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January 9, 2002

ADVISORY OPINION NO. 2002-04

The Honorable J. Chris McCool
District Attorney
24th Judicial Circuit
P.O. Box 526
Aliceville, Alabama 35442

Conflict Of Interest/District Attorney's
Office Employing Brother Of District
Attorney.

The District Attorney for the 24th Judicial
Circuit of Alabama may keep his brother
employed as an Assistant District Attorney
when the brother was hired prior to the
current District Attorney being appointed to
office and where the current District
Attorney had no involvement in the hiring of
his brother.

The brother of the District Attorney, who is
employed as an Assistant District Attorney,
may participate and attend conferences paid
for with the District Attorney's Fund when
these conferences are job related; provided,
the brother of the District Attorney is not
treated differently than other employees of
the District Attorney's Office nor receive
opportunities that are not available to the
other employees of the office.

The District Attorney may give his brother a raise in pay during his employment as an Assistant District Attorney; provided, the brother does not receive a pay increase that is not also received by all other employees of the District Attorney's Office and, therefore, does not receive a benefit that is not available to all the members of the class to which he belongs.

The District Attorney may place his brother on State payroll should funds through a drug task force grant from ADECA no longer be available; provided, the brother is not singled-out for placement on State payroll; and provided further, that all similarly situated employees are treated equally.

The brother of the District Attorney for the 24th Judicial Circuit, who is employed as an Assistant District Attorney, may participate in per diem and mileage provisions according to the office's travel policy; provided, the policy is available to all employees of the District Attorney's Office, and the brother does not receive any benefit that is not available to all other employees of the office.

The District Attorney for the 24th Judicial Circuit may not hire his brother on a full-time basis, as this would be using his position to provide a personal benefit to a family member as defined by the Alabama Ethics law.

The District Attorney is advised to contact the Attorney General's Office regarding State nepotism laws in general.

Dear Mr. McCool:

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) May the District Attorney for the 24th Judicial Circuit keep his brother on staff as an Assistant District Attorney when his brother was hired by the previous District Attorney?
- 2) May the brother of the District Attorney attend conferences paid for with the District Attorney's Fund according to the office's normal policies?
- 3) May the District Attorney give his brother a pay raise from time-to-time and, if so, under what circumstances?
- 4) Should funds no longer be available to the County through a drug task force grant from ADECA for payment of salaries, may the District Attorney place his brother on State payroll?
- 5) May the brother of the District Attorney participate in the office's travel policy, whereby, he receives per diem and a mileage allowance?

FACTS AND ANALYSIS

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

J. Chris McCool was appointed District Attorney for the 24th Judicial Circuit effective July 12, 2001. At that time, his brother, Timothy B. McCool, was serving as a part-time Assistant District Attorney in Pickens County, which is part of the 24th Judicial Circuit. He was appointed Assistant District Attorney by the Honorable P. M. Johnston, Mr. McCool's predecessor in office.

Based on these facts, he has asked the above questions.

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(23) defines a public employee as:

“(23) PUBLIC EMPLOYEE. Any person employed at the state, county, or municipal level of government or their instrumentalities, including governmental corporations and authorities, but excluding employees of hospitals or other health care corporations including contract employees of those hospitals or other health care corporations, who is paid in whole or in part from state, county or municipal funds. For purposes of this chapter, a public employee does not include a person employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee's income.”

Section 36-25-1(12) defines a family member of the public official as:

“(12) FAMILY MEMBER OF THE PUBLIC OFFICIAL. The spouse, a dependent, an adult child and his or her spouse, a parent, a spouse's parents, a sibling and his or her spouse, of the public official.”

Section 36-25-1(11) defines a family member of the public employee as:

“(11) FAMILY MEMBER OF THE PUBLIC EMPLOYEE. The spouse or a dependent of the public employee.”

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 36-25-5(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.”

Section 36-25-1(8) 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.”

While the District Attorney would be prohibited by law from hiring his brother as an Assistant District Attorney, his brother was hired prior to his being appointed as District Attorney. It, therefore, would not violate the Alabama Ethics law for the brother to maintain his employment with the District Attorney’s Office; provided, he does not receive any benefit or opportunity that is different from or otherwise not available to all other employees of the District Attorney’s Office.

Section 36-25-1(8), in defining a conflict of interest, defines a conflict as existing when the public official, public employee, or his or her family member is affected by the actions of the public official/employee in a manner differently than other members of the class to which he or she belongs.

In the facts before the Commission, the class would include all employees of the District Attorney's Office.

Based on this, it would not violate the Ethics law for the District Attorney to maintain the employment of his brother as an Assistant District Attorney; provided, the brother receives no benefits, pay raises, opportunities, etc., that are not available or offered to all other employees of the District Attorney's Office.

More specifically, as relates to the attendance at conferences relating to performing the functions of the office, the brother should not receive any opportunities to attend conferences or otherwise travel that is not available to all Assistant District Attorneys equally. The same would apply to the brother being placed on State payroll, provided, salary reimbursement is no longer available through the drug task force grant from ADECA. In other words, the brother may not be placed on State payroll unless all similarly situated employees are also placed on State payroll.

Based on the facts as provided and the above law, the District Attorney for the 24th Judicial Circuit of Alabama may keep his brother employed as an Assistant District Attorney when the brother was hired prior to the current District Attorney being appointed to office and where the current District Attorney had no involvement in the hiring of his brother.

In addition, the brother of the District Attorney, who is employed as an Assistant District Attorney, may participate and attend conferences paid for with the District Attorney's Fund when these conferences are job related; provided, the brother of the District Attorney is not treated differently than other employees of the District Attorney's Office nor receive opportunities that are not available to the other employees of the office.

Further, the District Attorney may give his brother a raise in pay during his employment as an Assistant District Attorney; provided, the brother does not receive a pay increase that is not also received by all other employees of the District Attorney's Office and, therefore, does not receive a benefit that is not available to all the members of the class to which he belongs.

Additionally, the District Attorney may place his brother on State payroll should funds through a drug task force grant from ADECA no longer be available; provided, the brother is not singled-out for placement on State payroll; and provided further, that all Assistant District Attorneys are treated equally.

Finally, the brother of the District Attorney for the 24th Judicial Circuit, who is employed as an Assistant District Attorney, may participate in per diem and mileage provisions according to the office's travel policy; provided, the policy is available to all employees of the District Attorney's Office, and the brother does not receive any benefit that is not available to all other employees of the office.

In the questions presented to the Commission, Mr. McCool desires to maintain his brother's employment with the District Attorney's Office in the same circumstances that he inherited when he became District Attorney. It would, however, be a use of office for personal gain benefitting a family member for Mr. McCool to change his brother's employment with the District Attorney's Office from a part-time basis to a full-time basis.

As a final word of caution, however, the District Attorney should be advised that as long as his brother is employed with the District Attorney's Office there will be numerous situations in which a conflict of interest will arise. The District Attorney is also advised to check with the Attorney General's Office regarding nepotism statutes in general.

CONCLUSION

The District Attorney for the 24th Judicial Circuit of Alabama may keep his brother employed as an Assistant District Attorney when the brother was hired prior to the current District Attorney being appointed to office and where the current District Attorney had no involvement in the hiring of his brother.

The brother of the District Attorney, who is employed as an Assistant District Attorney, may participate and attend conferences paid for with the District Attorney's Fund when these conferences are job related; provided, the brother of the District Attorney is not treated differently than other employees of the District Attorney's Office nor receive opportunities that are not available to the other employees of the office.

The District Attorney may give his brother a raise in pay during his employment as an Assistant District Attorney; provided, the brother does not receive a pay increase that is not also received by all other employees of the District Attorney's Office and, therefore, does not receive a benefit that is not available to all the members of the class to which he belongs.

The District Attorney may place his brother on State payroll should funds through a drug task force grant from ADECA no longer be available; provided, the brother is not singled-out for placement on State payroll; and provided further, that all similarly situated employees are treated equally.

The brother of the District Attorney for the 24th Judicial Circuit, who is employed as an Assistant District Attorney, may participate in per diem and mileage provisions according to the office's travel policy; provided, the policy is available to all employees of the District Attorney's Office, and the brother does not receive any benefit that is not available to all other employees of the office.

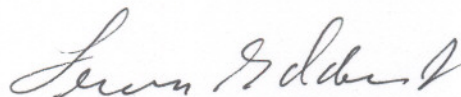
The Honorable J. Chris McCool
Advisory Opinion No. 2002-04
Page eight

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The District Attorney is advised to contact the Attorney General's Office regarding State nepotism laws in general.

AUTHORITY

By 4-0 vote of the Alabama Ethics Commission on January 9, 2002.



Lewis G. Odom, Jr., Esq.
Chair
Alabama Ethics Commission