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December 1, 1999

WITHDRAWN BY

COMMISSION ON 10/05/11

RECONSIDERATION OF

ADVISORY OPINION NO. 99-39

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The Honorable Michael D. Rogers
Member
Alabama House of Representatives
District 36
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Conflict Of Interests/Member Of Legislature
Raising Money On Behalf Of Party Caucus.

As matters relating to fund-raising, whether for campaign or caucus purposes, are covered by *The Fair Campaign Practices Act*, it is suggested that the requestor of this opinion contact the Attorney General's Office as to the applicability of *The Fair Campaign Practices Act*.

Solicitation Of Donations To Caucus/
Member Of Legislature Soliciting
Contributions For Party Caucus From
Lobbyists.

No public official (including but not limited to a member of the legislature), public employee, or group of public officials or public employees may solicit a lobbyist to contribute to a party caucus, political action committee, non-profit foundation, charitable organization, or any other group, entity or organization, as the Alabama Ethics Law prohibits the solicitation of any lobbyist to

give any thing whether or not the thing solicited is a thing of value for any purpose other than a campaign contribution.

A member (whether acting in the legislator's individual capacity or as an agent or representative of a third party) of the legislature may not solicit a lobbyist to solicit contributions from other lobbyists, nor may he or she solicit a third party to solicit contributions from a lobbyist, as this would be a subterfuge of the Alabama Ethics Law.

For purposes of the Alabama Ethics Law, a campaign contribution is a contribution made to a candidate or a principal campaign committee for the purposes of directly influencing the outcome of an election.

Dear Representative Rogers:

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

Are there any provisions within the Alabama Ethics Act which would govern, limit or in any way affect an agent of a party caucus from fund-raising, soliciting and/or accepting funds on behalf of the House Republican Caucus administrative funds or political action committee?

FACTS AND ANALYSIS

This opinion was originally released on October 6, 1999. The opinion held as follows:

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

Representative Mike Rogers represents the 36th House District for the State of Alabama. He has requested an Advisory Opinion on the solicitation of contributions to a party caucus.

Representative Rogers recognizes that most activities regarding fund-raising fall under *The Fair Campaign Practices Act*. He is interested in determining what, if any, Ethics provisions would still be applicable.

While the fund-raising, itself, falls under *The Fair Campaign Practices Act* and should properly be addressed by the Attorney General's Office, this opinion will limit itself to the use of public time, equipment, human labor, etc., in caucus fund-raising activities and who may be solicited for a contribution.

The Alabama Ethics Law, Code of Alabama, 1975, Section 36-25-5(c) states:

“(c) No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person, or principal campaign committee as defined in Section 17-22A-2, which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy.”

It should be pointed out that a political action committee or a party caucus would not be considered a principal campaign committee for purposes of Section 36-25-5(c). As this area is somewhat gray as relates to other sections of law, it is suggested that the requestor contact the Attorney General's Office for an opinion relating to the applicability of and any prohibitions contained within *The Fair Campaign Practices Act* regarding this.

Section 36-25-1(31)(a) defines a “thing of value” as:

“a. Any gift, benefit, favor, service, gratuity, tickets or passes to an entertainment, social or sporting event offered only to public officials, unsecured loan, other than those loans made in the ordinary course of business, reward, promise of future employment, or honoraria.”

However, the Ethics Law removes from the definition of a “thing of value” the following subject matters:

Section 36-25-1(31)(b):

“b. The term, thing of value, does not include any of the following, provided that no particular course of action is required as a condition to the receipt thereof:

1. Campaign contribution.
2. Seasonal gifts of an insignificant economic value of less than one hundred dollars (\$100) if the aggregate value of such gifts from any single donor is less than two hundred fifty dollars (\$250) during any one calendar year.
3. Hospitality extended to a public official, public employee, and his or her respective household as a social occasion in the form of food and beverages where the provider is present, lodging in the continental United States and Alaska incidental to the social occasion, and tickets to social or sporting events if the hospitality does not extend beyond three consecutive days and is not continuous in nature and the aggregate value of such hospitality in excess of two hundred fifty dollars (\$250) within a calendar day is reported to the commission by the provider provided that the reporting requirement contained in this section shall not apply where the expenditures are made to or on behalf of an organization to which a federal income tax deduction is permitted under subparagraph (A) of paragraph (1) of subsection (b) of Section 170 of the Internal Revenue Code of 1986, as amended, or any charitable, education or eleemosynary cause of Section 501 of Title 26 of the U.S. Code, and where the public official or public employee does not receive any direct financial benefit. The reporting shall include the name or names of the recipient or recipients, the value of the entire expenditure, the date or dates of the expenditure, and the type of expenditure.
4. Reasonable transportation, food and beverages where the provider is present, and lodging expenses in the continental United States and Alaska which are provided in conjunction with an educational or informational purpose, together with any hospitality associated therewith; provided, that such hospitality is less than 50 percent of the time spent at such event, and provided further that if the aggregate value of such transportation, lodging, food, beverages, and any hospitality provided to such public employee, public official, and his or her respective household is in excess of two hundred fifty dollars (\$250) within a calendar day the total amount expended shall be reported to the commission by the provider. The reporting shall include the name or names of the recipient or recipients, the value of the entire expenditure, the date or dates of the expenditure, and the type of expenditure.
5. Payment of or reimbursement for actual and necessary expenditures for travel and subsistence of a public official or public employee in connection with an economic development research or trade mission, or for attendance at a mission or meeting in which he or she is scheduled to meaningfully participate, or regarding

matters related to his or her official duties, and for which attendance no reimbursement is made by the state; provided, that any hospitality in the form of entertainment, recreation, or sporting events shall constitute less than 25% of the time spent in connection with the event. If the aggregate value of any such hospitality extended to the public employee, public official, and his or her respective household is in excess of two hundred fifty dollars (\$250) within a calendar day, the total amount expended for that day shall be reported to the commission by the provider. The reporting shall include the name or names of the recipient or recipients, the value of such expenditures, the date or dates of the expenditure, and the type of expenditure.

6. Promotional items commonly distributed to the general public and food or beverages of a nominal value.”

Section 36-25-23(b) states:

“(b) **No public official, public employee, or group of public officials** or public employees **shall solicit any lobbyist to give any thing** whether or not the thing solicited is a thing of value **to any person or entity for any purpose other than a campaign contribution.**” (Emphasis added.)

The Alabama Ethics Law further provides that a public official or a public employee may not solicit any thing from a lobbyist, regardless of whether or not the thing solicited is a thing of value with the exception of a campaign contribution.

Based on Section 36-25-23(b), a Legislative caucus may not solicit a lobbyist to make a contribution to a party caucus, political action committee, non-profit foundation, charitable organization, or any other group, entity or organization.

It should be pointed out that this solicitation may not be either direct or indirect. In other words, a member (whether acting in the legislator’s individual capacity or as an agent or representative of a third party) of the legislature may not contact a lobbyist and ask that lobbyist to contact other lobbyists for contributions, even if the lobbyist originally contacted by the member of the legislature, does not personally contribute, as this would still be a direct solicitation.

In addition, the solicitations may not be made indirectly. For example, a member of the legislature, or other public official, public employee, or group of public officials or public employees may not contact a private citizen and request that private citizen to solicit contributions

for the caucus or political action committee from a lobbyist, as this would be a subterfuge of the Alabama Ethics Law.

Subsequent to the original opinion being rendered, the Honorable Seth Hammett, Speaker of the House, asked that the Commission reconsider and clarify certain portions of the opinion. The prime area of contention revolves around what is a campaign contribution for purposes of the Alabama Ethics Law.

On November 1, 1999, the Office of the Attorney General rendered Advisory Opinion No. 2000-017, which held that:

“A ‘contribution’ as defined in the Fair Campaign Practices Act, to a political committee is the same as a ‘campaign contribution’ as used in the Ethics Law.”

That opinion went on to state that:

“Although the term ‘campaign contribution’ is not defined in the FCPA, the term ‘contribution’ is defined in the FCPA. The terms ‘contribution’ and ‘campaign contribution’ are commonly used interchangeably.”

The FCPA defines a “contribution” under Section 17-22A-2(a)1-4 as:

“a. The following shall be considered contributions:

1. A gift, subscription, loan, advance, deposit of money or anything of value, a payment, a forgiveness of a loan, or payment of a third party, made for the purpose of influencing the result of an election.

2. A contract or agreement to make a gift, subscription, loan, advance, or deposit of money or anything of value for the purpose of influencing the result of an election.

3. Any transfer of anything of value received by a political committee from another political committee, political party, or other source.

4. The payment of compensation by any person for the personal services or expenses of any other person if the services are rendered or expenses incurred on behalf of a candidate, political committee, or political party without payment of full and adequate compensation by the candidate, political committee, or political party . . .”

When the Alabama Ethics Law was amended in 1995, Section 36-25-1(32)(b)(1) excluded from the definition of a "thing of value," a "campaign contribution" as defined in Section 17-22A-2.

In 1997, those areas of the Ethics Law dealing with campaign matters were transferred to *The Fair Campaign Practices Act* by Act No. 97-651, which was signed into law by the Honorable Fob James on May 29, 1997. When these sections were removed from the Ethics Law, certain other changes were made.

Subsequent to the changes, Section 36-25-1(31)(b)(1) excludes from the definition of a "thing of value," a "campaign contribution."

It is important to note that when the changes were made, the reference to *The Fair Campaign Practices Act* in relation to a "campaign contribution" was deleted, thereby leaving the definition of a "campaign contribution" to the Ethics Commission.

It is the opinion of the Alabama Ethics Commission that, as relates to the Ethics Law, there is no reference or relation between the term "campaign contribution" contained in the Ethics Law and the definition of a "contribution" as defined by *The Fair Campaign Practices Act*. The Commission is further of the opinion that the definition of a "contribution" is a broader phrase which can relate to matters other than those that are designed to influence the results of an election than the definition of a "campaign contribution," which is intended to be directly related to a candidate's campaign.

When the Ethics Law was amended in 1995, Section 36-25-6 set certain prohibitions on when a candidate could solicit or accept campaign contributions. That section in pertinent part states as follows:

"(a) Notwithstanding any other provision of law, including but not limited to Sections 17-22A-1 to 17-22A-23, inclusive, and 13A-10-61, a candidate, public official, or principal campaign committee, as defined in Section 17-22A-2, may only accept, solicit, or receive contributions, as defined in Section 17-22A-2, to influence the outcome of an election; in addition, a candidate, public official, or principal campaign committee may not accept, solicit, or receive contributions more than 12 months before an election in which the person intends to be a candidate. The candidate may also solicit contributions for a period of 120 days after the election in which the person was a candidate, but only to the extent of any campaign debt of the candidate or the principal campaign committee of the candidate as indicated on campaign financial disclosure form or to the extent of reaching the threshold that is required for qualification as a candidate for the office

which he or she currently holds. The provisions of this section dealing with the campaign debt of the candidates or the principal campaign committee of the candidate shall not apply to any prior candidate or current elected official who files a verified statement of such debt with the Secretary of State on or before October 1, 1995. Said debt must have been created on or before January 1, 1995 and shall be directly related to lawful campaign expenditures. Provided, however, any candidate or elected official whose election is challenged including quo warranto challenges may then accept, solicit and receive campaign contributions for the purpose of paying all expenses associated with the election challenge.”

It is clear from the reading of this section that the legislature, at the time the Ethics Law was amended, fully intended that certain limitations be placed on the solicitation of campaign contributions by public officials. The law clearly states that campaign contributions can only be accepted or solicited within a 12-month period before an election and for 120 days after an election, to the extent of any campaign debt or the filing fee required for qualifying for that office.

It is clear that the legislature intended that limitations be put on the raising of campaign monies, and it would be a subterfuge of the law for a public official or principal campaign committee to raise monies outside the 12-month window for a caucus or other political organization, and then later distribute the money to a candidate for his or her election.

To further delineate the difference between a “contribution” and a “campaign contribution,” it is important to define the term “campaign.”

Black’s Law Dictionary, Fifth Edition defines a “campaign” as:

“All the things and necessary legal and factual acts done by a candidate and his adherents to obtain a majority or plurality of the votes to be cast. Running for office, or candidacy for office.” *Norris v. United States*, 86 F.2d. 379.

Therefore, it is clear that a “campaign contribution” does directly relate to an election or candidacy for office.

When the Attorney General issued Advisory Opinion No. 2000-017, there were two areas of the Ethics Law that appeared to be in conflict with the Office of the Attorney General. Those sections are as follows:

Section 36-25-13(f), Code of Alabama, 1975, states as follows:

“(f) Nothing in this chapter shall be deemed to limit the right of a public official or

public employee to publicly or privately express his or her support for or to encourage others to support and contribute to any candidate, political committee as defined in Section 17-22A-2, referendum, ballot question, issue, or constitutional amendment.”

Likewise, Section 36-25-23(b) states that:

“(b) No public official, public employee, or group of public officials or public employees shall solicit any lobbyist to give any thing whether or not the thing solicited is a thing of value to any person or entity for any purpose other than a campaign contribution.”

It is well settled in Alabama law that a specific provision overrides a general provision. The Commission has determined that Section 36-25-13(f) is a general provision that is overridden by Section 36-25-23(b). The interpretation that there is a conflict is erroneous based on the following case law:

“Where there is a general provision dealing with a general subject and a special provision dealing with a specific subject, special provision is to be construed as an exception to the general law and controls.” *State v. Elliot*, 21 So. 2d. 310.

“If there is an apparent conflict between general laws and those dealing with a specific subject, the general law yields to the special, and both are given effect so as not to conflict.” *Downing v. City of Russellville*, 3 So. 2d. 34.

“It is well settled under Alabama law that where two sections of provision of statute are conflicting, the last in order of arrangement controls.” *Alabama State Board of Health, ex. rel. Baxley v. Chambers County*, 335 So. 2d. 653.

It is clear to the Commission that there is no conflict between the two sections cited above, in that, Section 13(f) is not only a general provision, which would yield to the specific provision of Section 23(b), but 23(b) is also the last in order of arrangement.

While the Ethics Commission has no authority to interpret *The Fair Campaign Practices Act*, Section 36-25-27(c) states that:

“The enforcement of this chapter shall be vested in the commission; provided however, nothing in this chapter shall be deemed to limit or otherwise prohibit the Attorney General . . . from enforcing any provision of this chapter as they deem appropriate.”

Based on the fact that interpretation of the Ethics Law is vested in the Ethics Commission and that the term “campaign contribution” is not defined by either the Ethics Law or *The Fair Campaign Practices Act*, it is well within the purview of the Ethics Commission to define the term “campaign contribution.”

For purposes of the Alabama Ethics Law, a campaign contribution is a contribution made to a candidate or a principal campaign committee for the purposes of directly influencing the outcome of an election.

CONCLUSION

As matters relating to fund-raising, whether for campaign or caucus purposes, are covered by *The Fair Campaign Practices Act*, it is suggested that the requestor of this opinion contact the Attorney General’s Office as to the applicability of *The Fair Campaign Practices Act*.

No public official (including but not limited to a member of the legislature), public employee, or group of public officials or public employees may solicit a lobbyist to contribute to a party caucus, political action committee, non-profit foundation, charitable organization, or any other group, entity or organization, as the Alabama Ethics Law prohibits the solicitation of any lobbyist to give any thing whether or not the thing solicited is a thing of value for any purpose other than a campaign contribution.

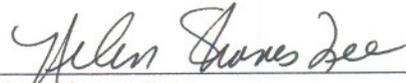
A member (whether acting in the legislator’s individual capacity or as an agent or representative of a third party) of the legislature may not solicit a lobbyist to solicit contributions from other lobbyists, nor may he or she solicit a third party to solicit contributions from a lobbyist, as this would be a subterfuge of the Alabama Ethics Law.

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Representative Rogers
Advisory Opinion No. 99-39
Page eleven

AUTHORITY

By 4-1 vote of the Alabama Ethics Commission on December 1, 1999.



Helen Shores Lee
Chair
Alabama Ethics Commission