



STATE OF ARKANSAS
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and Administration**

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May 20, 2021

Dr. Jeffrey P. Kirsch and
Dr. Patrick L. Fraley
Ear, Nose and Throat Center of Conway
2425 Dave Ward Drive, Suite 101
Conway, Arkansas 72034

Re: Advisory Opinion No. 2021-04

Dear Drs. Kirsch and Fraley:

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 a letter dated April 16, 2021 and received on May 5, 2021, regarding the circumstances described below involving your anticipated state employment with the University of Arkansas for Medical Science (UAMS) and a proposed operating agreement for Jeffrey P. Kirsch, M.D., P.A. d/b/a Ear, Nose, Throat Center of Conway (ENTCC) that you own and operate and which is located at 2425 Dave Ward Drive #101, Conway, Arkansas 72034.

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, then that could result in a revised opinion.

1. You are both officers in and currently own and operate ENTCC located at 2425 Dave Ward Drive #101, Conway, Arkansas 72034.
2. Your interests in ENTCC are the relevant financial interests for purposes of your advisory opinion request.
3. UAMS and you, as the owners and operators of ENTCC, are currently negotiating to enter into an operating agreement in which UAMS will 1) purchase ENTCC's equipment, 2) assume the management, operation, and expenses for the ENTCC clinical facility, and 3) hire all ENTCC physicians and ENTCC staff as UAMS employees.
4. Through a separate transaction, in which ENTCC will not be a party, UAMS will enter into a lease with Nabholz Properties for the use and occupation of the current ENTCC clinical facility space.
5. The anticipated effective date of the operating agreement is July 1, 2021.
6. As of the effective date, UAMS will own and operate ENTCC as the UAMS ENT Clinic.

Drs. Jeffrey P. Kirsch and Patrick L. Fraley
Adv. Op. 2021-04
May 20, 2021

7. In your anticipated roles at UAMS, you will practice medicine as associate professors in the UAMS College of Medicine and will report directly to Dr. John Dornhoffer, Chair of the Department of Otolaryngology.
8. You will practice primarily at the UAMS ENT Clinic with a minimum of 10% (2 days/month) at the UAMS Medical Center, with your prime responsibility to include patient care (Client visits and surgical procedures).
9. You have disclosed this information regarding ENTCC to the appropriate UAMS Conflict of Interest Committee (Committee) in anticipation of your employment with UAMS.
10. The Committee has reviewed your disclosed interests and has found no conflict of interest as to these financial interests, since as of the effective date of the operating agreement, ENTCC will become a UAMS ENT Clinic.
11. After July 1, 2021, ENTCC will continue to receive payments from UAMS under the operating agreement for those operating expenses incurred as a consequence of winding down the business of ENTCC.
12. On May 12, 2021, Lucie Ingram, UAMS Associate General Counsel, sent an email correspondence to me that supplemented your letter dated April 16, 2021, by including a copy of the draft Operating Agreement.
13. Ms. Ingram affirmed that "... UAMS and ENTCC plan to enter into an Operating Agreement to allow UAMS to assume management and operation of the ENTCC clinic. As part of UAMS' obligations in assuming the operational expenses of the clinic, UAMS will make payment to ENTCC for its current operational accounts as outlined in Section 1.1 and Exhibit A of the Agreement. UAMS will make payments to ENTCC while it works to transition those operational expenses to UAMS accounts and contracted services. Once those accounts are transitioned to UAMS, there will be no further payments to ENTCC under the Operating Agreement."
14. Section 1.1 of the draft Operating Agreement provides as follows:

Payment of Operating Expenses. Subject to the terms and conditions hereof, UAMS shall pay ENTCC for the reasonable and necessary operating expenses used exclusively in connection with the Clinic set forth on Exhibit A attached hereto and incorporated herein. At its sole discretion, UAMS may, where possible, transfer the accounts for these operational expenses to its name. ENTCC shall cooperate with UAMS and provide any information reasonably required to transfer ownership of operational accounts in a timely manner.

15. Exhibit A of the draft Operating Agreement identifies the operating expenses and is attached for reference. *See Attachment A.*

I. Relevant Law

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

Drs. Jeffrey P. Kirsch and Patrick L. Fraley
Adv. Op. 2021-04
May 20, 2021

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, neither of you is currently a state employee; however, one of the apparent considerations for the proposed agreement with UAMS and ENTCC is your, as well as your entire staff’s, future employment at UAMS as of July 1, 2021. Additionally, for purposes of this advisory opinion, your ownership of ENTCC, which is the subject of the Operating Agreement being negotiated with UAMS, certainly classifies you as having a financial interest in a state agency contract.

As you are not currently employed by the state, no conflict exists at this time. However, upon your employment at UAMS on July 1, 2021, the proposed Operating Agreement with UAMS will serve as the basis for this review.

The proposed Operating Agreement provides that UAMS will assume management and operation of ENTCC on July 1, 2021, and ENTCC will relinquish its management and operation of the business at that time. Concurrently, you both will become UAMS employees and practice medicine as associate professors in the UAMS College of Medicine. While ENTCC will receive payments from UAMS after July 1, 2021, under the operating agreement for those operating expenses incurred exclusively in connection with the ENT Clinic, these expenses are a pass-through while these service accounts are transferred to UAMS or terminated. Once those accounts are transitioned to UAMS or terminated, UAMS has affirmed that there will be no further payments to ENTCC under the Operating Agreement.

As a result, although there is no current conflict, your anticipated employment at UAMS in conjunction with the Operating Agreement becoming effective on July 1, 2021, serves as the

Drs. Jeffrey P. Kirsch and Patrick L. Fraley
Adv. Op. 2021-04
May 20, 2021


basis for this advisory opinion. Accordingly, 1) as ENTCC transitions to UAMS's ENT Clinic, 2) UAMS assumes management and operation of ENT Clinic and its staff, and 3) you become UAMS associate professors practicing medicine with no apparent procurement authority or responsibility, I conclude that the conflict is insubstantial and remote and will be resolved as the ENTCC operations accounts are transitioned to UAMS's ENT Clinic or terminated.

III. Decision

Thank you for seeking my counsel and approaching the issue with transparency. I am persuaded that, under the facts as stated above, any ethical conflict that might exist is insubstantial or remote, and I 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 Ann. § 19-11-715(c) regarding UAMS paying to ENTCC, in the form of reimbursement, those reasonable operations expenses identified in Attachment A incurred after July 1, 2021. This advisory opinion is expressly premised on the representation that ENTCC operations accounts will be transitioned to UAMS or terminated within a reasonable period.

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