

PROPOSED DRAFT/NOT APPROVED/SUBJECT TO REJECTION

[SINGLE VIEW]

IT IS COMMISSION PRACTICE TO OFFER ALTERNATE PROPOSED DRAFTS OF ITS ETHICS INTERPRETATIONS WHEREVER THE QUESTIONS ARE REASONABLY SUSCEPTIBLE TO ANOTHER VIEW. STAFF BELIEVES THAT THE QUESTIONS POSED HERE ARE CONTROLLED BY CLEAR LANGUAGE OF COMMISSION RULES.

THIS DRAFT WAS PUBLISHED TO THE AGENCY WEBSITE AT LEAST 5 DAYS BEFORE THE PUBLIC HEARING. THE LATTER APPEARS AS AN AGENDA ITEM FOR THE REGULAR MEETING OF THE ETHICS COMMISSION SCHEDULED FOR NOVEMBER 17, 2011.

THE FOLLOWING IS INTENDED AS A STARTING POINT FOR DISCUSSION. AS ALWAYS, STAFF IS HAPPY TO REVISE IT AS THE COMMISSION MIGHT DIRECT.

November 17, 2011

The Honorable Mary Fallin, Governor of the State of Oklahoma
2300 N. Lincoln Blvd., Suite 212
Oklahoma City, OK 73105

-INTERAGENCY MAIL-

RE: Ethics Interpretation EI-2011-004

Dear Governor Fallin:

Following a public hearing, the Ethics Commission in its regular meeting held November 17, 2011, considered your request for an ethics interpretation. You have asked:

Do the Constitutional Ethics Rules [“the Rules”], Section 257:1-1-1 et seq. of the Rules of the Ethics Commission, 74 O. S. 2011, Ch. 62, App. prohibit your spouse, who is a practicing attorney in this state, from continuing to provide legal services to either CompSource Oklahoma or the University of Oklahoma?

THE FACTS

You have advised:

- your spouse has been a practicing attorney in the State of Oklahoma for the past 27 years;
- during that time he has represented a number of clients;
- they have included CompSource Oklahoma [“CompSource”] and the University of Oklahoma, which he represented for approximately 17 years and five years, respectively;

- these attorney-client relationships predate both your marriage and you taking office as the Governor of this state;
- exercising caution, your spouse chose to suspend representation until a determination could be made regarding the legality of his continued work for these clients;
- you posed a similar question to the Attorney General who, in Opinion 2011-14, interpreted the Oklahoma Constitution to mean that prohibitions set forth in Article X, Section 11 apply solely to public funds and, hence, do not extend to monies of CompSource, which have been judicially determined as not constituting public funds;
- with respect to the University of Oklahoma, the Attorney General found that prohibitions of Article X, Section 11 do not apply to all public funds, but only to: (1) the use or loan of public funds in an officer's hands, or (2) monies to be raised through the officer's agency;
- the Attorney General thus concluded that Article X, Section 11 does not prohibit a governor's spouse from being paid attorney fees from funds of CompSource, nor does it prohibit the University of Oklahoma from using its public funds to pay attorney fees to a governor's spouse;
- you now ask whether the Constitutional Ethics Rules in any way preclude your spouse from representing either of these clients;
- the Commission relies solely on your statements and has made no independent effort to confirm them. It therefore limits its ethics interpretation to the facts you have provided;
- finally, while Section 257:1-1-6(h) protects "the identity of the person or persons involved in the situations presented in the request for ethics interpretation," you have formally waived those protections and have expressly authorized the Commission to publish your name and that of your spouse.

THE LAW

Since this is a question of first impression, the Commission has no interpretative authority on point. For that reason, it will confine itself to an examination of language within applicable Rules. The controlling provision is Section 257:20-1-10(b), in Chapter 20, governing ethics and conflicts of interest. It provides:

State officers' and state employees' private interests in public contracts

* * *

- (b) **Contracting with current or former legislators and statewide elective officers**
–**Exceptions.** No legislator or statewide elective officer shall sell or cause to be sold,

rent or lease either as an individual or through any business enterprise in which he holds a substantial financial interest, goods, services, buildings or property to any governmental entity. No state officer or state employee, acting in his or her official capacity, shall enter into any contract in which the state officer or state employee knows that a person who is then or has been a legislator within the previous year, **or a member of such person's immediate family, has a substantial financial interest.** The provisions of this subsection shall not apply to a contract of employment with an immediate family member of a legislator, together with any renewal, promotion or lateral transfer of such employment contract to another governmental entity, which is:

- (1) in existence on July 1, 1994;
- (2) in existence prior to the legislator's term of office;
- (3) in existence prior to marriage to the legislator; or
- (4) with a student employed on a part-time basis, which shall be seventy-five percent (75%) of a normal forty-hour work week or thirty (30) hours per week, or less, and who is regularly enrolled, as defined in Paragraph 11 of Section 840.8 of Title 74 of the Oklahoma Statutes, in an institution of higher education comprising the Oklahoma State System of Higher Education.

No legislator or statewide elected officer shall attempt to influence or perform an official function requiring the exercise of discretion relating to a contract with any governmental entity **if a member of the legislator's or statewide elective officer's immediate family has a substantial financial interest in such contract.**

(c) **Exceptions.** Subsections (a) and (b), except as prohibited by law, shall not apply to:

- (1) contracts with state employees for goods or services valued at less than five thousand dollars (\$5,000);
- (2) contracts with state employees entered into after public notice by the governmental entity and compliance with competitive bidding procedures; and
- (3) employment contracts entered into with former legislators.

* * *

Section 257:20-1-10

[emphasis added]

The Rule breaks down into three distinct parts.

First, with certain exceptions, it prohibits legislators and statewide elective officers from contracting with a state governmental entity. The latter is defined as:

Definitions

* * *

"Governmental entity"

(1) means any department, commission, authority, council, board, bureau, committee, legislative body, agency, state beneficial public trust, or other establishment of the executive, legislative or judicial branch of the State of Oklahoma.

(2) shall not mean entities of political subdivisions of the State of Oklahoma.

* * *

Section 257:1-1-2

The Commission finds that both CompSource and the University of Oklahoma were intended to fit under this broadly-worded definition, which includes “establishments” of any of the three branches of government in the State of Oklahoma.

Second, the Rule precludes state officers and employees from entering into publicly funded contracts with a person who has served as a legislator within the previous year, as well as a member of his or her immediate family. The latter is defined in the Rules as:

* * *

“**Immediate family**” means a child under the age of eighteen (18) years residing in a state officer’s or state employee’s household, a spouse of a state officer or state employee, and an individual claimed by the state officer or state employee or the state officer’s or state employees’ spouse as a dependent for tax purposes.

* * *

Id.

Finally, it forbids a legislator or statewide elective officer from attempting to influence or perform an official function requiring the exercise of discretion relating to a contract with a governmental entity where the legislator’s or statewide elective officer’s immediate family has a substantial financial interest in that contract.

ANALYSIS

These facts do not involve a statewide elective officer – like the governor – entering a contract in her official capacity with a person who has been a legislator within the past year or with his or her immediate family member. Therefore, part two of paragraph (b) of Section 257:20-1-10 does not apply.

Similarly, part three has no application. There is no suggestion that the governor will attempt to influence or perform an official function requiring the exercise of discretion relating to her spouse’s contract for legal services with one or more governmental entities.

The Commission therefore turns to part one of Rules' Section 20-1-10(b). As noted, it prohibits a statewide elective officer – including the governor – from selling or causing to be sold, rent or lease either as an individual or through any business enterprise in which he or she holds a substantial financial interest, goods, services, buildings or property to any governmental entity.

This language would prohibit the governor – were he or she a lawyer – from selling services, including legal services, to a state governmental entity. But, by its clear wording, it does not reach a spouse or other members of the immediate family. The absence of inclusive language in this provision shows an intent by the framers to omit the spouse, particularly where that person – and immediate family members – are expressly provided for elsewhere in this Chapter of the Rules.

For instance, Section 257:20-1-7 includes within its strictures not only a spouse and immediate family member(s), but expands the regulation to include an adopted child, step-child, and a business entity with which a state officer or legislator is associated. In pertinent part, it provides:

Votes, deliberations, and discussions by legislators or statewide elective officers

(a) A legislator or statewide elective officer shall not introduce or cause to have introduced, request the introduction of, promote, or vote on any legislation if the statewide elective officer or legislator or **a child, adopted child, step-child or spouse of the officer or legislator or a business or entity with which the legislator or officer or a member of the immediate family of the legislator or officer is associated** has:

- (1) a pecuniary interest in; or
- (2) a reasonably foreseeable benefit from:

the legislation . . .

* * *

Section 257:20-1-7

Similar language is contained in Rules' Section 257:20-1-8, which regulates votes, deliberation and discussions by public members. There applicable language includes not merely the public member, but his or her immediate family, as well as a business or entity with which he or she – or immediate family member(s) – is associated, has a pecuniary interest in or a reasonably foreseeable benefit from the matter under consideration by the entity the public member serves.

Votes, deliberations, and discussions by public members

(a) A public member shall not participate in the discussion on, vote on, influence, or attempt to influence an official action of the governmental entity the public member serves on if the public member or a member of the immediate family of the public member or a business or entity with which the public member or a member of the immediate family of the public member is associated, has:

- (1) a pecuniary interest in; or

(2) a reasonably foreseeable benefit from:

the matter under consideration by the governmental entity of which the public member is a member . . .

* * *

Section 257:20-1-8

These establish that the framers were aware of the option of extending Chapter 20 Rules to include spouses, immediate family members, adopted children, step-children and even businesses or entities in which the state officer holds a substantial financial interest. With regard to the controlling language of Rules' Section 257: 20-1-10(b), they chose not to take that step.

The Commission thus finds that nothing in the applicable part of that provision precludes the spouse of a statewide elective officer from contracting for legal services with a state governmental entity. As noted, the latter includes both CompSource and the University of Oklahoma.

Therefore, the Commission finds that nothing in the Constitutional Ethics Rules prohibits a governor's spouse, who is a practicing attorney in the State of Oklahoma, from continuing to provide legal services to either CompSource or the University of Oklahoma. Because this holding provides the ultimate answer to your question, the Commission does not analyze any alternate scenarios.

CONCLUSION

It is therefore the Ethics Interpretation of the Ethics Commission, as decided at its regular meeting held November 17, 2011, that the Constitutional Ethics Rules do not prohibit the Governor's spouse, who is a practicing attorney in the State of Oklahoma, from continuing to provide legal services to either CompSource or the University of Oklahoma.

Please be advised that ethics interpretations are fact specific. They answer only the question or questions put forth in the underlying request. While they may shed light on other situations, this opinion does not necessarily control them. To be binding on the future action of this agency, the interpretation must be directed to the individual situation.

The Commission is authorized to issue ethics interpretations by Oklahoma Constitution Article 29, Section 5 and Rule 257:1-1-6(h) . Questions pertaining to other Oklahoma Statutes, the state and federal Constitutions or federal law cannot be interpreted by the Commission and must be referred to the appropriate authority.

Ethics Interpretations are issued not by staff, but by the Commissioners. Members consider briefs, testimony and input from the public, who have prior notice of the issues and an opportunity

to be heard on the questions presented in the ethics interpretation request. Following consideration in executive session, members vote on the matter in open meeting.

Ethics Interpretations are ordinarily published with sufficient deletions to prevent identification of the requester. The protection of confidentiality was, in this instance, formally waived. This opinion therefore bears no restrictive label.

We trust the foregoing has answered your questions. Please advise if we may be of further assistance.

Respectfully,

Rebecca Adams, General Counsel
Oklahoma Ethics Commission

RLA/ra