TEXAS LEGISLATIVE COUNCIL

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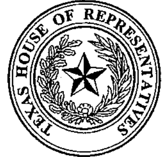

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Lieutenant Governor
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Chief Legislative Counsel
Executive Director

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Speaker of the House
Vice Chairman

September 29, 2003

The Honorable Dan Branch
State Representative
Capitol Extension
Room E1.418

Dear Representative Branch:

During the regular session of the legislature earlier this year, you asked the Texas Legislative Council to review the ethics policies adopted by your law firm, Winstead Sechrest & Minick, relating to lawyers in the firm who are also members of the legislature. Jeff Archer of the council legal staff reviewed the policies in detail during the regular session and discussed his analysis with you at that time. He concluded, and I concurred, that the policies appear to be sufficient to address the principal ethical issues that arise when a member of a law firm is also a member of the Texas Legislature, and that in many respects the policies exceed any legal requirements.

This letter is intended to memorialize our analysis of the nine substantive Winstead policies relating to attorneys who are legislators. For convenience, the discussion considers the Winstead policies in related groups. Please note that our analysis does not consider the policies in relation to the Texas Disciplinary Rules of Professional Conduct.

FINANCIAL REPORTS

Provision 1. Requires firm attorney-legislators to file all required financial reports with the Texas Ethics Commission.

This requirement is appropriate and self-explanatory. While the firm has no legal obligation to enforce a legislator's duty to file any required financial statements, the legislator's income from and any equitable interest in the firm will constitute a major part of the contents of the report. Failure to comply with the required reporting could subject the firm to undesired scrutiny and give the public the idea that its members are irresponsible or have something to hide. Provision 1 acknowledges that the firm's legislator-members have not only a legal duty to report but a fiduciary duty to the firm and its clients and personnel to avoid compromising the reputation of the firm.

STATE AND COUNTY LOBBYING

Provision 2. Prohibits firm attorney-legislators from lobbying state or county governments

and requires client engagement letters to reflect that prohibition.

Provision 3. Prohibits firm attorney-legislators from participating in client representation before state or county executive or legislative entities without executive committee approval.

Provision 8. Excludes firm attorney-legislators from receiving any share of firm revenues from lobbying state or county government for third parties.

These provisions are broader than required to comply with applicable law. Section 572.052(a), Government Code, prohibits legislators from representing clients for compensation before executive *state* agencies, with certain exceptions. But neither Section 572.052 nor any other law prohibits a legislator from lobbying or otherwise representing a client before a county or other *local* government. See Ethics Advisory Opinion No. 117 (1993) (legislator not prohibited from representing clients before school board). However, the legislature exercises so much authority over counties that restricting firm attorney-legislators from county lobbying avoids the appearance that the firm may intend to take advantage of its legislator-members by using them to unduly influence county officials.

Section 572.052, Government Code, does not appear to impose any sort of duty or liability on a legislator's law firm as opposed to the individual legislator. However, Provisions 2 and 3 remind the firm's personnel and clients of the prohibition against legislator lobbying of state agencies, and will help prevent misunderstandings by clients expecting the firm's legislator-members to pull strings for them. The provisions may even help protect the firm from any unforeseen criminal or civil liability in the event a firm member does violate the statute or a client alleges the firm did not represent the client adequately. Provisions 2 and 3 express the firm's commitment to ensuring that its members do not violate the law. They also help protect firm clients from harm to their interests or reputations in the event illegal lobbying was conducted on their behalf.

Section 572.052, Government Code, does not in any direct way prevent the firm from sharing income from state lobby work with legislators in the firm, and it is not clear that Provision 8 is required to comply with any law. However, by prohibiting legislators in the firm from sharing in income from state lobby work, Provision 8 reinforces the firm's commitment to complying with the letter and spirit of Section 572.052.

STATE AND COUNTY CONTRACTS

Provision 4. Prohibits firm attorney-legislators from participating in firm management.

Provision 5. Prohibits firm attorney-legislators from owning more than one percent of the firm.

Provision 6. Prohibits firm attorney-legislators from participating in firm sections or groups that practice in government matters.

Provision 9. Excludes firm attorney-legislators from receiving any share of firm revenues from representing state or county governments.

Provisions 4, 5, 6, and 9 appear to be primarily intended to ensure that the firm's attorney-legislators are not considered to have an interest in any firm contract with the state or a county to the extent that the interest would be prohibited by Article III, Section 18, Texas Constitution. That section, in part, prohibits a member of the legislature from being interested, either directly or indirectly, in a contract with the state or a county that is authorized by a law enacted during the member's term in the legislature. The attorney general in numerous opinions has construed that prohibition encompasses not only a statute authorizing the substance of a contract (such as a law authorizing counties to engage attorneys to collect delinquent taxes) but also an appropriation act authorizing a state expenditure to pay a contractual obligation. Op. Tex. Att'y Gen. No. JM-162 (1984) discusses this issue in detail and cites the long line of opinions reiterating the attorney general's construction.

The attorney general has stated that a legislator's participation in the management of a business entity is an important consideration in determining whether the legislator's ownership of a small interest in the entity may be sufficient to make the legislator "interested" in a contract entered into by the entity. See Op. Tex. Att'y Gen. No. M-625 (1970). Provisions 4 and 6 taken together effectively minimize the potential that a firm attorney-legislator may be considered to have any meaningful management role in the firm or any significant influence in firm business with state agencies or counties.

Provisions 5 and 9 work together to eliminate any real financial interest of a firm attorney-legislator in a firm contract with a state agency or a county. As the Winstead materials accompanying the policies note, the judicial and attorney general decisions applying Article III, Section 18, Texas Constitution, indicate that a legislator's ownership in an entity may be so minimal that the constitutional contract prohibition does not apply. It is possible that as long as a legislator in the firm has any equitable interest in the firm, he or she also has an interest in every firm contract with a client. However, short of prohibiting the firm from entering into any state contracts, the safeguards established by Provisions 4, 5, 6, and 9 appear to be an effective means of excluding firm legislators from having any interest in such contracts.

It should be noted that, since few, if any, county contracts are paid from state appropriations, a legislator is not prohibited from having an interest in a contract with a county under Article III, Section 18, unless the substantive law authorizing the contract (as opposed to the law appropriating the contractual payments) was enacted while the legislator was in the legislature. A firm legislator thus could probably have a financial interest in many county contracts. Provision 9 is broader than necessary as it applies to firm contracts with counties.

POLITICAL CONTRIBUTIONS

Provision 7. Prohibits firm attorney-legislators from participating in the firm's state and local political action committee.

It is not clear that this provision is necessary to comply with any legal standard. However, it appears to be an appropriate means by which to remove the appearance that contributions from the firm's PAC to state or local officers or candidates for state or local office are being directed by members of the legislature, who could reward official action favoring clients of the firm or retaliate for official decisions adverse to the firm's clients.

As you know, the legislature this year enacted a comprehensive ethics bill, H.B. 1606 (Chapter 249), Acts of the 78th Legislature, Regular Session, 2003. That bill substantially amended Section 572.052(a), Government Code, governing representation of clients by legislators before executive state agencies. The newly amended Section 572.052(a) limits representation by legislators before state agencies to criminal law matters and to filing documents in ministerial matters. H.B. 1606 also made other changes to the law that your law firm may want to consider reflecting in its policies for legislators in the firm. For example, we note that the Winstead policies do not address legislative continuances; given the reporting requirements regarding legislative continuances added by H.B. 1606, the Winstead policies could be amended to articulate the firm's intent that legislators in the firm comply with those requirements. Of course, the firm should periodically review all applicable laws to ensure that the legislator policies remain effective and relevant.

In addition, we note that the Texas Supreme Court has not yet issued a decision in the pending *Joe v. Two Thirty-Nine Joint Venture* appeal. If the supreme court adopts a conflict rule similar to that recognized by the Dallas Court of Appeals in *Joe*, Winstead would of course need to examine its internal conflicts procedures as appropriate. In that case, it would probably be useful to make additions to the Winstead policies for attorney-legislators to the extent those members of the firm would be required to take any action to assist the firm to comply with any new conflict rules. Of course, at this time it is impossible to predict to what extent, if any, the supreme court will agree with the burdensome conflict rules embraced by the court of appeals in *Joe*.

I hope the comments made in this letter are useful to you. Please contact me or Jeff Archer on the legislative council legal staff if you wish to discuss this matter further. This letter is a confidential communication under Section 323.017, Government Code, and its disclosure to third parties is entirely within your discretion.

Sincerely,

Steve Collins
Chief Legislative Counsel

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