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August 5, 1998

ADVISORY OPINION NO. 98-40

Mary Sue McClurkin
Candidate
Alabama House of Representatives
District 40
c/o Alabama Butane Company
P.O. Box 185
Wilsonville, Alabama 35186

Conflict Of Interests/Legislator Serving As
President Of The Alabama Propane Gas
Association.

A legislator may serve as the president of the
Alabama Propane Gas Association, as this is
a membership organization and has no
connection with state government.

A legislator serving as president of the
Alabama Propane Gas Association may not
lobby on behalf of nor attempt to influence
legislation that may be beneficial to the
Alabama Propane Gas Association or her
private business.

A conflict of interests exists for a member of
the Legislature to serve as the president of
the Alabama Propane Gas Association, as
the Alabama Propane Gas Association is a
business entity which may be uniquely
affected by proposed or pending legislation.
Based on the conflict of interests, should the

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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.

Dear Ms. McClurkin:

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

Would it create a conflict of interests under the Alabama Ethics Law for this State Representative to serve as president of the Alabama Propane Gas Association?

FACTS AND ANALYSIS

Mary Sue McClurkin won the Primary Election on June 2, 1998. As a republican candidate for House District 40, there was not a democrat candidate; therefore, she will be elected in November, barring something unforeseen.

On July 20, 1998, Ms. McClurkin is scheduled to take office as the president of the Alabama Propane Gas Association. This term will last until July 10, 1999.

Ms. McClurkin's company, Alabama Butane, is a member of the Alabama Propane Gas Association and pays annual membership dues.

The Alabama Propane Gas Association members elected Ms. McClurkin as president of the board of directors. Ms. McClurkin has served as secretary/treasurer then as vice-president and now hopes to serve her last year as president. This position is a non-compensated position.

Ms. McClurkin requests an opinion from the Alabama Ethics Commission on whether or not it would be a conflict of interests for her to serve as president of the state association, and in the event that she cannot serve, then another candidate be sought before the July 20, 1998 date.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-1(8) states:

"(8) CONFLICT OF INTEREST. A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust. A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official duties 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."

Section 36-25-1(24) states:

"(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 36-25-5(a) states:

"(a) No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain."

Section 36-25-2(b) states:

"(b) It is also essential to the proper operation of government that those best qualified be encouraged to serve in government. Accordingly, legal safeguards against conflicts of interest shall be so designed as not to unnecessarily or unreasonably impede the service of those men and women who are elected or appointed to do so. An essential principle underlying the staffing of our governmental structure is that its public officials and public employees should not be denied the opportunity, available to all other citizens, to acquire and retain private economic and other interests, except where conflicts with the responsibility of public officials and public employees to the public cannot be avoided."

Section 36-25-5(f) states:

"(f) A conflict of interest shall exist when a member of a legislative body, public official, or public employee has a substantial financial interest by reason of ownership of, control of, or the exercise of power over any interest greater than five percent of the value of any corporation, company, association, or firm, partnership, proprietorship, or any other business entity of any kind or character which is uniquely affected by proposed or pending legislation; or who is an officer or director for any such corporation, company, association, or firm, partnership, proprietorship, or any other business entity of any kind or character which is uniquely affected by proposed or pending legislation."

Section 36-25-5(b) states:

"(b) Unless 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, serving on committees, or making statements or taking action 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."

In 1981, the Office of the Attorney General rendered Advisory Opinion No. 81-00464, addressed to the Honorable Larry D. Dixon, who, at that time, served as a member of the Alabama House of Representatives and was interested in serving as executive secretary of the Board of Medical Examiners. In that opinion, the Attorney General held that the executive secretary was merely an employee of the State Board of Examiners and exercised no part of the sovereign power of the state, and therefore, the position could not be considered as an office of profit.

While this situation is different than that of Larry Dixon, in that, Ms. McClurkin is not an employee of the Alabama Propane Gas Association, it is similar to the extent that this is not an office of profit, in that, the president of the Alabama Propane Gas Association does not exercise the sovereign power of the state.

Section 5(f) of the Ethics Law recognizes an inherent conflict of interests for a member of a legislative body to serve as an officer of an association, firm, partnership, proprietorship or any other business entity of any kind or character which is uniquely affected by proposed or pending legislation.

The above notwithstanding, while an inherent conflict of interests exists, an actual conflict of interests does not exist until such time as legislation is pending which would uniquely affect that entity.

In the situation before the Commission, it is quite probable that at some time in the future, while she is serving in the Legislature, Ms. McClurkin's organization, the Alabama Propane Gas Association, will be interested in legislation pending before the Legislature which may materially affect its membership.

The situation is a little less clear when legislation is merely proposed and not yet pending. The Ethics Law does not define the term "proposed." However, the Commission will attempt to establish some guidelines regarding proposed legislation as follows:

House and Senate Rules require that before legislation is submitted and introduced, it must be submitted to the Legislative Reference Service to make certain that the legislation is in its proper form. For purposes of this and future opinions, the Commission will consider legislation to be proposed at the time it is submitted to the Legislative Reference Service.

Section 5(b) recognizes the potential for a legislator to have an interest in pending litigation and instructs a member of a legislative body not to vote for any legislation in which he or she knows or should have known that he or she has a conflict of interests.

Based on the above law and the facts as provided, Ms. McClurkin must abstain from not only voting but also discussing or participating in any manner on any legislation that may be pending or proposed before the Legislature that would affect the Alabama Propane Gas Association and its membership.

It is also important that while she serves as a member of the House of Representatives, Ms. McClurkin totally separate her responsibilities as a member of the House with that of her service with the Alabama Propane Gas Association.

In addition to the above, Ms. McClurkin may not lobby on behalf of the Alabama Propane Gas Association nor attempt to influence legislation that may be beneficial to either the Association or her private business.

CONCLUSION

A legislator may serve as the president of the Alabama Propane Gas Association, as this is a membership organization and has no connection with state government.

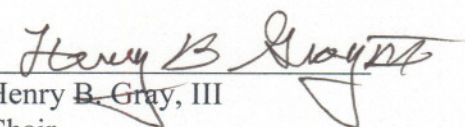
A legislator serving as president of the Alabama Propane Gas Association may not lobby on behalf of nor attempt to influence legislation that may be beneficial to the Alabama Propane Gas Association or her private business.

A conflict of interests exists for a member of the Legislature to serve as the president of the Alabama Propane Gas Association, as the Alabama Propane Gas Association is a business entity which may be uniquely affected by proposed or pending legislation. Based on the conflict of interests, 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.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on August 5, 1998.


Henry B. Gray, III
Chair
Alabama Ethics Commission