ARKANSAS ETHICS COMMISSION

910 West Second Street, Suite 100
Post Office Box 1917
Little Rock, Arkansas 72203-1917
(501) 324-9600 Fax (501) 324-9606
Toll Free (800) 422-7773

ADVISORY OPINION NO. 2011-EC-003
Issued May 20, 2011

The Arkansas Ethics Commission ("AEC") has received a written advisory opinion request from Mr. George Carder, a newly appointed member of the Arkansas Oil and Gas Commission ("AOGC"). The AOGC regulates oil and gas operations in the state of Arkansas.

In his request, Mr. Carder states that he is a licensed attorney who, from time to time, represents clients in litigation against various oil and gas exploration and production companies. He seeks guidance regarding whether he may vote on issues before the AOGC involving a company which is a party to such litigation as long as his client does not have a pecuniary interest in the outcome of the specific matter before the AOGC.

Mr. Carder refers to Section 403 of the AEC's Rules on Conflicts, and goes on to state: "[i]t appears from my reading that, as an attorney, I may vote on issues involving an oil and gas exploration company which may be a party in litigation in which I am involved unless my client has a particular pecuniary interest in the issue for which the vote is being taken."

Section 403 of the Rules on Conflicts mirrors Ark. Code Ann. § 21-8-1001, which provides as follows:

> (a)(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.

The first subsection of this particular statute contains a general prohibition against a member of a state board or commission participating in an official decision if the member has a "pecuniary interest in the matter under consideration." An exception to that prohibition is then stated in the second subsection, which allows participation in the decision making process if the only pecuniary interest to the member accrues to him or her "as a member of a profession, occupation or large class." The AEC is being called upon to determine whether legal representation of a client involved in a litigation matter against an oil and gas exploration company appearing before the AOGC rises to the level of a conflict which prohibits his participation in AOGC decisions concerning that company.

It is noted that the AEC previously interpreted Ark. Code Ann. § 21-8-1001 and addressed a similar question posed by a member of the AOGC in Advisory Opinion No. 2007-EC-004. Therein, the member asked whether it was permissible for a member of the AOGC to be involved in decision making pertaining to a company or corporation in which the member is a minor common stock owner and whose matters are under consideration by the AOGC. In response, the AEC stated that while it was likely true that the member may be one of many stockholders of common stock in a particular company, the fact that member was one of many stockholders did not cause him to be a member of a "large class" as that phrase is interpreted by the AEC. It was the AEC's opinion that the type of "large class" referenced in the statute was one which would include, for example, stockholders in all utility companies, not merely a large group of stockholders in one company.

Specifically, the AEC concluded:

> With respect to members of state boards or commissions, the existence of a pecuniary interest in the outcome generally serves to prohibit a member from participating in a matter under consideration, notwithstanding the value of the interest or whether the interest is disclosed or not. That prohibition applies unless the pecuniary interest is incidental to his or her position or accrues to all other members of a profession, occupation or large class. As previously stated, the [AEC] has concluded that shareholders in one particular company do not constitute a large class.

In the instant situation, the AEC concludes that, in accordance with Ark. Code Ann. § 21-8-1001, Mr. Carder may vote on issues involving a company which may be a party in litigation in which he is involved *unless* he or his client has a particular pecuniary interest in the issue for which the vote is being taken before the AOGC. However, the AEC's analysis does not end here.

Another statute of potential applicability is Ark. Code Ann. § 21-8-1002, which states that no member of a state board or commission or board member of an entity receiving state funds shall use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others. As a member of the AOGC, Mr. Carder must take care to ensure that his position of trust is not compromised by outside influences and is prohibited from using his position to secure "unwarranted privileges or exemptions" for himself or others.

The term "unwarranted privileges or exemptions" is defined in section 400 (r) of the AEC's Rules on Conflicts to mean:

> a particular benefit or advantage unfairly extended to a person beyond the common advantages of others or the unjustified release of a person from a duty or obligation required of others.

Whether or not it would violate Ark. Code Ann § 21-8-1002 for a member of the AOGC to participate in the decision-making process regarding matters related to a company being sued by the member's client depends upon the facts of the particular situation. If the matter pending is completely unrelated to the litigation, the potential for a conflict would be minimized. However, it might be argued that the member was using his vote in the AOGC matter to gain an advantage or leverage in litigation settlement negotiations. Therefore, the potential for creating a conflict exists even if the litigation was unrelated to the matter before the AOGC.

Accordingly, to avoid any potential conflicts, the AEC believes the prudent course of action would be for the AOGC member to simply refrain from participating in the decision-making process in regard to any and all matters concerning that company, regardless of venue, until such time as litigation has concluded.

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

ARKANSAS ETHICS COMMISSION

By: Rita S. Looney, Chief Counsel