



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

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June 5, 2020

Mr. Brad Phelps
General Counsel
Arkansas State University System
501 Woodlane, Suite 600
Little Rock, Arkansas 72201

RE: Advisory Opinion No. 2020-05

Dear Mr. Phelps:

This letter is in response to a written request for a waiver pursuant to Arkansas Code Annotated §19-11-715(c), which was sent to me in an email dated May 11, 2020, regarding the circumstances described below involving your employment as General Counsel for Arkansas State University (ASU), the employment of your father, John Phelps, with the law firm Womack Phelps Puryear Mayfield & McNeil, P.A. (Womack Firm), and Advisory Opinion No. 2019-09.

This opinion is based upon the following facts that have been presented to me and upon which I am relying. 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. Advisory Opinion No. 2019-09 was issued on June 6, 2019, and is incorporated herein in its entirety. See Attachment A;
2. Brad Phelps remains employed as General Counsel for Arkansas State University (ASU);
3. John Phelps remains employed at Womack Phelps Puryear Mayfield & McNeil, P.A.;
4. ASU utilizes the services of outside counsel to assist in the representation of campuses within the ASU System;
5. In consultation with Dr. Charles Welch, ASU System President, you plan to extend the current agreements with law firms through June 30, 2021, with the exception of the Womack Firm due to the advisory opinion that stated in pertinent part: "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

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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.”

6. The Womack Firm addresses two legal areas for ASU: 1) ongoing bankruptcy matters without your involvement, and 2) a lawsuit with co-counsel Wright Lindsey & Jennings filed against certain university employees and ASU Board members by Turning Point USA. The litigation is currently pending at the Eighth Circuit Court of Appeals (Case No. 19-3016). After ASU prevailed in the District Court, Turning Point USA appealed the decision to the Eighth Circuit Court of Appeals and subsequently requested oral argument. The case has been fully briefed since February 27, 2020, and, as of this date, oral argument has not been set¹, and it appears unlikely that the case will be concluded before the end of the current fiscal year;
7. As a result, and pursuant to the advisory opinion, you seek a waiver to extend the arrangement with the Womack Firm on the same terms as ASU is planning to do with its other outside law firms.
8. You have attached a letter from the Womack Firm sent to you as ASU General Counsel on February 21, 2020, that seeks to provide additional facts and circumstances to clarify and supplement the findings contained in the advisory opinion as follows:
 - a. The Womack Firm has been contracted as external counsel for ASU going back at least to the 1960’s;
 - b. In 2017, the Womack Firm was awarded a contract with ASU, focusing on bankruptcy matters and general legal matters;
 - c. For bankruptcy matters, the Womack Firm deals directly with ASU Treasurer, Vanessa Williams, without the involvement of Brad Phelps, with the payment for services being handled by the Vice Chancellor for Finance Administration and his support staff;
 - d. The Womack Firm represents ASU in litigation, including an appeal that is currently pending before the United States Court of Appeals for the Eighth Circuit;
 - e. The Womack Firm has erected a “Chinese wall,” which excludes John Phelps from any participation or involvement with the Womack Firm’s legal matters concerning its contract with ASU;
 - f. John Phelps does not and has not performed any legal work for ASU;
 - g. John Phelps has not received compensation for work done for ASU by the Womack Firm;
 - h. Since January 1, 2018, John Phelps has been compensated on his own production, which does not include any work for ASU. He has received no compensation for work performed by others. From January 1, 2013, to December 31, 2017, he received payment only for a portion of his own work, plus a deferred compensation payment that was satisfied in 2017.

¹ The appeal has subsequently been set for June 18, 2020.

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I. Relevant Law

As noted in the previous advisory opinion, for purposes of interpreting Arkansas Code Annotated §19-11-701 *et seq.*, Arkansas Code Annotated §19-11-701(8) defines “employee,” as “an individual drawing a salary from a state agency, whether elected or not, and any non-salaried individual performing personal services for any state agency.” “State agency” is defined in Arkansas Code Annotated §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.”

Arkansas Code Annotated §19-11-701(2) defines “business” to mean “any corporation, partnership, individual, sole proprietorship, joint-stock company, joint venture, or any other legal entity.” The term “financial interest” is defined in Arkansas Code Annotated §19-11-701(9)(C) as meaning:

- (A) Ownership of any interest or involvement in any relationship from which, or as a result of which, a person within the past year has received, or is presently or in the future entitled to receive, more than one thousand dollars (\$1,000) per year, or its equivalent;
- (B) Ownership of more than a five percent (5%) interest in any business; or
- (C) Holding a position in a business such as an officer, director, trustee, partner, employee, or the like, or holding any position of management;

Arkansas Code Annotated §19-11-701(9)(C). The ethical strictures set forth in Arkansas Code Annotated §19-11-705 (a)(1)(A) prohibit 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 Arkansas Code Annotated §19-11-705. Arkansas Code Annotated §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.”

II. Analysis

Based on the above facts, and specifically noting that I stated in the previous advisory opinion that “you may again seek a waiver for my consideration,” I grant your waiver request.

One of the two areas of representation provided to ASU by the Womack Firm is defense of a lawsuit with co-counsel Wright Lindsey & Jennings that was filed against certain university employees and ASU Board members by Turning Point USA. As the case 1) is currently pending at the Eighth Circuit Court of Appeals (Case No. 19-3016), 2) has been fully briefed since February 27, 2020, 3) as of this date, has not set a date for oral argument, and 4) is unlikely to be concluded before the end of the current fiscal year, it is in the interest of the state for me to grant the waiver request.

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Additionally, based on the facts submitted, the Womack firm has implemented an appropriate “Chinese wall.” John Phelps, as an attorney at the Womack firm, does not perform work for ASU. John Phelps does not receive compensation from ASU for the work that the Womack Firm performs. And the Womack Firm works directly with the ASU Treasurer, not Brad Phelps. Therefore, a waiver request is warranted.

Public service is a position of trust, and the public must maintain its trust of public servants. It is, therefore, paramount that state employees strive to avoid even the appearance of a conflict of interest. In this case, John Phelps must remain screened from any work involving ASU and the Womack Firm is subject to the same laws and processes that govern the hiring of external counsel for Universities.

III. Decision

Thank you for seeking my counsel and approaching the issue with transparency. I am persuaded that, under the facts as stated above, it is in the interest of the state to grant permission to proceed to such extent and upon such terms and conditions as specified in this letter. This decision grants a waiver in accordance with Arkansas Code Annotated § 19-11-715(c). Compliance with the above course of conduct is deemed to constitute compliance with the ethical standards of the Arkansas Code Annotated §19-11-701 *et seq.*

Sincerely,


Larry W. Walther
Secretary

Attachment

cc: Edward Armstrong, Office of State Procurement
Amy Fecher, Secretary