

# The Alabama Ethics Law for Lawyers

by James L. Sumner, Jr. and Hugh R. Evans, III



## Introduction

In 1995, sweeping revisions were made to the Alabama Ethics Law, *Code of Ethics for Public Officials, Employees, etc.*, §36-25-1 through 36-25-30, *Code of Alabama*, 1975. Those changes have had a tremendous impact on the way the public's business is conducted in the State of Alabama.

While the Alabama Ethics Law and Ethics Commission only have jurisdiction over public officials and public employees, there are certain areas of the Ethics Law of which the practicing attorney in the State of Alabama should be aware.

## Section I

### Reporting Violations of the Alabama Ethics Law

Section 36-25-17 of the 1995 amended Ethics Law provides that:

*"(a) Every governmental agency head shall within 10 days file reports with the commission on any matters that*

*come to his or her attention in his or her official capacity which constitute a violation of this chapter.*

*(b) Governmental agency heads shall cooperate in every possible manner in connection with any investigation or hearing, public or private, which may be conducted by the commission."*

While the law requires that every governmental agency or department head report suspected violations of the Ethics Law to the Commission, it is important to recognize that it is not the department head's responsibility to determine

whether or not a violation has in fact occurred, but it is merely their obligation to report suspected violations of the law. While the legal obligation to report these matters to the Commission rests solely on the department head, for the Ethics Law to be successfully enforced, it is incumbent upon those individuals who provide legal counsel to the various public entities to not only make those governmental officials whom they represent aware of the reporting requirements, but to advise those officials as to the merits of a suspected Ethics violation. A recommended guideline if there is any question is, "when in doubt, report to the Commission."

Due to the litigious nature of today's society, many individuals are somewhat reluctant to report suspected violations for fear of incurring liability for their actions. Governmental agency heads should be counseled that if their report is made in good faith to the Commission, no liability will attach to them. Their failure to file the required information, however, could subject

that governmental agency or department head to criminal liability.

Section 36-25-27(a)(7) makes the failure to disclose required information to the Ethics Commission a Class A misdemeanor. Under the Ethics Law, a Class A misdemeanor is punishable by up to a year in prison and up to a \$2,000 fine. Under the new law, there is a two-year statute of limitations for misdemeanor prosecutions.

Section 36-25-17 further requires that the reporting of suspected violations to the Ethics Law be made within ten days. From a realistic viewpoint, the Ethics Commission is not so concerned as to when the suspected violation is reported, but that the suspected violation is, in fact, reported. For example, should the department head not make the report until the 13<sup>th</sup> or 15<sup>th</sup> day is of little or no consequence as long as the report is indeed filed with the Commission.

Section 36-25-2(c) indicates that the Ethics Law shall be liberally construed to promote complete disclosure of all relative information and to ensure that the public interest is fully protected.

There are many situations under which a department will conduct an internal investigation into alleged violations of the Alabama Ethics Law. Should disclosure of the investigation hinder or jeopardize an internal investigation, the Ethics Commission would surely not hold the department head to a strict ten-day reporting requirement. However, as a practical matter, the Commission should be notified of the internal investigation with the additional caveat that the results of the internal investigation will be forwarded to the Commission upon completion. Generally speaking, the Commission will then take no action until the internal investigation is completed.

Section 36-25-17 further requires department heads to cooperate in every possible manner in connection with any investigation or hearing being conducted by the Alabama Ethics Commission. Therefore, a department head should be prepared to provide the Ethics Commission with any and all documentation that supports the allegation, as

well as making individuals available to assist in gathering needed documents. In other words, a department head should not file a complaint with the Ethics Commission and then fail or refuse to provide the documentation to back up the charges.

A further question that arises is whether or not a department head or counsel for that department head may require an employee to testify in matters relating to that investigation.



The Ethics Law clearly states that respondents may not be required to testify or be a witness against themselves during any phase of an Ethics Commission investigation. In addition, as the Ethics Commission has no subpoena power, no witness may be compelled to testify. The case of *Garrity v. New Jersey*, 87 S. Ct. 616, 385 U.S. 493, 17 L. Ed. 2d 562 (1967), held that a police officer may be required to give a statement during an internal investigation and refusal to do so could result in termination or other disciplinary action. However, should the police officer give a statement, while it may be used against that officer in disciplinary matters, it may not be used against him in a criminal proceeding.

Based on *Garrity* and the Ethics Commission's lack of subpoena power, the Ethics Commission has taken the position that a department head may not force an employee to testify before the Commission and then use that testimony against the employee in a criminal proceeding. This would especially hold true with individuals who are answering to ethics complaints. However, a department head should, under no circumstances, discourage or prohibit an employee, who is asked to testify, from testifying.

One area of concern that has arisen on numerous occasions under the reporting requirements of Section 36-25-17 is the question of whether or not the department head, in fulfilling their legal obligation to report a suspected violation, is merely fulfilling their reporting requirements, or is in fact filing an official complaint. The Ethics Commission has addressed this situation from two perspectives.

In one situation, a department head is fulfilling his reporting requirements under the law and has taken appropriate action against the employee in relation to the suspected violation, and does not intend the report to be a formal complaint. Under this scenario, it is within the Ethics Commission's discretion to either treat the notification as a complaint and investigate further, or if appropriate action has indeed been taken by the department head, to consider the matter appropriately handled and the reporting requirements satisfied.

Under the second scenario, the department head not only fulfills his reporting requirements but fully intends for his notification to the Commission to serve as a formal complaint. Under the second scenario, an investigation will be instituted into the allegations as would be done in the case of any other complaint filed with the Commission.

## Section II

### Resolving Conflicts of Interests Under the Alabama Ethics Law

One key area that attorneys who represent public entities often have to deal with involves situations whereby a conflict of interests is presented. The Alabama Ethics Law defines a conflict of interest as:

*"(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."

For example, a member of a county board of education has a spouse who is employed as a tenured teacher within that county school system. The question that presents itself is, "Am I strictly prohibited from participating in any matters that come before the board for official action due to the fact that my spouse will be impacted by my action?"

In *OPINION OF THE JUSTICES NO. 317*, 474 So. 2d 700, the Supreme Court of the State of Alabama addressed a similar situation regarding legislators who were also educators, or who had spouses who were educators, and what, if any, involvement they could have in school

funding matters. In that opinion, the supreme court stated that legislators/educators could vote and participate in matters that they or a family member might be affected by,



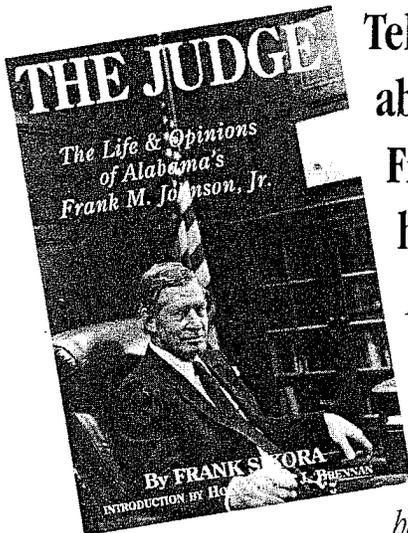
provided, that they or the family member were not affected in a manner different from other members of the class to which they belong.

In the hypothetical situation we have presented, a county board of education

member may vote on an across-the-board pay raise for all employees of the school system, but not vote, attempt to influence or in any way participate in a vote for a pay raise that is only going to be given to science teachers, when that board member's spouse happens to be a science teacher. The effect of that vote would be that the spouse is affected differently from other members of the class to which he or she belongs, that class being all employees of that county school system.

In the past several months, the Ethics Commission has rendered numerous advisory opinions relating to this matter, a sampling of which is below.

**Advisory Opinion No. 95-73** states that a mayor or council member may not vote or participate in any matters which would result in financial gain to the member, or family member, or a business in which the mayor or council member has an interest.



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**Advisory Opinion No. 96-20** states that a city council member, whose spouse is employed as a tenured teacher by the City of Athens School System, may vote on an appointment to the city school board.

**Advisory Opinion No. 96-69** states that an employee with a municipal water and sewer board may run for the position of city councilman or mayor and hold the same, if elected; provided, that the public office is not used for personal gain, that he not vote on or otherwise participate in the appointment of his superiors to the water and sewer board, and that the duties of city councilman or mayor are performed on his own time, and further that no public equipment, facilities, time, materials, or labor are used to assist the public official.

Further, a mayor or council member, whose spouse is employed with that city's library, may not vote or otherwise participate on a matter that will affect his spouse in a manner differently than the rest of the class to which she belongs.

Further, a mayor or council member, whose spouse is employed with that city's library, may not vote or otherwise participate in any budgetary matters relating to the library employing the spouse.

**Advisory Opinion No. 96-78** states that a superintendent of a county school system, may recommend an across-the-board pay raise for all school board employees, including his wife, as long as his wife does not benefit in a manner different from other members of the class to which she belongs.



## Section III

### Attorneys as Lobbyists

Section 36-25-1(17) 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."*

Further, Section 36-25-1(18)(a) defines a lobbyist as:

*"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."*

Section 36-25-1(18)(b) excludes from the definition of a lobbyist the following:

*"1. A member of a legislative body on a matter which involves that person's official duties.*

*2. A person or attorney rendering professional services in drafting bills or in advising clients and in rendering opinions as to the construction and effect of proposed or pending legislation, executive action, or rules or regulations, where those professional services are not otherwise connected with legislative, executive, or regulatory action.*

*3. Reporters and editors while pursuing normal reportorial and editorial duties.*

*4. Any citizen not expending funds as set out above in paragraph a.3. or not lobbying for compensation who contacts a member of a legislative body, or gives public testimony on a particular issue or on particular legislation, or for the purpose of influencing legislation and who is merely exercising his or her constitutional right to communicate with members of a legislative body.*

*5. A person who appears before a legislative body, a regulatory body, or an executive agency to either sell or purchase goods or services.*

*6. A person whose primary duties or responsibilities do not include lobbying, but who may, from time to time, organize social events for members of a legislative body to meet and confer with members of professional organizations and who may have only irregular contacts with members of a legislative body when the body is not in session or when the body is in recess."*

A common question that arises when an attorney is representing clients before public boards and bodies is whether or not that attorney is in fact serving as a lobbyist. Several questions for thought are:

(1) Under what circumstances is an attorney required to register as a lobbyist?

(2) Would an attorney be required to register as a lobbyist every time he or she files an appearance of counsel with an agency on behalf of a client?

(3) Who will be affected by the attorney's actions?

The important distinction to make is, when does the attorney cease to be an

attorney representing a client and become a lobbyist, triggering the reporting requirements of the Alabama Ethics Law?

The obvious distinction is the situation where an association consisting of numerous businesses with similar interests hires an attorney to represent them regarding legislation that impacts on the various association members. This obviously would consist of lobbying, thereby triggering the reporting requirements and requiring the attorney to register with the Commission as a lobbyist.

If the attorney is merely representing a client before an agency, he may not necessarily be considered a lobbyist. For example, an attorney represents an individual attempting to have a plat restriction lifted by the municipal zoning board. The fact that the official action requested will impact only on the client would not trigger the lobbying registration requirements as this is a situation where the attorney is clearly representing the interests of a client, and not attempting to influence legislation per se.

On the other hand, should that same attorney be appearing before the same municipal zoning board in an effort to have the entire municipal zoning ordinance revised, he would indeed be considered a lobbyist and would therefore have to register with the Ethics Commission.

A key consideration in making the distinction is who will be affected by the attorney's actions. Will the actions have an impact on only the individual he is immediately representing, or will his actions have an impact on a broader group? If his actions have an impact on a larger group, more than likely, he will be considered a lobbyist and not strictly an attorney representing a client.

There are many agencies within the State of Alabama whereby an attorney represents a client just as he would represent a client in a court of law. For example, before the Public Service Commission, an attorney is required to file formal pleadings, notices of appearance, briefs, etc. In this setting, which is more likely than not a quasi-adversarial setting, the attorney would again

merely be representing a client and advocating the interests of that client. On the other hand, should the attorney be representing a special interest group in an effort to have regulations, guidelines, etc., revised, changed, or amended, he would be lobbying and would be required to register with the Alabama Ethics Commission.



## Section IV

### Representing Clients Before the Alabama Ethics Commission

The Alabama Ethics Commission sits as a quasi-criminal body whose function is to determine whether or not probable cause exists to believe that an individual who has been charged with violating the Alabama Ethics Law has violated the Ethics Law. Section 36-25-1(23) defines probable cause as, "A finding that the allegations are more likely than not to have occurred."

The Ethics Commission, therefore, serves in the nature of a grand jury, and hearings before the Ethics Commission

are conducted in much the same manner as proceedings before a grand jury. In fact, Section 36-25-4(b) states that a complaint filed with the Ethics Commission is "subject to the same restrictions relating to secrecy and non-disclosure of information, conversation, knowledge, or evidence of Sections 12-16-214 to 12-16-216 . . ." (commonly referred to as the Grand Jury Secrecy Act).

Section 36-25-4(d) requires that a respondent be given no less than 45 days' notice of a complaint having been filed against him or her prior to that matter being set for a hearing with the Ethics Commission.



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Just as with a grand jury proceeding, there is no right to cross-examination, nor are the Rules of Evidence strictly applied.

We all know that when a client has been sued civilly, the first step in defending the client is to obtain a copy of the complaint. Likewise, if you are representing a criminal defendant, you first obtain a copy of the indictment. However, under the Alabama Ethics Law, a complaint filed with the commission is considered confidential information and is not discoverable as provided in Section 36-25-1(7), which states:

*"(7) CONFIDENTIAL INFORMATION. A complaint filed pursuant to this chapter, together with any statement, conversations, knowledge of evidence, or information received from the complainant, witness, or other person related to such complaint."*

To protect the respondent's due process rights, the law requires that the respondent be provided with a summary of the charges that have been levied against him or her. The policy of the Ethics Commission is to make that summary as detailed as possible in order to make certain that the respondent's due process rights are protected.

One of the basic concepts in legal proceedings is the right of cross-examination. However, under the Grand Jury Secrecy Laws, there is no right of cross-examination. When a complainant testifies before the Commission, neither the respondent nor his or her attorney is present in the hearing room, and likewise, when a respondent and his attorney testify before the Commission, the complainant is not present in the hearing room. In addition, the respondent may produce any witnesses he or she deems necessary to defend the allegations levied against him or her; however, when those witnesses testify, neither the respondent nor the respondent's attorney are allowed to be present in the room, nor may they examine those witnesses.

Should you as an attorney represent an individual before the Ethics Commission, the filing of a formal notice of appearance is not a technical requirement; however, in order that all communications be addressed through you and not your client, it would be the wiser course of action to file a notice of appearance as soon as you are retained by your client.

As the Alabama Ethics Commission does not have subpoena power, the commission may not compel the attendance of either respondents or witnesses at a commission hearing. As an attorney representing a client before the commission, it is your judgment which should determine whether or not your client is going to appear and testify before the commission.

The Alabama Ethics Law provides that discovery will be made pursuant to Rule 16.1 of the *Alabama Rules of Criminal*

*Procedure*. Under the *Rules of Criminal Procedure*, the Ethics Commission will provide to you and your client, prior to the hearing, copies of any statements that your client may have made to a special agent of the Alabama Ethics Commission.

In addition, should there be co-respondents to the complaint, you will likewise be provided with their statements.

As a general rule, it is the policy of the Ethics Commission to supply to the respondent any information and documentation that may arguably be exculpatory in nature. In addition, any documentation that your client is questioned on during any interview conducted with a staff member of the commission will be provided to you as part of the discovery process.

Just as in a normal criminal proceeding, the Ethics Commission will not disclose internal memoranda, specifics of an investigation which may include opinion, or witnesses who may testify before the commission.

After the Ethics Commission hears the testimony and evidence relating to the complaint, one of three possibilities exists. First of all, the Ethics Commission can determine that probable cause does not exist and close the case, ending the matter at that point. Likewise, the Ethics Commission can determine that probable cause does exist and can refer the case for further review and presentation to a grand jury to either the attorney general or the district attorney for the appropriate jurisdiction.

For purposes of the Ethics Law, venue is located in the county where the



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**Hugh R. Evans, III**

Hugh R. Evans, III received his undergraduate degree from Auburn University at Montgomery and his J.D. degree from Jones School of Law. He presently serves as assistant director and general counsel for the Alabama Ethics Commission.

alleged violation occurred. Should the violation have occurred outside the State of Alabama, venue lies in Montgomery. Should the attorney general or district attorney have a conflict or otherwise be unable to prosecute the case, the case may be referred back to the Ethics Commission for prosecution by the commission staff under the auspices of either the attorney general or the district attorney.

When the Alabama Ethics Law was amended in 1995 to give the Ethics Commission prosecutorial powers, there was a benefit that was created that was undoubtedly not intended. Because the Ethics Commission has prosecutorial powers and the case may be referred back to the commission staff for handling, the Ethics Commission's policy is that the staff will not make a recommendation of probable cause unless the staff is ready, willing and able to prosecute the case to its conclusion. This benefit accrues to the respondent in that the staff has placed a higher burden on itself than the general probable cause standard.

Prior to the 1995 amendments to the Ethics Law, the Ethics Commission had only two choices of action: (1) refer the case for prosecution, and (2) close the case for lack of probable cause. The Alabama Ethics Law, as amended, includes a procedure known as an "administrative resolution." An administrative resolution is appropriate when the financial benefit to the individual charged or the financial detriment to the public entity is less than \$250, making it a minor violation as defined by law.

Should the Ethics Commission determine that an administrative resolution is appropriate, several steps must be taken. First of all, the respondent must request that his or her case be handled administratively and must acknowledge an unintentional violation of the law. In other words, an individual may not appear before the Ethics Commission and simply state, "I did not do this; however, I would like to have my case handled administratively."

Should the respondent request an administrative resolution, the Ethics Commission must unanimously agree to have the matter handled administra-

tively. Should the commission do so, either the attorney general or the district attorney for the appropriate jurisdiction must also give their approval. Once the paperwork is completed, the Ethics Commission can order restitution to be paid and may order a fine of three times the restitution up to \$1,000.

The mission of the Ethics Commission is not only the responsibility of seeing that individuals who have violated the Ethics Law are adequately punished, but it is also to see that those individuals who have had a complaint wrongly filed against them have their good name and character cleared. The commission staff works equally hard to accomplish both goals.

## Section V

### Advisory Opinions

Just as the attorney general's office is charged with the responsibility of interpreting various sections of Alabama law, so is the Ethics Commission charged with rendering advisory opinions relating to interpretations of the Alabama Ethics Law.

Any individual within the State of Alabama, whether it be a public official, public employee, attorney representing one of the above classes of individuals, or an individual who purely has an interest in state law, may request a formal advisory opinion based on either a hypothetical set of facts or an actual fact situation, provided that the scenario is prospective in nature.

A formal advisory opinion is drafted by the staff of the Ethics Commission and is presented to the commission for official action. The commission may either adopt the opinion as drafted, adopt the opinion with modifications, or may render an entirely different opinion from that which was presented to the commission.

A formal advisory opinion carries the weight of law to the extent that it is (1) requested in good faith; (2) all pertinent facts are made available to the commission; and (3) it is relied on as rendered.

An advisory opinion is only as good as the facts that are presented. Should an

individual provide a specific set of facts to the Ethics Commission which leave out material details, then the advisory opinion will not offer that individual the protection of law. Likewise, an advisory opinion that is relied upon in good faith by other individuals similarly situated to that of the individual requesting the opinion will also protect that person from potential liability. ■



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