



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

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July 13, 2021

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

Re: Advisory Opinion No. 2021-06

Dear Mr. Phelps:

This letter is in response to a written request for an advisory opinion pursuant to Arkansas Code Annotated § 19-11-715(c), which was sent to my office in an emailed letter dated June 21, 2021, and received on that date, regarding Arkansas State University's (ASU) selection of the law firm Womack, Phelps, Puryear, Mayfield and McNeil (Womack Firm) to perform outside legal services. *See Attachment A.*

This opinion is based upon the following facts that you have 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, then that could result in a revised opinion.

1. On April 26, 2021, ASU issued a Request for Qualifications (RFQ) for outside legal services;
2. Responses to the RFQ were due on May 12, 2021;
3. Approximately eleven law firms submitted timely responses to the RFQ, which included a proposal from the Womack Firm;
4. You recused from participation in the evaluation of the responsive proposals as reflected in a letter that you wrote to me dated May 17, 2021. *See Attachment B;*
5. The committee that evaluated the proposals selected eight law firms, which selection included the Womack Firm;
6. John Phelps, a name partner in the Womack Firm, is your father;
7. The Womack Firm has previously represented that it has performed services for ASU since the 1960's;
8. I have previously issued Advisory Opinion No. 2020-05 concerning the Womack Firm's representation of ASU. *See Attachment C;*
9. Mark Mayfield is a partner in the Womack Firm and, in response to your inquiry, affirmed that the representations contained in the firm's letter dated February 21, 2020, remain accurate. *See Attachment D;*
10. In addition, Mr. Mayfield stated that John Phelps is currently "Of Counsel" with the firm.

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I. Relevant Law

As noted in both advisory opinions that I have issued addressing this matter, *see* Advisory Opinion No. 2019-09 and Advisory Opinion No. 2020-05, the ethical strictures set forth in Ark. Code Ann. § 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. Arkansas 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 non-salaried individual performing personal services for any state agency.” “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.”

Arkansas Code Ann. § 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 Ark. Code Ann. § 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; ...

II. Analysis

Based on the above facts, your current role as ASU’s General Counsel and ASU’s proposed selection of the Womack Firm for outside legal services, in which your father is a named partner, establish the application of the statutory provisions to you on the basis of being a state employee having a financial interest in a state agency contract.

I note as an initial matter that the representations made by Mr. Mayfield are not entirely accurate as the identified Eight Circuit Court of Appeals litigation has progressed to, and is pending in, the United States Supreme Court. *See* U.S. Supreme Court No. 20-1066. According to that court’s records and correspondence, counsel of record for the ASU parties is David C. Frederick of the Kellogg, Hansen, Todd, Figer & Frederick law firm in Washington, D.C. *See* Attachment E. Nevertheless, the Womack Firm continues to represent ASU as one of its named counsel in that litigation, *see* Attachment F, which factor serves as the basis of my continuing to grant your waiver request in the interests of the state.

I also note that upon conclusion of this litigation, the provisions that I articulated in Advisory Opinion No. 2019-09 are either to be effected or you may again seek a waiver for my consideration. *See* Attachment G.


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III. Decision

Thank you for seeking my counsel in this continuing matter. I rely upon the stated representations and facts and am persuaded that it is in the interests of the state to grant a waiver in accordance with Arkansas Code Ann. § 19-11-715(c) due to the pending status of the identified litigation.

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
Secretary

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