

# ARKANSAS ETHICS COMMISSION

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## ADVISORY OPINION NO. 2020-EC-001

Issued November 20, 2020

The Arkansas Ethics Commission (the "Commission") received a written advisory opinion request dated October 8, 2020, from Nicole C. Gillum, Esq. of Little Rock, Arkansas. Therein, she requested an advisory opinion concerning potential prohibited conduct and/or a conflict of interest relating to certain actions by a member of a state professional licensing board.

As background, the following fact pattern was provided:

1. *After being delegated the task by the state professional licensure board, the board member assists the board attorney with drafting a proposed rule which has a direct impact on his personal medical practice;*
2. *The board member makes the motion to approve the first draft of the proposed rule;*
3. *The board member makes the motion for the board to formally adopt the rule; and*
4. *When the rule fails to make its way through the Arkansas Legislative Council because of policy pushback, the board member hires a lobbying firm to represent his personal medical practice to ensure the rule's success through the legislative process.*

The Commission has identified several potentially applicable statutes under its jurisdiction, specifically Ark. Code Ann. § 19-11-718, Ark. Code Ann. § 21-8-304, Ark. Code Ann. § 21-8-601, and Ark. Code Ann. § 21-8-1001.

### **Ark. Code Ann. § 19-11-718—Special State Employees:**

Ark. Code Ann. § 19-11-718 defines a "special state employee"<sup>i</sup> and outlines certain prohibited conduct and "conflicts of interest"<sup>iii</sup> while serving on a "covered board".<sup>iii</sup>

The background provided by the requestor states the board member in question is a member of a state professional licensure board and references the board member's personal medical practice. The background facts, as provided, indicate that the state professional licensing board would qualify as a covered board and the board member would qualify as a special state employee. The definition of "conflict of interest" provides three specific examples of what would qualify as a conflict of interest, and all three involve an issue of "procurement", which is not indicated as an issue in the background facts, as provided. All prohibited conduct under Ark. Code Ann. § 19-11-718 appears to relate to "procurement" in some form except for Ark. Code Ann. § 19-11-718 (e), which provides as follows:

(e) A special state employee or former special state employee shall not:

- (1) Represent an entity other than the state in a matter in which he or she participated in making a decision, rendering approval or disapproval, making a recommendation, or rendering advice on behalf of the covered board; or
- (2) Assist or represent a party for contingent compensation in a matter involving a covered board other than in a judicial, administrative, or quasi-judicial proceeding.

The background facts, as provided, state that the board member made the motion on two occasions for the board to adopt a rule that the board member helped draft. It goes on to say that when the relevant rule change failed before the Legislative Council, the board member hired a lobbying firm on behalf of his medical practice to promote the rule change. The phrase "represent an entity other than the state in a matter" has not yet been interpreted or applied by the Commission. Nine other times in Ark. Code Ann. § 19-11-718, the word "matter" is accompanied by the phrases "before the covered board", "of the covered board", or "with the covered board." Likewise, looking at Ark. Code Ann. § 21-8-1001<sup>iv</sup>, similar language is used; however, additional language is provided, reading, "in the matter *under consideration by the board, commission, or agency*" (*emphasis added*). When the board member provided in the background facts hires a lobbying firm on behalf of his medical practice, he was arguably representing an entity other than the State of Arkansas and it was related to an issue about which he had rendered approval. However, the approval or rejection of the proposed rule was, at that point, no longer before the covered board, but instead before the Legislative Council.

**Ark. Code Ann. § 21-8-304—Special Privileges or Exemptions:**

The background facts, as provided, do not give sufficient information to indicate that the board member used or attempted to use his official position to secure a special privilege or exemption<sup>v</sup> for anyone on the list of prohibited recipients of a special privilege or exemption. Likewise, nothing in the background facts appears to relate to confidential information. Furthermore, there is no information given that implies the disclosure of information gained by board membership for personal gain or benefit. The background, as provided, likewise does not imply that the first three

activities (assisting with the drafting of the rule and twice moving to adopt the rule) was an unfair use of the board member's position on the board.

**Ark. Code Ann. § 21-8-601—Lobbyists:**

Ark. Code Ann. § 21-8-601<sup>vi</sup> provides, in pertinent part, as follows: (3) A lobbyist shall not be required to register if he or she engages in no lobbying other than the following activities:

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- (C) Action in a person official capacity as a public servant.
- (ii) However, a public servant shall be required to register as a lobbyist if he or she:
  - (a) Receives income from a nongovernmental person in excess of four hundred dollars (\$400) in a quarter for lobbying; or
  - (b) Expends or is reimbursed in excess of four hundred dollars (\$400), regardless of the source, in a quarter for lobbying, excluding the cost of informational material and personal travel, lodging, meals, and dues[.]

The facts, as provided, indicate that the board member, who would qualify as a public servant in his capacity as a board member, spent more than \$400 in a calendar quarter when he hired a lobbyist. However, Ark. Code Ann. § 21-8-601(a)(4), goes on to provide, “[a] person whose only act of lobbying is to compensate or reimburse a registered lobbyist in the person's behalf shall not be required to register as a lobbyist.”

**Ark. Code Ann. § 21-8-1001—Members of State Boards or Commissions:**

Ark. Code Ann. § 21-8-1001 provides that a board member would be prohibited from participating in a decision in which he had a “pecuniary interest”, but goes on to provide that he may participate in the decision if:

“the only pecuniary interest that may accrue to the member is incidental to his or her position or accrues to him or her as a member of a profession, occupation, or large class to no greater extent than the pecuniary interest could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.”

The background facts, as provided, state the rule at issue has direct impact on the board member's medical practice. However, the facts do not say that the rule exclusively or uniquely benefits his medical practice. For example, if the rule change allowed for a lower licensure fee or more hours of continuing education to maintain a license for all license holders regulated by a board, such changes might directly impact the board member as a member of that profession, but it would be incidental to his position as a member of the profession and no greater than other members. If the board member had a pecuniary interest in the underlying issue, then long before he hired the lobbyist, they would have been precluded from helping draft the rule or moving to approve it.



### **Conclusion:**

In summary, it is not apparent what, if any, prohibited conduct is exhibited by the background facts, as presented. This advisory opinion is limited to the specific set of facts or activity set forth in the request. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law.

In conclusion, it should also be noted that the advisory opinion process is not a vehicle designed to make factual findings regarding events that have already occurred. An advisory opinion, by its very nature, is intended to provide guidance related to future conduct—not past events—and is prospective in its application. Accordingly, the Commission cannot opine regarding the permissibility of a specific past event.

This advisory opinion is issued by the Commission pursuant to Ark. Code Ann. § 7-6-217(g)(2).

### **ARKANSAS ETHICS COMMISSION**

By:   
**Jill Rogers Barham**

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<sup>i</sup> Ark. Code Ann. § 19-11-718 (2) (A) provides a “special state employee” means a person appointed to a covered board, regardless of whether the person:

- (i) Receives compensation for his or her services;
- (ii) Receives reimbursement for travel expenses;
- (iii) Receives per diem; or
- (iv) Was appointed formally or informally.

<sup>ii</sup> Ark. Code Ann. § 19-11-718 (1) (A) provides that “Conflict of interest” means a special state employee's direct or indirect pecuniary or other interest in a matter before a covered board. It goes on to say, in pertinent part, as follows:

(B) “Conflict of interest” includes without limitation the following:

- (i) An offer of employment from an entity that is involved in a procurement matter with the covered board or is involved in a discussion of a procurement matter with the covered board;
- (ii) Being an officer or employee of a business, association, or nonprofit organization that is involved in a procurement matter with the covered board or is involved in a discussion of a procurement matter with the covered board; and
- (iii) Receiving compensation from an entity that is involved in a procurement matter or is involved in a discussion of a procurement matter with the covered board[.]

<sup>iii</sup> Ark. Code Ann. § 19-11-718 (a) (2)(A) provides “Covered board” means:

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- (i) A commission, board, bureau, office, or other state instrumentality created within the executive branch; and
  - (ii) An entity that is created by rule, statute, legislative direction, executive order, or other informal means if the entity has decision-making authority over procurement criteria, contracts, appointment of individuals to negotiate procurement directly or indirectly, or the approval of procurements.
- (B) "Covered board" does not include the following:
- (i) The constitutional departments of the state;
  - (ii) The elected constitutional offices of the state;
  - (iii) The General Assembly, including the Legislative Council, the Legislative Joint Auditing Committee, and supporting agencies and bureaus of the General Assembly;
  - (iv) The Supreme Court;
  - (v) The Court of Appeals;
  - (vi) The circuit courts;
  - (vii) Prosecuting attorneys;
  - (viii) The Administrative Office of the Courts;
  - (ix) An institution of higher education;
  - (x) A municipal government;
  - (xi) A county government;
  - (xii) An interstate agency; or
  - (xiii) A legislative task force or committee if the legislative task force or committee only advises the General Assembly[.]

<sup>iv</sup> Arkansas Code Ann. § 21-8-1001 (a) provides as follows:

- (1) No member of a state board or commission or board member of an entity receiving state funds shall participate in, vote on, influence, or attempt to influence an official decision if the member has a pecuniary interest in the matter under consideration by the board, commission, or entity.
- (2) A member of a state board or commission or board member of an entity receiving state funds may participate in, vote on, influence, or attempt to influence an official decision if the only pecuniary interest that may accrue to the member is incidental to his or her position or accrues to him or her as a member of a profession, occupation, or large class to no greater extent than the pecuniary interest could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.
- (b) No member of a state board or commission or board member of an entity receiving state funds shall participate in any discussion or vote on a rule or regulation that exclusively benefits the member.

<sup>v</sup> Ark. Code Ann. § 21-8-304 provides as follows:

- (a) No public servant shall use or attempt to use his or her official position to secure special privileges or exemptions for himself or herself or his or her spouse, child, parents, or other persons standing in the first degree of relationship, or for those with whom he or she has a substantial financial relationship that are not available to others except as may be otherwise provided by law.
- (b) No public servant shall accept employment or engage in any public or professional activity while serving as a public official which he or she might reasonably expect would require or induce him or her to disclose any information acquired by him or her by reason of his or her official position that is declared by law or rule to be confidential.
- (c) No public servant shall disclose any such information gained by reason of his or her position, nor shall he or she otherwise use such information for his or her personal gain or benefit.

<sup>vi</sup> Ark. Code Ann. § 21-8-601 (a) (1) provides, as follows:

A lobbyist shall register within five (5) days after beginning lobbying. Such registration shall be on forms provided by the Secretary of State containing the following information:

- (A) The name, address, and telephone number of the lobbyist;
- (B) The calendar year for which the lobbyist is registering;
- (C) The types of public servants being lobbied;

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- (D) The name, address, and telephone number of the lobbyist's client or employer;
- (E) A description of the nature of the lobbyist's client or employer; and
- (F) Certification by the lobbyist that the information contained on the lobbyist registration form is true and correct.
- (2)(A) Except as provided in subdivision (a)(2)(B) of this section, if there is a change of information during the registration period, a lobbyist shall file an amended registration form within ten (10) days of the change.
- (B) A lobbyist registered to lobby members of the General Assembly shall file an amended registration form within three (3) business days of a change of information that occurs during a regular or extraordinary session of the General Assembly.
- (3) A lobbyist shall not be required to register if he or she engages in no lobbying other than the following activities:
- (A) The publishing or broadcasting, by news media executives or their employees or agents, in the ordinary course of business, of news items, editorials, or other comments or paid advertisements which directly or indirectly urge legislative action or administrative action;
- (B) Engaging in lobbying exclusively on behalf of an Arkansas church which qualifies as a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code when lobbying solely for the purpose of protecting the rights of members or adherents to practice the religious doctrines of the church;
- (C)(i) Action in a person's official capacity as a public servant.
- (ii) However, a public servant shall be required to register as a lobbyist if he or she:
- (a) Receives income from a nongovernmental person in excess of four hundred dollars (\$400) in a quarter for lobbying; or
- (b) Expends or is reimbursed in excess of four hundred dollars (\$400), regardless of the source, in a quarter for lobbying, excluding the cost of informational material and personal travel, lodging, meals, and dues;
- (D) Drafting legislation;
- (E) Appearing in:
- (i) A judicial proceeding;
- (ii) A proceeding or hearing if the appearance is a matter of public record; or
- (iii) Any hearing or appeal proceeding conducted pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq.;
- (F) Assisting an executive agency, at the written request of the agency, in drafting administrative rules or in publicizing or assisting in the implementation of final administrative actions;
- (G) Testifying as an individual at a public hearing in support of or in opposition to legislation or administrative action, testifying on behalf of a corporation, partnership, association, or other organization with which the person is regularly associated as an employee, officer, member, or partner, or testifying at the request of a legislative committee; or
- (H) Actions by contractors or employees of contractors while engaged in selling to a governmental body by demonstrating or describing commodities or services or inquiring as to specifications or terms and conditions of a particular purchase unless such contractor or its employees expend in excess of four hundred dollars (\$400) in a calendar quarter for food, lodging, travel, or gifts to benefit public servants who purchase commodities or services on behalf of a governmental body.
- (4) A person whose only act of lobbying is to compensate or reimburse a registered lobbyist in the person's behalf shall not be required to register as a lobbyist.
- (b) Upon the termination of a registered lobbyist's employment or designation as a lobbyist, the termination shall be conveyed by the registered lobbyist in writing to the public official with whom the lobbyist is registered. The written notice of termination shall:
- (1) State the registered lobbyist's name;
- (2) State the date the registered lobbyist's employment is terminated or his or her designation as a lobbyist terminated; and
- (3) Report any activity to be reported during the period in which the registration was in effect that has not already been reported.
- (c) Each registered lobbyist whose employment or designation as a lobbyist has not terminated shall reregister by January 15 of each year.