



OHIO ETHICS COMMISSION

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September 29, 1995 Informal Opinion 1995-INF-0929

Virgil E. Brown, Jr.

Dear Mr. Brown:

I am writing in response to your letter dated March 1, 1995, in which you requested an advisory opinion based upon the Ohio Ethics Law and related statutes and their effect upon a member of the Ohio State Board of Education who is also an attorney in private practice.

First, you ask whether the member of the State Board of Education, who is also an attorney, may represent clients, his private employer, or clients of a private law firm in matters before the General Assembly, the Ohio Supreme Court, the Governor's office, and state agencies other than the State Board of Education (Board). You then ask whether this attorney may have a direct ownership interest in a client's business when representing that client before any of the aforementioned public entities. You also ask whether this attorney may represent clients, his private employer, or clients of a private law firm, before local school boards inside and outside of his district. Finally, you ask whether the answers to the above questions would differ if the attorney charged fees based on either an hourly fee arrangement or on a contingency fee basis.

In response to your question, the Ohio Ethics Law and related statutes generally prohibit an attorney, who is also a member of the Board, from representing clients, his private employer, or clients of a private law firm in matters before the General Assembly, the Ohio Supreme Court, the Governor's office, state agencies, and local school boards inside and outside of his district. The specifics of these prohibitions are explained in detail below.

The Revolving Door Statute:

Members of the Ohio State Board of Education are public officials as that term is defined in R.C. 102.01(B). Advisory Op. No. 75-029. As such, these individuals are subject to the provisions and prohibitions of the R.C. Chapter 102.

R.C. 102.03(A)(1), known as the "Revolving Door" statute, states:

No present or former public official or employee shall, during his public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which he personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

Some of the terms used in the above section are defined by law. "Represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person. R.C. 102.03(A)(5). "Person" includes an individual, corporation, business trust, estate, trust, partnership, and association. R.C. 1.59(C). "Matter" includes any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments. R.C. 102.03(A)(5).

The Revolving Door statute prohibits representation on any matter in which the public official or employee personally participated, regardless of who is being represented. The statute prohibits representation before any public agency, not merely before the agency with which the public official or employee serves. Additionally, the prohibition is not limited to representation in a formal procedure, such as a hearing. The definition of "matter" also encompasses "issues" and "questions" in which the public official or employee participated. Finally, the R.C. 102.03(A)(1) prohibition is effective during, and for one year after leaving, public service. R.C. 102.03(A)(7) exempts from the prohibition the performance of ministerial functions, including but not limited to, the filing or amendment of tax returns, applications for permits and licenses, incorporation papers, and other similar documents.

Representation Before State Agencies:

R.C. 102.04(A) imposes additional representation restrictions upon public officials and employees. It states:

Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts. (Emphasis added.)

"Compensation" is defined for purposes of R.C. 102.04 as money, a thing of value, or a financial benefit. R.C. 102.01(A). The money that an attorney would receive as an employee of a private law firm, whether from hourly fees or from a contingency fee agreement, is "compensation" for purposes of R.C. 102.04(A). Advisory Op. No. 92-006.

Therefore, a member of the Board who is also an attorney is prohibited from accepting "compensation" for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the General Assembly, or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts. However, this prohibition is not applicable to the representation of clients before local school boards.

The Ethics Commission has defined the rendering services, in the context of R.C. 102.04(A), as "the performing of services such as advising, consulting, representing or the like which involves matters 'before' the General Assembly. . . ." Advisory Op. No. 75-006. The Commission has also explained that a matter is "before" a governmental agency "when it is being considered by, decided by, or in the presence of or under the official purview of an agency of a governmental entity, such as the General Assembly." Advisory Op. No. 76-009.

Again, this section of the Ethics Law focuses on the public official or employee "personally" rendering services. The Ethics Commission has repeatedly reinforced the premise that R.C. 102.04(A) prohibits a state officer or employee from receiving compensation from a client for personally rendering services before the General Assembly or other state entities. Advisory Op. No. 92-006. R.C. 102.04 does not prohibit a state officer from receiving compensation in the form of a distributive share of profits from a law firm, provided that some other person personally renders the services. However, other statutes under the Ethics Commission's jurisdiction may prohibit the receipt of a distributive share of law firm profits. *Id.* However, since you did not mention the receipt of a distributive share of profits from any partnership interest in either the law firm for whom the attorney works, or the client's business in which the attorney may have an interest, these sections are not addressed. Finally, R.C. 102.04(F) excludes from the prohibition the performance of ministerial functions including, but not limited to, the filing or amendment of tax returns, applications for permits and licenses, incorporation papers, and other documents.

Therefore, an elected member of the Board, who is also an attorney, is prohibited from accepting compensation for any non-ministerial service that he personally renders in any case, proceeding, application, or other matter before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state. It is important to note that R.C. 102.04(D) sets out an exception to the above prohibition. However, the exception is only applicable to public officials appointed to nonelective office and public employees. This exemption would not be applicable to an elected member of the Board. If, under the Board's new statutory framework, the attorney will be serving in an appointed rather than an elected capacity, you should contact this office for information concerning the application of the exception contained in R.C. 102.04(D).

Representation Before Local School Boards:

Whether a member of the Board, who is also an attorney, may represent clients, his employer, or clients of his law firm before local school boards, both inside and outside of his district, is determined by R.C. 102.03(D) and (E), which state:

(D) No public official or employee shall use or authorize the use of the authority or influence of his office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

(E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

The term "anything of value" is defined, for purposes of R.C. 102.03, in R.C. 1.03 to include money and every other thing of value. R.C. 1.03 and 102.01(G). For purposes of R.C. 102.03(D) and (E), the Ethics Commission has previously held that payment received for the sale of goods or services is within the definition of "anything of value." Advisory Ops. No. 89-016, 90-003, and 92-006. Additionally, a license issued by a regulatory board and a regulatory decision are things of value. Advisory Ops. No. 86-007, 90-002, and 90-009.

The Ethics Commission has consistently held that R.C. 102.03(D) and (E) do not prohibit public officials and employees from engaging in private business activities or holding private employment, so long as no conflict of interest exists between the public official's or employee's public and private interests. Advisory Op. No. 92-009. However, the Ethics Commission has held that R.C. 102.03(D) and (E) do prohibit a public official or employee from doing business with a public agency where the activity could impair his independence of judgment and objectivity as a public official or employee, with respect to his official actions and decisions for the public agency with which he serves or is employed. Advisory Ops. No. 88-002, 89-010, and 92-006. Generally, a public official's or employee's objectivity and independence of judgment could be impaired if he were to accept, solicit, or use the authority or influence of his office or employment to secure anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with the public agency with which he serves. Specifically, in Advisory Op. No. 77-006, the Commission held that a person appointed to, or employed by, a state agency with review authority over another agency may be subject to a conflict of interest if he were then employed by the agency subject to review.

Pursuant to R.C. Chapter 3317., the superintendents of schools in each county, city, and exempted village school district must certify their district's average daily membership to the Board, on or before the fifteenth day of October of each year. These figures are then used in the statutory scheme that determines the distribution of state funding to local school districts. The Department of Education (Department) administers the powers of the Board and the

Superintendent of Public Instruction in supervising the system of public education in Ohio. R.C. 3301.13. While a local board of education is responsible for the management and control of schools within its district, the Department exercises a myriad of regulatory and supervisory functions that govern the operation of local school districts. In light of the regulatory and fiscal ties between the Department and local school districts, it is apparent that local boards of education are regulated by and interested in matters before the Department, and thereby the Board, for purposes of R.C. 102.03(D) and (E).

In the situation presented, a Board member who is also an attorney wishes to represent clients before local school boards both inside and outside of his district. His realization of a thing of value, in the form of compensation for services rendered, will depend upon appearing before the local school boards, which are parties regulated by and interested in matters before the Board. Additionally, the Board member, acting as an attorney for a client before a local school board, would, by the very nature of his representation, be attempting to secure a thing of value for his client, in the form of a favorable decision, from a party regulated by and interested in matters before his public agency. The potential for abuse of authority exists whenever an attorney in private practice who serves on a state board, which exercises authority over public officials and employees, represents clients before a public agency whose officials and employees are subject to his board's jurisdiction. See Advisory Op. No. 93-004. Therefore, R.C. 102.03(D) and (E) prohibit an elected Board member, who is also an attorney, from representing clients before local school boards, regardless of whether the school board is located inside or outside of the Board member's district.

Miscellaneous Issues:

With regard to your question concerning the representation of clients when the Board member has an ownership interest in the client's business, the Ethics law and related statutes prohibit a public official or employee from participating within the scope of their duties as a public official, except through ministerial functions, in any license or rate-making proceeding that directly affects the license or rates of any person, partnership, trust, business trust, corporation, or association in which they or their immediate family owns or controls more than five percent. R.C. 102.03(C). This prohibition is in addition to those previously mentioned.

With regard to the issue of representing clients in which the Board member has an ownership interest in their business, it must be noted that attorneys are also subject to the requirements of the Code of Professional Responsibility. Those provisions are outside of the jurisdiction of the Ethics Commission, and should be referred to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

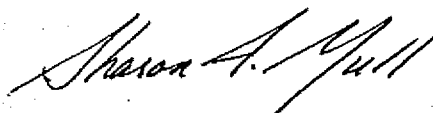
Finally, R.C. 102.03(B) prohibits present and former public officials and employees from disclosing or using confidential information acquired in the course of their official duties. This prohibition has no time limit.

Virgil E. Brown Jr.
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This advisory opinion was approved by the Ethics Commission at its meeting on September 27, 1995. It represents the views of the undersigned, and is based on the facts presented. It is limited to questions arising under Chapter 102, and sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules.

If you have any questions, please do not hesitate to contact this office again.

Sincerely,

A handwritten signature in cursive script that reads "Sharon A. Mull".

Sharon A. Mull, Staff Attorney
Ohio Ethics Commission

Encl: Advisory Op. No. 92-006