disadvantage of the former client, except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.”

This Code Section, as well as the Rules of Professional Conduct, realizes the distinct possibility for the use of confidential information, obtained in the course of one's employment in the public sector, being used to the detriment of the public employer and to the benefit of the new employer or client and is, therefore, prohibited by law.

Another Code Section that needs to be recognized is Section 36-25-23(a) which states:

“(a) No former member of the House of Representatives or the Senate of the State of Alabama shall be extended floor privileges of either body in a lobbying capacity.”

Therefore, even after a former member of the Legislature has been out of office for two years, and may begin lobbying activities before the Legislature, he or she may not be extended floor privileges by either the House of Representatives or the Senate to assist himself or herself in his or her lobbying duties.

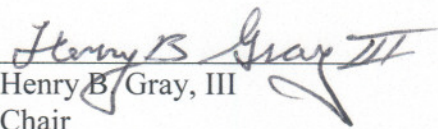
CONCLUSION

This opinion is designed to discuss and interpret as completely as possible, the various Sections of the “Revolving Door provision” of the Alabama Ethics Law in an effort to apprise those individuals leaving public service and entering the private sector as to what activities are permissible and what activities are barred by the Ethics Law.

While this opinion has attempted to cover as many fact situations and scenarios as possible, there still may be situations that arise which are not adequately covered by this opinion. In that situation, it is suggested that the Ethics Commission be contacted for further clarification.

AUTHORITY

By 4-0 vote of the Alabama Ethics Commission on July 1, 1998.


Henry B. Gray, III
Chair
Alabama Ethics Commission