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ADVISORY OPINION NO. 99-46

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Revolving Door/Former Insurance Commissioner Associating With Law Firm Representing Entities Subject To Regulation By The Department Of Insurance.

The former Commissioner of the Alabama Department of Insurance may not participate in the representation of entities which he regulated while Commissioner of the Department of Insurance, for a period of two years after leaving that position, regardless of whether or not they were clients prior to his becoming Commissioner of Insurance.

The law firm employing the former Insurance Commissioner may represent clients before the Alabama Insurance Department; provided, the former Commissioner of Insurance not participate in any matters relating to the representation; and, that the former Commissioner of Insurance not provide confidential information to the other members of his law firm obtained in the course of his service as Insurance Commissioner in a manner that would assist the law firm in representing the client or in obtaining the clients.

The former Commissioner of the Alabama Department of Insurance may not act as an attorney for an insurance company or otherwise aid, counsel, advise, consult or assist in representing an insurance company in connection with any judicial proceeding or other matter in which the State of Alabama is a party or has a direct and substantial interest, and in which the former Commissioner of Insurance participated personally and substantially as Commissioner of Insurance, or which was within or under the public official's or public employee's official responsibilities as Commissioner of Insurance.

The two-year prohibition contained in the "Revolving Door" provisions of the Alabama Ethics Law applies solely to the former Commissioner of Insurance and does not apply to other members of his law firm or the law firm in general.

Dear Mr. Cater:

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.

QUESTIONS PRESENTED

1. Is it permissible to continue to represent insurance related entities that had been his clients prior to his service as Insurance Commissioner or had been represented by Steiner-Crum, Byars and Main, P.C., and its predecessors?

2. May Mr. Cater or the firm represent other regulated entities that were not previously represented by either himself or Steiner-Crum and Baker prior to his service as Insurance Commissioner?

3. Does the two-year prohibition contained in the "Revolving Door" provisions of the Alabama Ethics Law apply solely to the former Commissioner of Insurance or does it also apply to other members of his law firm or the law firm in general?

FACTS AND ANALYSIS

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

Richard H. Cater served as Insurance Commissioner from February 2, 1998 to January 18, 1999 and recently returned to the private practice of law. His law firm has become associated with Steiner-Crum, Byars and Main, P.C., which is the successor firm to Steiner-Crum and Baker. Mr. Cater is interested in clarifying the firm's status under the Code of Ethics regarding representation of entities that were subject to regulation by the Department of Insurance during his tenure as Insurance Commissioner. He is requesting that the Commission clarify any limitations imposed by law on the firm's representation of insurance companies, agents, brokers or other types of entities that are regulated by the Alabama Department of Insurance.

Prior to his becoming Insurance Commissioner, Mr. Cater provided legal services to insurance companies, agents and related entities. Substantially all of these services involved the defense of insurers. The other matter included policy coverage issues and subrogations. Steiner-Crum provided similar services to these type entities.

Mr. Cater raises several issues on which they request clarification.

1. Is it permissible to continue to represent insurance related entities that had been his clients prior to his service as Insurance Commissioner or had been represented by Steiner-Crum, Byars and Main, P.C., and its predecessors?

2. May Mr. Cater or the firm represent other regulated entities that were not previously represented by either himself or Steiner-Crum and Baker prior to his service as Insurance Commissioner?

Mr. Cater states that the regulatory scheme found in the Insurance Code and its supporting regulations is administered by the regulatory experts that comprise the Insurance Department staff. It is designed to be applied universally across the categories of regulated entities. The Commissioner, who is chief regulator, is not personally nor directly involved with a single regulated entity, unless a situation develops that is outside the normal course of events. Mr. Cater states that in these cases, the Commissioner must be involved personally and directly.

By way of example, Mr. Cater offers a situation that requires the Commissioner's personal involvement when an insurance company wishes to pay dividend to stockholders. As long as the company will remain financially sound after payment, the Insurance Department has no discretion and the dividend must be allowed. However, should the company seek to pay an extraordinary dividend which is an amount in excess of what is considered reasonable and ordinary, it must satisfy the Department that it will remain financially sound following the payment. The Commissioner has the discretion to approve, approve with modifications or deny payment of the extraordinary dividend. Therefore, the personal and direct involvement of the Commissioner is necessary in this situation.

Mr. Cater states that in his opinion it is this situation that requires the personal, direct and discretionary action on part of the regulator that presents the opportunity for a quid pro quo which the Ethics Law is designed to prohibit. He further states that it appears that the chief of the regulatory agency that has not had personal and direct involvement with a regulated entity is not prohibited from doing work for that entity after leaving office, even within the time limitations as set out in the statute. Mr. Cater asks for confirmation of his understanding as to the applicability of this section of the Ethics Law.

The final issue presented by Mr. Cater regards the two-year revolving door which prohibits a former public official from engaging in certain activities for a period of two years following his tenure. Mr. Cater states that his service was less than a single year by approximately two weeks. He asks the Commission to find an exception to the two-year period that will allow representation of entities that did not require his personal and direct attention in regulatory and non-regulatory matters.

The Alabama Ethics Law, Code of Alabama, 1975, 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(2) states:

"(2) BUSINESS WITH WHICH THE PERSON IS ASSOCIATED. Any business of which the person or a member of his or her family is an officer, owner, partner, board of director member, employee, or holder of more than five percent of the fair market value of the business."

Section 36-25-8 states:

"No public official, public employee, former public official or former public employee, for a period consistent with the statute of limitations as contained in this chapter, shall use or disclose 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 other than his or her regular salary as such public official or public employee for himself or herself, a family member of the public employee or family member of the public official, or for any other person or business."

Section 36-25-13 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.

(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.

(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.
>
> (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.
>
> (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.
>
> (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."

While the "Revolving Door" provisions clearly prohibit Mr. Cater from representing any entity before the Insurance Department for a period of two years after he left the position of Commissioner, there are other types of litigation that, as an attorney, he may not become involved.

Under Section 36-25-13(e), Mr. Cater may not represent an insurance company in relation to any judicial proceeding or other matter in which the State is a party or has a direct and substantial interest, and in which Mr. Cater participated personally and substantially as Commissioner of Insurance during his tenure, or in a manner which was within or under his official responsibilities as Commissioner of Insurance.

It should be pointed out that the "Revolving Door" provisions contained in the Alabama Ethics Law apply solely to the former public official or public employee and his or her activities and do not apply to his or her employer generally. However, the former public official or public employee may not use his or her influence or information he or she obtained in the course of his or her former employment to benefit his or her new employer or another business with which he or she may be associated.

Likewise, as relates to question number four, there is no exception to the two-year prohibition. In other words, it does not matter how long one's tenure is as a public official or a public employee. The two-year prohibition remains the same.

CONCLUSION

The former Commissioner of the Alabama Department of Insurance may not participate in the representation of entities which he regulated while Commissioner of the Department of Insurance, for a period of two years after leaving that position, regardless of whether or not they were clients prior to his becoming Commissioner of Insurance.

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The former Commissioner of the Alabama Department of Insurance may not act as an attorney for an insurance company or otherwise aid, counsel, advise, consult or assist in representing an insurance company in connection with any judicial proceeding or other matter in which the State of Alabama is a party or has a direct and substantial interest, and in which the former Commissioner of Insurance participated personally and substantially as Commissioner of Insurance, or which was within or under the public official's or public employee's official responsibilities as Commissioner of Insurance.

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AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on October 6, 1999.

Helen Shores Lee
Chair
Alabama Ethics Commission