



STATE OF ARKANSAS
**Department of Finance
and Administration**

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June 6, 2019

Brad Phelps
General Counsel
Arkansas State University
501 Woodlane, Suite 600
Little Rock, AR 72201

RE: Advisory Opinion No. 2019-09

Dear Mr. Brad Phelps:

This letter is in response to a written request for a waiver pursuant to Ark. Code Ann. §19-11-715 (c), which was sent to my office in an email from you as general counsel for Arkansas State University ("ASU") on May 31, 2019 ("the Request"), regarding the circumstances described below involving your employment with ASU and the proposed contract between ASU and the law firm of Womack Phelps Puryear Mayfield and McNeil (the "Womack Firm").

This opinion is based upon the following facts that have been presented to me in the attached documents, which I am relying upon. It should be noted that if one or more of these facts are later shown to be incorrect, that could result in a revised opinion.

1. Brad Phelps is general counsel for ASU, and as such is an employee of ASU;
2. As general counsel for ASU, you serve as the point of contact for all matters related to the contracts with external counsel law firms, including the Womack Firm;
3. On March 8, 2017, a request for proposals was issued for the procurement of legal services, with fourteen (14) responses ultimately being submitted to ASU by April 7, 2017;
4. In a letter dated April 11, 2017 (the "Disclosure Letter"), sent by you to my office pursuant to Ark. Code Ann. §19-11-705 (c), it is disclosed that one of the proposals was submitted by the Contracting Firm, and that your father, John Phelps, is affiliated with the Womack Firm;
5. You further stated in the Disclosure Letter that though you personally believed the conflict to be insubstantial or remote, you were not seeking a waiver at that time, choosing rather to recuse from participating in the matter altogether;
6. Ultimately, the Womack Firm was awarded a contract with ASU, focusing on bankruptcy matters and general legal matters (the "Contract");
7. The Womack Firm had also been awarded a contract with ASU in 2013 for the handling of an array of legal matters;
8. You have stated the Womack Firm deals directly with the ASU Treasurer, Vanessa Williams, on bankruptcy matters without your involvement, with payment for the services being handled by the Vice Chancellor for Finance & Administration and his support staff;
9. You have stated you are involved, along with another ASU attorney and an attorney from a different external counsel firm, in litigation in which the Womack Firm represents ASU, such involvement consisting of meetings, conferences, and attending hearings, depositions and other matters related to the litigation of this case;
10. Final decision about settlement and overall litigation strategy in this case ultimately rests with you;

11. As the Contract is being renewed, the Request was sent to me seeking a waiver, assumedly pursuant to Ark. Code Ann. §19-11-715 (c);

I. Relevant Law

Ark. Code Ann. §19-11-705 (a)(1)(A) prohibits state employees from participating directly or indirectly in any particular matter pertaining to any state agency contracts in which an employee or an employee's immediate family member has a financial interest. *See* Ark. Code Ann. §19-11-705. Ark. Code Ann. §19-11-705 (a)(2) defines “direct or indirect participation” as including, but not being limited to, involvement through decision, approval, disapproval, recommendation, preparation of any part of a procurement request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.

For purposes of interpreting Ark. Code Ann. §19-11-701 *et seq.*, Ark. Code Ann. §19-11-701 (8) defines “employee,” as an individual drawing a salary from a state agency, whether elected or not, and any nonsalaried individual performing personal services for any state agency, before defining “immediate family” in Ark. Code Ann. §19-11-701 (11) as meaning a spouse, children, parents, brothers and sisters, and grandparents. “Financial interest” is defined in Ark. Code Ann. §19-11-701 (9)(C) as holding a position in a business such as an officer, director, trustee, partner, employee, or the like, or holding any position of management. Finally, “State agency” is defined in Ark. Code Ann. §19-11-701 (16) as meaning any office, department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other establishment or official of the executive, judicial, or legislative branch of this state.

Ark. Code Ann. §19-11-715 (c) gives the Director of DFA authority to issue a waiver from the application of Ark. Code Ann. §19-11-705, upon written request of an employee, and grant permission to proceed with the transaction to such extent and upon such terms and conditions as may be specified. Such waiver and permission may be granted when the interests of the state so require or when the ethical conflict is insubstantial or remote.

II. Analysis

Based on the above facts, your employment with ASU certainly classifies you as a state employee. Your father falls within the statutory definition of “immediate family,” and given his name appears in the official Womack Firm name, he clearly is an employee of the Womack Firm or holds a position of management in the Womack Firm. Accordingly, a contract with the Womack Firm statutorily creates in you a financial interest in that contract.

Furthermore, your role as general counsel of ASU makes it virtually impossible to not participate directly or indirectly in any particular matter pertaining to the Contract, as defined by Ark. Code Ann. §19-11-705 (a)(2). This is a contract for legal services, and decisions pertaining to the litigation strategy, settlements, and general handling of the array of legal matters that ASU faces will inevitably land on the general counsel’s desk. This is not a fact you have sought to hide by any means, as you have been quite transparent, both during the procurement process and now, in laying out specifically what your direct and indirect involvement involves. Furthermore, the Womack Firm represented ASU prior to your employment there, an important factor demonstrating the Contract was likely awarded to the Womack Firm based on the qualifications of the Womack Firm rather than your familial relationships.

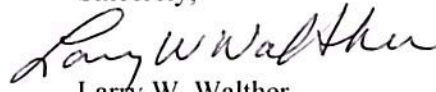
Regardless, your direct and indirect involvement in a contract in which your immediate family member has a financial interest is an inescapable reality, and your role as general counsel for ASU makes it difficult to see this conflict as insubstantial or remote.

According to Ark. Code Ann. § 19-11-715(c), the Director may grant a waiver or permission to proceed with the transaction that may otherwise involve an ethical conflict when interests of the state so require or, alternatively, when the ethical conflict is insubstantial or remote. The waiver may contain terms and conditions upon which such waiver is based.

Because of the pending litigation and other ongoing bankruptcy matters in which the Womack Firm represents ASU, matters of significant complexity that cannot be quickly moved to a different law firm without damaging the interests of ASU, I believe that it is in the interest of the state for me to grant the waiver on the condition that the contract only be awarded for a period of one (1) year, during which time ASU should issue a request for qualifications to procure these legal services from a law firm that is not conflicted. During this next year of the Contract, you should recuse yourself or continue to recuse yourself from any involvement in reviewing billable hours or invoices, reviewing or issuing payments, or any other matter related to the compensation of the Womack Firm by ASU for the legal services under the Contract, a condition necessary to safeguard against even the appearance of impropriety until a new contract for these services is in place. At the end of the year, if the litigation is still pending and ASU believes it would be detrimental to shift law firms at that point, you may again seek a waiver for my consideration.

This waiver is issued in accordance with Ark. Code Ann. § 19-11-715 (c). Compliance with the above course of conduct is deemed to constitute compliance with the ethical standards of the Ark. Code Ann. §19-11-701 *et seq.*

Sincerely,


Larry W. Walther
Director

cc: Edward Armstrong, Office of State Procurement