

# MEMORANDUM

TO: PURPLE STRATEGIES™

FROM: JANE W. DUKE

DATE: JANUARY 19, 2015

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## I. Introduction

We have been retained by Purple Strategies™ to research and render a legal opinion regarding the ability of the Arkansas Lieutenant Governor to maintain private employment while simultaneously serving in Office. This Memorandum reflects the research and analysis conducted on the stated issue, as well as related issues.

## II. Factual Understandings

On November 4, 2014, Tim Griffin was elected by popular vote to the Office of Lieutenant Governor for the State of Arkansas, defeating his nearest opponent by more than 150,000 votes. In official ceremony held in the Chambers of the Arkansas House of Representatives, Lieutenant Governor Griffin was sworn into Office on Tuesday, January 13, 2015. Lieutenant Governor Griffin has a long and notable history of public service. He most recently served as a two-term member of the United States Congress, representing Arkansas' Second Congressional District from 2011 to 2015. Lieutenant Governor Griffin has also worked as an attorney in the United States Department of Justice (DOJ) and was appointed to the position of United States Attorney for the Eastern District of Arkansas in 2006. Prior to his tenure with DOJ, Lieutenant Governor Griffin served as Special Assistant to the President and Deputy Director of Political Affairs for President George W. Bush. Throughout his staff, appointed, and elected posts in government, Lieutenant Governor Griffin has continued his service in the United States Army Reserve, in which he currently holds the rank of Lieutenant Colonel. As an

employee, Lieutenant Governor Griffin received compensation for his federal employment. From 1996 to the present, Lieutenant Governor Griffin has also received limited and intermittent compensation for duty/drill/training, as well as expense reimbursement, from the United States Army Reserve.

As more fully discussed below, the Office of Lieutenant Governor for the State of Arkansas has historically been a part-time position, with many of its former occupants holding simultaneous public and private employment. Accordingly, effective Monday, January 5, 2015, Lieutenant Governor Griffin accepted a position as senior advisor for communications and growth strategies with the national strategic communications and branding firm of Purple Strategies™.

Purple Strategies™ is headquartered in Alexandria, Virginia, with offices in Chicago and Boston. It offers services in strategic communication, public affairs, issue advocacy, public opinion research, advertising, and media relations. Purple Strategies™ operates a subsidiary, Purple Advocacy, a government affairs and lobbying group. Lieutenant Governor Griffin's employment relationship is limited to the entity Purple Strategies™ and he will be based in Little Rock, Arkansas. Lieutenant Governor Griffin has no employment or agency relationship with Purple Advocacy and will not engage in lobbying at either the state or federal level.

### **III. Powers, Duties, and Compensation of the Arkansas Lieutenant Governor**

The Office of Lieutenant Governor is within the Executive Department of the State of Arkansas. *See* Ark. Const. art. VI, § 1. The Lieutenant Governor shall possess the same qualifications of eligibility for the Office as the Governor. Ark. Const. amend. VI, § 5. To be eligible for the Office of Governor in the State of Arkansas, one must be (1) a citizen of the United States; (2) thirty years of age; and (3) a resident of Arkansas for at least seven years. Ark. Const. art. VI, § 5. In Arkansas, the Lieutenant Governor derives his power from the Arkansas Constitution. Specifically, Amendment 6, which provides that executive power shall be vested in a Governor, goes on to state that in case of the "... impeachment of the Governor, or his removal from office, death, inability to discharge the powers and duties of the office, resignation or absence from the State, the powers and duties of the office [of the Governor], shall devolve upon the Lieutenant Governor for the residue of the term or until the disability shall cease." *See Bryant v. English*, 311 Ark. 187, 847 S.W.2d 308 (1992) (citing Ark. Const. Amend. VI, § 4). An additional duty conferred by Arkansas Constitution is the responsibility to preside over the Senate with the ability to cast a vote in the event of a tie. The General Appropriation Act for the Ordinary Expenses of the Executive, Judicial and Legislative Branches for the 2014-2015 Fiscal Year (House Bill 1002) set the salary of the Arkansas Lieutenant Governor at \$42,315.

It has been stated that the Arkansas Constitution “. . . is not a grant of power, but constitutes a limitation.” *Berry v. Gordon*, 237 Ark. 547, 556, 376 S.W.2d 279, 286 (1964). See Ark. Const. art. IV, § 2 (stating that no person in one branch of government shall exercise any power belonging to either of the other branches) (also cited in Op. Att’y Gen 99-063 to opine that the service of a constitutional officer as a special circuit or chancery judge is prohibited by the Arkansas Constitution). Nevertheless, with these specific limitations, it may reasonably be inferred that the framers did not intend to further limit a Lieutenant Governor’s employment. The Arkansas Constitution and the Arkansas Code fail to limit, or even address, additional private employment of a Lieutenant Governor. Without any constitutional or statutory prohibition, an Arkansas Lieutenant Governor may maintain additional private employment separate from his constitutional office.

Since its creation, individuals who have held the Office of Lieutenant Governor hail from various employment backgrounds, including attorneys, business owners, ministers, teachers, and farmers. Anecdotal references demonstrate that previous Lieutenant Governors maintained private employment and/or other sources of income while simultaneously serving as Lieutenant Governor. For example, Former Lieutenant Governor Winston Bryant apparently maintained a law practice while serving in office. In fact, the Former Lieutenant Governor’s website for The Law Offices of Winston Bryant (<http://www.winstonbryant.com>) specifically mentions this fact, stating, “I practiced law in Malvern, Arkansas, from 1971 until 1983 when I relocated to North Little Rock, Arkansas. (I did not practice during 1977 and 1978 because I served as Secretary of State which was full time. *I practiced law while serving as state representative and Lt. Governor since both offices were part-time*).” (Emphasis supplied). Likewise, it appears that Former Lieutenant Governor Win Rockefeller maintained his business ownership interests and management roles in numerous entities, including Winrock Farms, Inc. and multiple automobile dealerships, while serving in Office from 1996 to 2006. Finally, media accounts refer to the fact that Lieutenant Governor Nathan Gordon, who served from 1947 to 1967, maintained an active law practice in Morrilton, Arkansas while simultaneously serving as Lieutenant Governor.<sup>1</sup>

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<sup>1</sup> The part-time nature of the Office of Lieutenant Governor is common in states all across the country. For example, in the State of Vermont, Howard Dean maintained an active medical practice while serving as Lieutenant Governor. Notably, South Dakota has only had two full-time Lieutenant Governors in the entire history of the Office and one of those, current Lieutenant Governor Matt Michels, moved to part-time status in April of 2012.

#### IV. Constitutional and Statutory Constraints on Simultaneous Employment Being Held by Lieutenant Governor

A review of Arkansas law demonstrates the absence of any constraint on the ability of the Lieutenant Governor to concurrently hold private and public employment. Arkansas Code Annotated Section 21-1-402 is the lone statute that speaks to prohibitions of constitutional officers in other employment. Notably, however, this statute is limited by its express terms to situations of dual *government* employment; the statute does not in any way address the situation of a constitutional office holder who is simultaneously *privately* employed. Specifically, the statute states, “. . . no person elected to a constitutional office may, after being elected to the constitutional office and during the term of which elected, enter into employment with: (A) Any state agency; (B) Any public school district of this state in a noncertified position; (C) Any vocational education school funded by the state; (D) Any education service cooperative; or (E) The Cooperative Education Services Coordinating Counsel [abolished].” It goes on to provide that any constitutional officer who was employed by a state agency prior to being elected a constitutional officer may continue the employment, but the employment shall not thereafter be reclassified or receive a pay raise except under limited situations.

Likewise, the prohibitions on a constitutional officer’s ability to enter into lease agreements, contracts, and grants are also expressly limited to any such agreements between the constitutional officer and state agencies. Arkansas Code Annotated Section 21-1-403 states, “No constitutional officer may enter into any lease agreement, contract, or grant *with any state agency*, unless...”. Ark. Code Ann. § 21-1-403 (emphasis added).

While it is permissible for an Arkansas Lieutenant Governor to maintain separate private employment during his term in office, there are some restrictions to said employment. Specifically, Arkansas law prohibits a Lieutenant Governor from being employed as a lobbyist. See Ark. Code Ann. § 21-1-402(g). A “lobbyist” is defined in the Arkansas Code as a person who: (A) Receives income or reimbursement in a combined amount of four hundred dollars (\$400) or more in a calendar quarter for lobbying one (1) or more governmental bodies; (B) Expends four hundred dollars (\$400) or more in a calendar quarter for lobbying one (1) or more governmental bodies, excluding the cost of personal travel, lodging, meals, or dues; or (C) Expends four hundred dollars (\$400) or more in a calendar quarter, including postage, for the express purpose of soliciting others to communicate with any public servant to influence any legislative action or administrative action of one (1) or more governmental bodies unless the communication has been filed with the Secretary of State or the communication has been published in the news media. Ark. Code Ann. § 21-8-402. “Lobbying” is also defined as “communicating directly or soliciting others to communicate with any public servant with the purpose of influencing legislative action or administrative action.” *Id.* It is our understanding,

however, that Lieutenant Governor Griffin will not be employed as either a state or federal lobbyist.<sup>2</sup>

It is important to note that on his own accord and prior to accepting employment with Purple Strategies™, Lieutenant Governor Griffin contacted the Arkansas Ethics Commission and made inquiry about potential concurrent employment with a non-governmental entity. Lieutenant Governor Griffin requested that the Ethics Commission provide him with any and all potentially relevant provisions of Arkansas law. In response, a representative of the Ethics Commission provided Lieutenant Governor Griffin with the following, all of which are reproduced in the Appendix to this Memorandum: (A) Rules on Gifts; (B) Rules on Conflicts; (C) Arkansas Code Annotated Section 21-1-402; (D) Arkansas Code Annotated Section 21-1-403; and (E) Arkansas Code Annotated Section 21-1-403. Each of these authorities has been thoroughly analyzed in the course of our research. The *most* relevant of the authorities provided by the Ethics Commission (but still *not* applicable to Lieutenant Governor Griffin's employment arrangement because the statute speaks to dual government employment) was Arkansas Code Annotated Section 21-1-402.

## V. Other Noteworthy Provisions of Arkansas Law

Not only is an Arkansas Lieutenant Governor prohibited from being employed as a lobbyist, he also may not “knowingly or willfully solicit or accept a gift from a lobbyist, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist.” Ark. Const. Art. XIX, § 30, added by Ark. Const. Amend. XCIV, § 2. Furthermore, “gift” means any payment, entertainment, advance, services, or anything of value, unless consideration of equal or greater value has been given therefor. *Id.* Under Arkansas law, consideration is “any benefit conferred or agreed to be conferred upon the promisor to which he is not lawfully entitled, or any prejudice suffered or agreed to be suffered by the promisor, other than such as he is lawfully bound to suffer.” *Youree v. Eshaghoff*, 99 Ark. App. 4, 9, 256 S.W.3d 551, 555 (2007). Given the specifics of the employment relationship between Lieutenant Governor Griffin and Purple Strategies™, it does not appear that the gift provisions are implicated for two separate reasons. First, there will be no conferral of anything of value from the lobbying group Purple Advocacy to Lieutenant Governor Griffin. Second, by virtue of his work, duty, and efforts, Lieutenant Governor Griffin will have given “consideration of equal or greater value” in exchange for his compensation. Thus, compensation would not fall within the definition of “gift” under this provision.

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<sup>2</sup> It is noted as a point of interest that Lieutenant Governor Griffin would appear to be legally permitted to engage in federal lobbying after the expiration of his one-year “cooling off” period from his service in Congress. 18 United States Code, Section 207.

Even before the passage of Amendment 3, the Lieutenant Governor was bound by the Rules on Ethics and the Rules on Gifts promulgated by the Arkansas Ethics Commission. These Rules continue to apply to the Office of Lieutenant Government. Accordingly, as has long been the case, all “public servants” in Arkansas (a class expressly defined as including anyone holding an elected office) must maintain strict secrecy for any confidential government information acquired by him or her in the course of, and by reason of, the public servant’s official duties. Arkansas Ethics Commission, Rules on Conflicts, § 401. Specifically, no public servant shall “disclose any such information gained by reason of his or her position, nor shall he or she otherwise use such information for his or her personal gain or benefit.” Similarly, no public servant shall purposely use or disclose to any other person or entity confidential government information acquired by him or her in the course of and by reason of the public servant’s official duties, to secure anything of material value or benefit for himself or herself or his or her family. § 401(a)(2) and (b).

Perhaps the most amorphous and arguably broadest provision of § 401 is found in (a)(1). This provision states, “No public servant shall accept employment or engage in any public or professional activity while serving as a public official which he or she might reasonably expect would require or induce him or her to disclose any information acquired by him or her by reason of his or her official position which is declared by law or regulation to be confidential.” Under this provision, there is an affirmative obligation on the part of the public servant to determine whether the public servant “reasonably expects” to be “required to disclose” or “induced to disclose” confidential government information by virtue of the proposed employment. This appears to be an entirely subjective determination on the part of the public servant.

The “Fair Treatment” rule promulgated by the Arkansas Ethics Commission states that “[n]o public servant shall use or attempt to use his or her official position to secure special privileges or exemption for himself or herself or his or her spouse, child, parents, or other persons standing in the first degree of relationship, *or for those with whom he or she has a substantial financial relationship* that is not available to others except as may be otherwise provided by law.” Arkansas Ethics Commission, Rules of Conflicts, § 402(a). “Substantial financial interest” is left undefined, but one can fairly safely assume that it includes an employment relationship. Thus, Lieutenant Governor Griffin would be prohibited from using his official position to secure special privileges for Purple Strategies™ and its clients.

Under the Rules on Gifts promulgated by the Arkansas Ethics Commission, Lieutenant Governor Griffin’s future receipt of salary and expense reimbursement from Purple Strategies™ would not qualify as a “gift”. A gift is expressly defined as “any payment . . . *unless consideration of equal or greater value has been given therefor.*” Arkansas Ethics Commission, Rules on Gifts, § 300(b). Under the employment relationship stated above, Lieutenant

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Governor Griffin will be devoting time, effort, and personal expense to his work for Purple Strategies™. This time, effort, and personal expense will constitute “consideration of equal or greater value” for any monetary payments made to him by Purple Strategies™ (*i.e.*, salary and/or expense reimbursement), thereby taking such payments outside the definition of a “gift” under Section 300(b). Likewise, since the payments would not be made “for the performance of the duties and responsibilities of” Lieutenant Governor Griffin’s office or position (but rather in exchange for his employment duties and expenditures in pursuit of his work for Purple Strategies™), the payments would not be prohibited under Section 303 (Receipt of Gifts by Public Servants) or Section 304 (Providing Gifts to Public Servants). Section 303(d) would also permit the payment of gratuities or bonuses to Lieutenant Governor Griffin by Purple Strategies™. Section 303(d) provides as follows:

- (d) A public servant is not prohibited from receiving all gifts. For example, a public servant may accept a gift conferred on account of a *bona fide* personal, professional, or business relationship independent of his or her official status.

Obviously, as a state constitutional officer, Lieutenant Governor Griffin will have considerable state resources at his use and discretion. These include, but are certainly not limited to, office space; support staff; technology equipment; and office supplies. Arkansas Code Annotated Section 19-4-2103 would prohibit the use of any state resources for non-government use. To quote the statute in full, it states:

- (a) No constitutional officer or employee of a constitutional officer shall expend for personal use any moneys appropriated by the General Assembly for the maintenance and operation of the office, and the moneys appropriated for the maintenance and operation of the offices of the constitutional officers shall be expended only for official state business.

Thus, Lieutenant Governor Griffin would be prohibited from conducting business for Purple Strategies™ through the use of any state resources.

Section 305 of the Arkansas Ethics Commission Rules on Gifts would arguably require disclosure of any payment of a gratuity or bonus to Lieutenant Governor Griffin by Purple Strategies™. Section 305(a) states that a public servant is required to report on his or her Statement of Financial Interest the “source, date, description, and a reasonable estimate of the fair market value of each gift of more than \$100 received by the public servant . . . .” Under the definition of “gift” referred to above, one could argue that there has not been consideration given in exchange for the payment of a bonus---it

is simply a gift over and above any salary that is made to the Lieutenant Governor by his employer, Purple Strategies™, for meeting or exceeding performance expectations.<sup>3</sup>

Independent reporting obligations also arise by virtue of Arkansas Code Annotated Section 21-8-701 with respect to private employment and the receipt of income by a Lieutenant Governor. Under this provision, a public official is required to file a written statement of financial interest by January 31 of each year. The statement of financial interest shall include the identification of each employer and of each other source of gross income<sup>4</sup> amounting to more than \$1,000 annually received by the public official or his/her spouse, and a brief description of the nature of the services for which the compensation was received. In addition, identification of each source of gross income of more than \$12,500 is required. As previously noted, a public official is also required to report “gifts” in excess of \$100.

## VI. Conclusion

Given the factual understanding set forth above and the discussion of authorities included herein, subject to the reporting requirements identified, there is no legal prohibition to Lieutenant Governor Griffin’s employment with Purple Strategies™. Accordingly, it is legally and ethically permissible under Arkansas law.

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<sup>3</sup> Expense reimbursements for food, travel, or lodging would not be reportable by virtue of Section 302. Such reimbursements are only reportable if the food, lodging, or travel expense is incurred because of an appearance in the public servant’s “official capacity at an event which bears a relationship to his or her office or position.” Arkansas Ethics Commission, Rules on Gifts, § 302(b).

<sup>4</sup> Arkansas Code Annotated Section 21-8-402 provides that “income” or “compensation” means any money or anything of value received or to be received as a claim for future services, whether in the form of a retainer, fee, salary, expense, allowance, forbearance, forgiveness, interest, dividend, royalty, rent, or any other form of recompense or any combination thereof. It includes a payment made under obligation for services or other value received.