Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 25, 1993

Ms. Genevieve G. Stubbs
Associate General Counsel
Texas A & M University System
College Station, Texas 77843-1230

Letter Opinion No. 93-12

Re: Whether the Texas A & M University System may contract with a law firm that has, as one of its partners, a member of the Texas A & M University System's board of regents and related questions (ID# 17933)

Dear Ms. Stubbs:

You have asked for our opinion as to whether The Texas A & M University System (TAMUS) may contract with a law firm that has, as one of its partners, a member of TAMUS' board of regents. You have provided us with the following background information:

> The firm of Winstead, Sechrest & Minick (WSM) has been providing patent legal services for The Texas A&M University System for over two years. Most of those services have related to a law suit and a cluster of technologies relating to biomass conversion. The individual attorney who has done the majority of work on behalf of the System, Mr. David Tannenbaum, was originally a partner with Baker and Botts. Our agreement with Baker and Botts covered his work until such time as he became a partner in WSM. Subsequently, an outside counsel agreement with WSM was entered into for the 1991-1992 fiscal year.
>
> Work has continued on the project, and Mr. Tannenbaum has continued to provide valuable assistance with regard to the lawsuit. However, as of September 1, 1992[,] a member of the Board of Regents of The Texas A&M University System[] became a partner in WSM. The Regent-partner is in the Houston office of the firm, while Mr. Tannenbaum works in the Dallas office. None of the regent[']s work is related in any way to the services provided by Mr. Tannenbaum and the patent attorneys in the firm.

> Subsequent to September 1, some additional work was performed on behalf of the System by Mr. Tannenbaum and others at WSM. . . . [I]t has been a practice in the past to allow such services to be paid when the firm subsequently does enter into an outside agreement with the institution.

You inform us that your office instructed WSM on October 12, 1992, to cease all work for TAMUS.

Based on these facts, you ask three questions. You first ask whether TAMUS may contract with WSM for legal services for the period that began September 1, 1992, the date that the member of TAMUS' board of regents became a partner with WSM. If TAMUS may not enter into an outside counsel agreement with WSM, you ask whether TAMUS may pay WSM for legal services it performed from September 1, 1992, through October 12, 1992, and whether TAMUS may pay WSM for legal services it performed during the same period if the regent did not receive a salary from the firm during that period and receives no monetary remuneration at all deriving from these services.

The governing boards of state level institutions, which include state universities, are subject to the strict common-law rule regarding conflict of interest that bars a governmental body from entering into a contract in which one of its members is pecuniarily interested. Attorney General Opinions JM-817 (1987) at 2, JM-671 at 2; Letter Opinion 92-52 (1992) at 3; *see Meyers v. Walker*, 276 S.W. 305, 307 (Tex. Civ. App.--Eastland 1925, no writ). This office has held even very small pecuniary interests to constitute a prohibited financial interest in a public contract. *See* Attorney General Opinions JM-817 at 2, JM-671 at 3; JM-424 (1986) at 4; H-624 (1975) at 2. Furthermore, the strict common-law rule reaches the indirect as well as the direct pecuniary interests that a member of a governmental body may have in a transaction. *See Bexar County v. Wentworth*, 378 S.W.2d 126, 128-29 (Tex. Civ. App.--San Antonio 1964, writ ref'd n.r.e.); Attorney General Opinions JM-817 at 3, JM-671 at 3. Contracts violating this strict common-law rule are void. *Bexar County*, 378 S.W.2d at 128; *Meyers*, 276 S.W. at 307; Attorney General Opinions JM-671 at 2-3; JM-424 at 5; H-624 at 2.

The regent who is a partner with WSM certainly has a pecuniary interest in any contract TAMUS makes with WSM. Not only does he receive a salary from WSM, but under the law of partnerships, he is entitled to a share of any profits WSM makes.[1] *See* V.T.C.S. art. 6132b, §§ 6(1), 7(4), 18(1)(a); 57 TEX. JUR. 3d *Partnership* § 29, at 357 (1987). Similarly, under the law of partnerships, he is obligated to bear his share of any

---

[1]In general, the rights of law partners are determined by the general law of partnerships. 7 TEX. JUR. 3d *Attorneys at Law* § 151, at 502 (1980). You have indicated that the regent is a "partner" in WSM. We assume, therefore, that the law of partnerships governs the regent's relationship with WSM.

losses WSM incurs. *See* V.T.C.S. art. 6132b, § 18(1)(a); 57 TEX. JUR. 3D *Partnership* § 29, at 357. Whether or not TAMUS contracts with WSM may impact on the amount of profits WSM makes or the amount of losses it incurs.

We proceed to consider your specific questions. First, because the regent has a pecuniary interest in any contract TAMUS executes with WSM, TAMUS may not contract with the firm.[2] To answer your second question, we must consider the nature of the agreement by which WSM performed legal services for TAMUS after August 31, 1992. You have stated that, traditionally, TAMUS pays for such services when the firm subsequently enters into an outside agreement with the institution. We believe that TAMUS may pay WSM for the legal services it performed after August 31, 1992, only if the 1991-1992 contract can be construed to extend through October 12, 1992, thereby covering those legal services.[3]

If the 1991-1992 contract cannot be construed to cover legal services performed after August 31, 1992, any formal or informal agreement pursuant to which WSM performed the legal services is void. Furthermore, TAMUS may not reimburse WSM for any of the work any member of the firm has performed for TAMUS after September 1, 1992. *See* Attorney General Opinion JM-969 (1988) at 2-3 (stating that legislature may not appropriate funds to pay claim under invalid contract); *see also* Tex. Const. art. III, § 44; *State v. Steck Co.*, 236 S.W.2d 866, 869 (Tex. Civ. App.--Austin 1951, writ ref'd) (stating that, if no pre-existing law authorizes recovery, state is not liable for unenforcible contract); *State v. Haldeman*, 163 S.W.2d 1020, 1022 (Tex. Civ. App.--austin 1913, writ ref'd) (denying right to recover payment in excess of statutorily-authorized amount); *accord* Susman, *Fiscal and Constitutional Limitations*, 44 TEX. L. REV. 106, 130-35 (1965) (stating that courts almost uniformly have held that party cannot recover from state on quantum meruit claim).

In answer to your final question, whether the regent receives a salary for the period running from September 1, 1992, through October 12, 1992, or whether he receives any direct remuneration deriving from WSM's services to TAMUS, is inconsequential. Because of his partnership status with the firm, he has indirect interests in any services WSM performs for TAMUS, in addition to any direct pecuniary interests he may have.

We realize that this result may seem harsh, particularly in view of the fact that Mr. Tannenbaum has developed a great deal of expertise in the pending litigation in which TAMUS is involved. So long as both he and the regent remain partners at WSM, and so

---

[2]Even if the regent's relationship with WSM differs from that of a typical partnership, such that he is not entitled to a share of WSM's profits or required to bear a proportional share of any losses, we believe that his indirect interests in WSM's contract with TAMUS are sufficient to mandate the conclusion we reach here.

[3]Of course, construing a specific contract is outside the scope of the opinion process.

long as the regent is a member of TAMUS' board of regents, however, we find no alternative.

> It is not a question of whether or not the public interest will actually suffer in permitting the particular contract, but it is rather one of a sound policy as to official conduct where the law will not speculate upon the actualities following its violation.

Attorney General Opinion V-640 (1948) at 2.

SUMMARY

The common-law rules pertaining to conflict of interest preclude The Texas A & M University System (TAMUS) from contracting with a law firm in which one of the members of the board of regents of TAMUS is a partner. Any services the law firm performed for TAMUS after the regent became a partner were performed pursuant to a void agreement, and TAMUS may not pay the law firm for such services. Furthermore, because a partner has an indirect interest in the law firm's profits and losses, neither the fact that the regent did not receive a salary from the law firm during the period that the law firm performed services for TAMUS, nor the fact that the regent will receive no direct monetary remuneration from these services at all, alter the analysis or the result.

Very truly yours,

Kymberly K. Oltrogge

Kymberly K. Oltrogge
Assistant Attorney General
Opinion Committee