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February 6, 2019

ADVISORY OPINION NO. 2019-03

The Hon. Craig Lipscomb
Alabama State House
11 South Union Street
Suite 526-D
Montgomery, AL 36104

Use of Office for Personal Gain/Conflict of Interest

A member of the Alabama House of Representatives may continue his professional occupation as a Registered Architect and may obtain new clients "under facts which make it clear" that the business is unrelated to his position as a public official. He may manage his parents' general contracting business while he serves in the Alabama Legislature under the same restrictions. He must avoid conflicts of interest while he serves, and he must supply a copy of any contract paid in whole or in part with public money to the Commission within 10 days of entering the contract. Finally, he may not serve as a lobbyist while in the legislature, but may "appear[] before a legislative body, a regulatory body, or an executive agency to either sell or purchase goods or services." That allowance notwithstanding, should such public sector clients be seeking official action by the State Legislature on issues related to the subject matter of his business or contractual relationship with such entity, or funding for a client, then such circumstances could create a conflict of interest for Mr. Lipscomb. See Ala. Code § 36-25-5. In those circumstances, the existence of a conflict of interest

and the appropriate action to take would have to be looked at on a case-by-case basis.

Dear Representative Lipscomb:

The Alabama Ethics Commission is in receipt of your request for a formal Advisory Opinion of this Commission and this opinion is issued pursuant to that request.

FACTS

Mr. Craig Lipscomb is a newly-elected member of the Alabama Legislature. He is, as well, a Registered Architect in the private practice of architectural design. Roughly half of his company's clients are various city or county public entities. For his public projects, his fees are set by the State of Alabama Building Commission. Representative Lipscomb has developed a disclosure form for new clients wherein they acknowledge and affirm that they are choosing him based on his professional experience, their needs and preferences, and that they are not choosing him because of his position as a public official. In addition to his work as a Registered Architect, he intends to begin working closely with GKL Companies, Inc., a general contracting business owned and run by his parents. GKL primarily provides commercial roofing services to both public and private sector entities. He intends to work more closely with this company and eventually manage and run it for his parents. He will not represent these businesses before the Legislature or state agencies. Mr. Lipscomb understands the prohibitions related to use of office for personal gain, but requests additional guidance related to his abilities to earn a living in his chosen profession while serving the public as a state representative in the Alabama Legislature.

QUESTIONS PRESENTED

1. Is my professional occupation as a Registered Architect permitted under the Ethics laws?
2. Are there any prohibitions under the Ethics laws that would prevent me from working with my parents' general contracting company?
3. What restrictions exist and what are the general parameters under the Ethics Code that apply to my activities and interactions with my personal business activities and as a legislator?

ANALYSIS

The starting point for this analysis is found in Ala. Code 36-25-2(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. (Emphasis added).

The additional Code sections which apply are Ala. Code §§ 36-25-1, 1(34)b.10., 5, 5.1, 23(a), (c) and 11. Mr. Lipscomb is a "public official." His parents are "family member[s] of the public official." See Ala. Code § 36-25-1. The Commission has issued advisory opinions that provide guidance on the issues raised. See Advisory Opinions 2016-27, 2016-31, 2016-34, and 2018-06. The relevant portions of these opinions include the following:

From 2018-06:

An employee of Birmingham Aids Outreach may retain his employment with that nonprofit organization if elected to the Alabama House of Representatives but must remain aware of conflicts of interest as they arise and may not violate the lobbying restrictions of Ala. Code § 36-25-23(a).

From AO 2016-27:

A public official or public employee may discuss, apply for, interview, negotiate, and accept a job with a principal while still employed with the State, but only if those discussions take place within the parameters articulated herein, and under circumstances which "make it clear" that the job offer is being made for reasons unrelated to the recipient's public service as a public official or public employee.

From AO 2016-34:

To the extent that portions of Advisory Opinion No. 2011-12 can be read as continuing the per se prohibition on all individuals and organizations - not just principals, lobbyists or subordinates of lobbyists - providing a "thing of value" to any public official or employee in this state, those portions are overruled. The Commission will continue to recognize the exceptions found in Ala. Code § 36-25-1(34)b to be a "safe harbor" for public employees and officials, but public employees and officials are no longer bound by those exceptions outside the clear context of Section 5.1.

From AO 2016-31:

Ala. Code § 36-25-23(a) does not prohibit a licensed Civil Engineer who serves in the Legislature from engaging in the private practice of civil engineering while still in office; however, he may not lobby any legislative body (state, county or local) on behalf of his employer without violating Section 23(a). He may not use the fact that he is a State Senator in order to gain new clients (in other words, he may not trade on the office) without violating Section 5(a). He must, as well, comply with the following sections: Ala. Code § 36-25-5.1 (subject to the exception found in Ala. Code § 36-25-1(34)b.10).

Senator Chambliss should exercise caution in retaining new clients that he did not do business with prior to being elected to the Senate such as expanding his business into areas that are outside his field of expertise, or working for clients that may benefit from his official position or have interests pending in the Legislature. Senator Chambliss should comply with all Competitive Bid or Public Works laws if applicable, including being able to demonstrate why a contract not required to be bid was incapable of being bid if that is the case.

With these previous Opinions and the applicable sections in mind and as guidance, the following additional guidance is supplied in answer to the specific questions raised. Representative Lipscomb's professional occupation as a Registered Architect is permitted under the Ethics laws. The prohibitions that apply to his own business and to working with his parents' general contracting company include that he cannot use the fact that he is a public official in order to obtain business for either himself or his parents. He may solicit business from principals, but only under facts which "make it clear" that the work provided is unrelated to his official position as a legislator. In this regard, Representative Lipscomb is free to work with clients he had before he entered public life, and to the extent he retains new clients, he should exercise appropriate caution with those who have pending interests in the Legislature and who would benefit from his official position. If, however, matters come before the Legislature that would provide a unique benefit to either his business or a client of his business or that of his parents (preexisting or new), then Representative Lipscomb must abstain from voting for that legislation or using his official position to encourage others to do so. See Ala. Code § 36-25-5.

Nothing can be solicited or accepted by Representative Lipscomb for the purpose of corruptly influencing his official actions. See Ala. Code § 36-25-7. Representative Lipscomb cannot solicit business from a lobbyist. See Ala. Code § 36-25-23(c). If contracts are entered into which are paid with public money, whether bid or not, and including not only Representative Lipscomb's business but also that of his family members, then copies of these contracts must be filed with the Commission within 10 days of being entered. See Ala. Code § 36-25-11.

We have recognized that Ala. Code § 36-25-23(a) prohibits "lobbying," the "representation" language of that section notwithstanding. See AO 2016-31. Therefore,

Representative Lipscomb cannot lobby any state or local legislative body or branch of government. See also Ala. Code § 36-25-1.1. However, Mr. Lipscomb's "appearance" before a legislative or regulatory body at the local level to contractually engage the use of his services is an exception to the definition of "lobbyist." See Ala. Code § 36-25-1(21)b.5. Thus, for that reason, and under these facts, engaging with various public sector entities as clients for the provision of his professional architectural services or for the products and services of his parents' company would not be prohibited at the local level. That allowance notwithstanding, should such local public sector clients be seeking official action by the State Legislature on issues related to the subject matter of his business, contractual relationship with such entity, or funding for a client, then such circumstances could create a conflict of interest for Mr. Lipscomb. See Ala. Code § 36-25-5. In those circumstances, the existence of a conflict of interest and the appropriate action to take would have to be looked at on a case-by-case basis.

CONCLUSION

A member of the Alabama House of Representatives may continue his professional occupation as a Registered Architect and may obtain new clients "under facts which make it clear" that the business is unrelated to his position as a public official. He may manage his parents' general contracting business while he serves in the Alabama Legislature under the same restrictions. He must avoid conflicts of interest while he serves, and he must supply a copy of any contract paid in whole or in part with public money to the Commission within 10 days of entering the contract. Finally, he may not serve as a lobbyist while in the Legislature, but may "appear[] before a legislative body, a regulatory body, or an executive agency to either sell or purchase goods or services." That allowance notwithstanding, should such public sector clients be seeking official action by the State Legislature on issues related to the subject matter of his business or contractual relationship with such entity, or funding for a client, then such circumstances could create a conflict of interest for Mr. Lipscomb. See Ala. Code § 36-25-5. In those circumstances, the existence of a conflict of interest and the appropriate action to take would have to be looked at on a case-by-case basis.

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on February 6, 2019.


Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair
Alabama Ethics Commission