

July 12, 2002

Victoria Chamberlain  
Executive Director  
Teacher Standards and Practices Commission  
465 Commercial Street NE  
Salem, Oregon 97301

Dear Ms. Chamberlain:

At its July 12, 2002 meeting, the Oregon Government Standards and Practices Commission (GSPC) adopted the following advisory opinion.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION**  
**ADVISORY OPINION NO. 02A-1001**

**STATED FACTS:** Part of the duties of the Teachers Standards and Practices Commission (TSPC) Executive Director is to supervise the investigation of complaints regarding educator misconduct. Following the investigation of a complaint, the executive director makes a recommendation to the commission whether or not to file charges against a licensed educator. The executive director also has authority to negotiate with the accused educator and to recommend settlements to the TSPC Commissioners.

The executive director's husband's daughter is an attorney, holding an associate position with the law firm of Smith, Gamson, Diamond and Olney. It is the executive director's understanding that the daughter is employed on a salaried basis and her income is not dependent on the number of hours she works or the amount of income she generates for the firm. The Smith Gamson law firm has a contractual arrangement with the Oregon Education Association to represent licensed educators who are charged with misconduct in TSPC proceedings. The firm regularly provides representation to educators in these cases based on an hourly fee for services.

We issued Advisory Opinion 93A-1008 which concerned a similar fact situation. That opinion concerned a county commissioner whose husband was an attorney employed by a firm that represented several unions having labor contracts with the county. In its opinion we reasoned that the existence of a conflict of interest depended on the fee arrangement between the husband's law firm and its clients. We concluded that no

conflict of interest was presented if the firm provided services on an hourly or a flat fee basis; however, a conflict of interest would exist if the firm represented a client against the county on a contingent fee arrangement, because the size of the firm's fee would be dependent on the commissioner's decisions concerning settlement or litigation.

RELEVANT STATUTES: The following Oregon Revised Statutes are applicable to the issues addressed herein:

244.020(1) "'Actual conflict of interest' means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (7) of this section."

244.020(2) "'Business' means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official is associated in a nonremunerative capacity."

244.020(3) "'Business with which the person is associated' means any business of which the person or the person's relative is a director, officer, owner or employee, or agent or any corporation in which the person or the person's relative owns or has owned stock worth \$1000 or more at any point in the preceding calendar year."

244.020(15) "'Public official' means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services."

244.020(16) "'Relative' means the spouse of the public official, any children of the public official or of the public official's spouse, and brothers, sisters or parents of the public official or of the public official's spouse."

244.040 **“Code of ethics; prohibited actions; honoraria.** The following actions are prohibited regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120:”

244.040(1)(a) “No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this subsection, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated.”

244.120 **‘Methods of handling conflicts; generally; application to elected officials or members of boards.** (1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:”

244.120(1)(c) “If the public official is any other appointed official subject to this chapter, notify in writing the person who appointed the public official to office of the nature of the conflict, and request that the appointing authority dispose of the matter giving rise to the conflict. Upon receipt of the request, the appointing authority shall designate within a reasonable time an alternate to dispose of the matter, or shall direct the official to dispose of the matter in a manner specified by the appointing authority.”

QUESTION: Would it be a violation of Oregon Government Standards and Practice laws for the TSPC Executive Director to participate in discipline cases brought against licensed educators represented by the Smith, Gamson, Diamond and Olney law firm?

OPINION: Oregon Government Standards and Practices laws define actual conflict of interest [ORS 244.020(1)] and potential conflict of interest [ORS 244.020(7)]. The difference between an actual conflict of interest and a potential conflict of interest is determined by the words would and could. An actual conflict of interest occurs when the action is reasonably certain to result in a financial benefit or detriment. It will occur when an action taken by the official would directly and specifically affect the financial interest of the official, the official's relative or a business with which the official or a relative of the official is associated. A potential conflict of interest exists when an official takes action that could possibly have a financial impact on that official, a relative of that official or a business with which the official or the relative of that official is associated. Such impact is not certain.

ORS 244.040(1)(a) prohibits a public official from using, or attempting to use, official position or office to obtain financial gain or avoidance of financial detriment for the official, the official's relative or a business with which the official or the official's relative is associated. This prohibition exists regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120.

The stated facts indicate that the executive director makes recommendations to the TSPC on whether or not to file charges against a licensed educator. The stated facts also indicate that the law firm Smith, Gamson, Diamond and Olney, the employer of the executive director's spouse's daughter, represents licensed educators who are charged in TSPC proceedings. The firm regularly provides representation to educators in these cases based on an hourly fee for services.

If the executive director makes a recommendation to the TSPC to revoke an educator's license, or otherwise impose sanctions, the educator could request a contested case hearing. Accordingly, the Smith Gamson law firm would be financially impacted by representing the educator in the contested case hearing on an hourly fee basis. Likewise, if the executive director recommends to the TSPC that the case against a licensed educator be dismissed, the law firm would be financially impacted by experiencing a financial detriment because there would be no further representation of that licensed educator. In cases where the Smith Gamson law firm is representing a licensed educator it appears that the executive director would have an actual conflict of interest and must comply with the requirements of ORS 244.120(1)(c).

The executive director would be required to disclose the nature of the actual conflict of interest pursuant to ORS 244.120. The executive director would be in violation of ORS 244.040(1)(a) if the executive director then took official action that financially benefited the executive director's spouse's daughter or the business with which she is associated. Accordingly, it appears that the executive director would be prohibited from taking any official action in cases in which the executive director's spouse's daughter or the business with which she is associated are involved.

The stated facts cite GSPC Advisory Opinion 93A-1008. Upon reconsideration of the facts in that opinion, we now believe that the rationale used is not valid. In the answer to question number four of that opinion we stated that "There would not be a financial impact to the law firm if the case at hand involved a set fee or hourly rate for legal services ... " We erred in making that statement. As stated above, if a public official's recommendation or other action impacts the number of hours for which a relative's business would be able to charge a fee, an actual conflict of interest would exist.

**THIS OPINION IS ISSUED BY THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION PURSUANT TO ORS 244.280. A PUBLIC OFFICIAL OR BUSINESS WITH WHICH A PUBLIC OFFICIAL IS ASSOCIATED SHALL NOT BE LIABLE UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS LIMITED TO THE FACTS SET FORTH HEREIN.**

Issued by Order of the Oregon Government Standards and Practices Commission at Salem, Oregon on the 12<sup>th</sup> day of July, 2002.

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Alice Schlenker, Chairperson

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Lynn Rosik  
Assistant Attorney General

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Date