



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>December 12, 2008</p>	<p>No. I08-010 (R08-026)</p> <p>Re: Cancellation of Contracts Pursuant to A.R.S. § 38-511</p>
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To: The Honorable Robert Meza
House of Representatives

Questions Presented

1. Is a contract to which the State, a political subdivision, or a department or agency of either is a party subject to cancellation pursuant to Arizona Revised Statutes ("A.R.S.") § 38-511 if within three years after the contract's execution, a person significantly involved in negotiating or drafting the contract is employed by or serves as a consultant to another party to the contract in a matter unrelated to the contract's subject matter?

2. If an outside attorney (not a government employee) represents the State or a political subdivision in connection with drafting a contract, may that attorney within three years after the contract's execution provide legal services to the other party to the contract in connection with matters unrelated to the contract without implicating A.R.S. 38-511?

Summary Answer

1. Pursuant to A.R.S. § 38-511, if a person who was significantly involved in negotiating or drafting a contract on the behalf of the State or a political subdivision of the State becomes an employee or an agent of another party to the contract within three years of the execution of the contract, the State or its political subdivision may cancel the contract. However, if that person becomes a consultant to another party to the contract in a matter unrelated to the contract's subject matter, the contract is not subject to cancellation.

2. If outside counsel played a significant role in the drafting or negotiation of a contract for the State or political subdivision of the State, he or she may not become an agent for, or an employee of, another party to the contract without subjecting the contract to cancellation pursuant to A.R.S. § 38-511.

Analysis

Arizona Revised Statutes § 38-511(A) permits the State or a political subdivision to cancel a contract within three years of its execution

if any person significantly involved in initiating, negotiating, securing, drafting or creating the contract on behalf of the state, its political subdivisions or any of the departments or agencies of either is, at any time while the contract or any extension of the contract is in effect, an employee or agent of any other party to the contract in any capacity or a consultant to any other party of the contract with respect to the subject matter of the contract.

When interpreting statutes, courts endeavor to give effect to legislative intent. *Mejak v. Granville*, 212 Ariz. 555, 557, ¶ 8, 136 P.3d 874, 876 (2006). Legislative intent is established by clear statutory language. *Id.* If the language is clear, the court need not look further. *Ariz. Dep't of Revenue v. Salt River Project Agric. Improvement & Power Dist.*, 212 Ariz. 35, 39, ¶ 15, 126 P.3d 1063, 1067 (App. 2006). On the other hand, if the statute is not clear, the court reads the

statute as a whole and interprets it in such a manner that “no provision is rendered meaningless, insignificant or void.” *Mejak*, 212 Ariz. at 557, ¶ 9, 136 P.3d at 876.

The statute states that the State or its political subdivision may cancel the contract if a person who was significantly involved in the formulation of the contract on behalf of the State becomes “an employee or agent of any other party to the contract *in any capacity*.” A.R.S. § 38-511(A) (emphasis added). Thus, under the statute’s plain language, even if the person is employed by or is an agent to another party in an area completely unrelated to the subject matter of the contract at issue, the State or its political subdivision may at its option cancel the contract. However, the same is not true with respect to consultants; the statute authorizes cancellation when a person becomes “a consultant to any other party of the contract *with respect to the subject matter of the contract*.”¹ A.R.S. § 38-511(A) (emphasis added). Therefore, a person who had a significant role in the contract’s negotiating or drafting on the behalf of the State or its political subdivision may serve another party to the contract as a consultant in unrelated matters without subjecting the contract to cancellation.

These same principles apply to an outside attorney who is significantly involved in a contract’s formation on behalf of the State or its political subdivision. Outside counsel who was significantly involved in the formation of the contract on behalf of the State or its political subdivision may not act as an agent for, or become an employee of, another party to the contract without making the contract subject to cancellation under A.R.S. § 38-511(A).

¹ A consultant differs from an agent in certain key respects. A consultant gives expert or professional advice and does not act on behalf of, or under the control of, a principal. *II New Riverside Univ. Dictionary* 303 (1994). Because a consultant does not represent or advocate a position on the client’s behalf, he or she is closer to an independent contractor than to an agent or an employee. *See Simpson v. Home Petroleum Corp.*, 770 F.2d 499, 500 (5th Cir. 1985). An agent acts on behalf of the principal, has little if any actual binding authority without the principal’s consent, and is controlled by the capacity in which he or she represents the principal’s interest. *Black’s Law Dictionary* 32 (5th ed. 1983); Restatement (3d) of Agency, § 1.01 (definition of agency).

Generally, a lawyer acts as an agent of his or her client, the principal. In *Dawson v. Withycombe*, 216 Ariz. 84, 100, ¶ 43, 163 P.3d 1034, 1050 (App. 2007), the court noted that

to create an agency relationship, there must be a manifestation of consent by the alleged principal to the alleged agent that the agent shall act on his behalf and subject to his control and consent by the agent to act on behalf of the principal and subject to his control.

And, an attorney is defined as “[a]n agent, or one acting on behalf of another.” *Black’s Law Dictionary* 66 (5th ed. 1983). An attorney is an agent because he or she works on the principal’s behalf, has little if any actual binding authority without the principal’s consent, and is controlled by the capacity in which he or she represents the principal’s interest.

There may be limited instances in which a lawyer acts as a consultant rather than as an agent. As noted above, the cancellation provision in A.R.S. § 38-511 is not implicated when a person significantly involved in a contract’s formation on behalf of the State or political subdivision later becomes a consultant to another party to the contract in a matter unrelated to the contract’s subject matter. Therefore, if an outside attorney who previously was involved on behalf of the State or a political subdivision of the State in the formulation of a contract and then within three years of its execution becomes a consultant to, rather than an agent of, another party to the contract on an unrelated subject matter, the contract would not be subject to cancellation pursuant to A.R.S. § 38-511. If the outside attorney provides legal services to another party to the contract limited to rendering advice on subject matter unrelated to the contract, and the attorney is not authorized to act on that party’s behalf as an employee or agent and is not rendering the advice from the position of an advocate on behalf of that party, the contract is not subject to cancellation. However, as a practical matter it should be noted that a lawyer acts as a consultant to a client rather than an agent in only very limited circumstances.

Conclusion

A party, including an outside attorney, playing a significant role in the development or negotiation of a contract to which the State or a political subdivision of the State was a party may not become an employee or agent for another party to the contract within three years of the contract's execution without subjecting the contract to cancellation at the State or political subdivision's discretion, regardless of whether that person's work relates to the contract. However, he or she may become a consultant to that same party without subjecting the contract to cancellation so long as he or she does not work on the contract's subject matter.

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