

OHIO ETHICS COMMISSION

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October 29, 1998

Informal Opinion 1998-INF-1029

David M. Lynch, Esquire
Director of Law
City of Westlake



Dear Mr. Lynch:

In a letter to the Ethics Commission that was received on July 10, 1998, you ask whether the prohibitions imposed by the Ohio Ethics Law and related statutes upon a city council member preclude the city that he serves from contracting with the council member's law partner to perform legal services.

Facts

You state that Regal Cinemas is suing the City of Westlake and other municipalities on the claim that each municipality's Admission Tax Ordinance is unconstitutional. Because the ordinances are almost identical, four cities have contemplated hiring one lawyer, Phillip Campanella, of Calfee, Halter, and Griswold, for \$190.00 an hour, to defend them collectively. You have included a representation that Mr. Campanella is an highly skilled litigation and trial attorney with an excellent reputation. You state that this is the municipal rate that other cities pay the law firm with which the attorney is a partner for this type of legal service. Each city will share in this cost by paying \$47.50 an hour. You state that it is impossible for the city you represent to secure the services of a qualified lawyer for \$47.50 an hour.

You also state that a city council member, Dale LaPorte, is a law partner in the same law firm as the attorney the four cities wish to engage. Because of this fact, you state that the city has retained an attorney other than Mr. Campanella, at a higher cost, but desires to be represented by Mr. Campanella, along with the other municipalities, if it is not precluded by the Ethics Law and related statutes.

As explained below, the city is not precluded from retaining the attorney to represent it in combination with the other cities provided that the council member: (1) does not participate in the decision to retain his law partner; (2) can demonstrate that he meets the exception to having an interest in a public contract provided by R.C. 2921.42(C); and (3) does not receive a distributive share of partnership funds received by his law partner.

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Securing a Public Contract for a Business Associate—R.C. 2921.42(A)(1)

Your attention is first directed to R.C. 2921.42(A)(1), which provides that no public official shall knowingly:

Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

The term "public official" is defined, in R.C. 2921.01(A), for purposes of R.C. 2921.42, to include an elected official of a political subdivision of the state. Therefore, a member of a city council is a "public official" for purposes of R.C. 2921.42. Ohio Ethics Commission Advisory Opinion No. 89-008.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (G)(1)(a) of that section to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of "the state, any of its political subdivisions, or any agency or instrumentality of either." R.C. 2921.42(G)(1)(a). The purchase, or a contract for the purchase, of legal services from an attorney or law firm falls within this definition. Adv. Ops. No. 74-001, 84-002, and 86-004. R.C. 2921.42(A)(1) prohibits a public official from authorizing, or using his authority or influence to secure authorization of, a public contract in which a business associate has an interest.

The Ethics Commission has held that a business association is created whenever persons join together to pursue a common business purpose. Adv. Op. No. 86-002. Accordingly, the Commission has held that a partner or associate in a law firm is the "business associate" of the firm and its members for purposes of R.C. 2921.42(A)(1). Adv. Ops. No. 79-001, 89-015, and 90-007.

In the instant situation, the law firm, and its individual partners and associates, are "business associates" of the council member for purposes of R.C. 2921.42(A)(1). Thus, R.C. 2921.42(A)(1) prohibits the council member from voting upon, discussing, or otherwise using the authority or influence of his public position, either formally or informally, to secure authorization of a contract between the city and Mr. Campanella, or the law firm itself. This includes a bar on the council member's participation in any issue relating to the contract after it is entered into, such as a renewal, modification, or dispute between Mr. Campanella and the city regarding the terms of the contract. Adv. Op. No. 89-015. See also R.C. 102.03(D) (set forth below).

Having an Interest in a Public Contract--R.C. 2921.42(A)(4)

Your attention is next directed to R.C. 2921.42(A)(4), which provides that no public official shall knowingly:

Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

The Ethics Commission has held that a public official has a prohibited "interest" in a public contract if the official has a definite and direct interest, of either a pecuniary or fiduciary nature, in the contract. Adv. Ops. No. 89-004 and 90-007.

The Ethics Commission has held that a partner in a law firm who receives a distributive share of partnership profits has a pecuniary interest in the contracts of his firm, even when he does not personally render the legal services. Adv. Ops. No. 78-001, 86-004, and 90-007. Furthermore, a partner in a law firm will have a fiduciary interest in the contracts of the firm and its partners or associates. See Arpadi v. First MSP Corp., 68 Ohio St. 3d 453 (1994) (The partners in a partnership owe a fiduciary duty to one another).

Therefore, for purposes of R.C. 2921.42(A)(4), the council member would have an interest in a contract for the purchase of legal services by the city from his law partner, or the law firm, even if, as described below, he does not receive a distributive share of partnership profits attributable to the contract. See R.C. 2921.42(A)(3) and 102.03(E) (set forth below). The potential receipt of a distributive share of partnership profits is further addressed below.

Exception to R.C. 2921.42(A)(4)--R.C. 2921.42(C)

Division (C) of Section 2921.42 does, however, provide an exception to the prohibition of Division (A)(4), which states:

- (C) This section does not apply to a public contract in which a public official, member of his family, or one of his business associates has an interest, when all of the following apply:
 - (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
 - (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision or governmental agency or instrumentality involved;
 - (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;

- (4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of his family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

Under R.C. 2921.42(C), all of the following must be met: (1) the subject of the contract is necessary supplies or services; (2) the supplies or services are unobtainable elsewhere for the same or lower cost, or are furnished as part of a continuing course of dealing established prior to the public official's association with the public agency; (3) the treatment accorded the public agency is either preferential to or the same as that accorded other customers or clients in similar transactions; and (4) the entire transaction is conducted at arm's length with full knowledge of the public official's interest, and the public official takes no part in any discussion or decision with respect to the contract.

The facts and circumstances of each particular situation will determine if the exception provided by R.C. 2921.42(C) applies. Adv. Op. No. 82-007. The criteria are strictly construed against the public official, and the official bears the burden of showing that the exception applies. Adv. Ops. No. 83-004 and 88-008.

Unobtainable Elsewhere for the Same or Lower Cost—Division (C)(2)

Division (C)(2) of Revised Code Section 2921.42 is of particular note in this situation. One means of meeting the requirement of R.C. 2921.42(C)(2) is by demonstrating that the services under the public contract are being furnished as part of continuing course of dealing established prior to an individual becoming associated with a political subdivision. Because of the facts and circumstances stated above, the continuing course of dealing exception of R.C. 2921.42(C)(2) is not applicable in the instant situation and need not be addressed further.

Division (C)(2) can be met if there is an objective showing that the supplies or services that are being furnished under the contract are unobtainable elsewhere for the same or lower cost. Adv. Ops. No. 84-006 and 90-003. Where the subject of the public contract has been legal services, the Ethics Commission has stated that "[i]t would be extremely difficult to demonstrate that legal services [provided by a firm in which a public official has an interest] would be 'unobtainable elsewhere for the same or lower cost.'" Adv. Op. No. 84-002. See also Adv. Ops. No. 78-001 and 90-007. However, in the instant situation, this difficult burden can be met because you state that the city's hourly cost will be \$47.50 instead of the customary hourly rate of \$190.00 due to the division of the cost between the four cities, and you have included evidence that the city could not get an attorney with reputation and skills comparable to Mr. Campanella's for this rate.

Other Requirements--Divisions (C)(1), (C)(3), and (C)(4)

The council member must also demonstrate objectively that he complies with the other three provisions of R.C. 2921.42(C) in order to meet the exception. Division (C)(1) requires that the subject of the contract be necessary supplies or services for the city. You have stated that the city is defending a challenge to the constitutionality of a municipal ordinance. You have stated that the city must engage an attorney to represent it, and, in fact, has engaged another attorney while waiting for the Commission's opinion. This fact may demonstrate objectively that the subject of the contract, legal services on constitutional and municipal law issues, is a necessary service for the city and the criteria of R.C. 2921.42(C)(1) has been met.

Division (C)(3) requires that the treatment accorded the public agency be either preferential to, or the same as, that accorded other customers or clients in similar transactions. You have stated that the attorney has agreed to represent this city, as one of four, for the same cost as it usually charges individual cities for representation. Provided that the attorney provides legal services to the four cities of the same quality that he provides to his individual municipal clients, the city council member may be able to demonstrate objectively that the treatment accorded the city is preferential to, or the same as, that accorded other customers or clients in similar transactions.

Finally, Division (C)(4) requires that the entire transaction is conducted at arm's length with full knowledge of the public official's interest, and the public official takes no part in any discussion or decision with respect to the contract. In the instant situation, you have stated that the entire transaction would be conducted with full knowledge by yourself and city council that the attorney and the council member are both partners in the same law firm. You also state that the council member would take no part in any discussion or decision with respect to the proposed contract. These factors would indicate that the proposed contract is an "arm's length transaction" and the criteria of Division (C)(4) has been met. See R.C. 2921.42(A)(3) and R.C. 102.03(D) (set forth below).

Assuming that the exception is met, the prohibition that R.C. 2921.42(A)(4) imposes upon the city council member would not preclude the city from retaining the attorney to represent it in combination with the other cities. However, in addition to R.C. 2921.42(A)(4), there are other restrictions that will apply.

Position of Profit in a Public Contract—R.C. 2921.42(A)(3)

You should also note R.C. 2921.42(A)(3), which provides that no public official shall:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

R.C. 2921.42(A)(3) prohibits a public official, during his term of office and for one year after he leaves his public position, from profiting from a public contract that was authorized by the legislative body upon which he serves, if the contract was not let by competitive bidding to the lowest and best bidder. Adv. Op. No. 93-008. A public official will be deemed to "occupy [a] position of profit" in a public contract whenever the official receives a fee or compensation that will be paid from, or is dependent upon, the contract, or some other profit or benefit from the contract. Adv. Ops. No. 88-008 and 92-008. A "position of profit" that is prohibited under R.C. 2921.42(A)(3) must be definite and direct in nature. *Id.* A public official who is a member of a legislative body is subject to the prohibition of R.C. 2921.42(A)(3) even if he does not deliberate, participate in the discussions, vote upon, or otherwise approve the public contract. Adv. Op. No. 90-005. See also R.C. 2921.42(A)(1) (described above) and R.C. 102.03(D) (described below).

In Advisory Opinion No. 92-013, the Ethics Commission held that the word "profit" in R.C. 2921.42(A)(3) connotes only a pecuniary gain or benefit, but that the "interest" prohibited by R.C. 2921.42(A)(4) may be either pecuniary or fiduciary. See also Adv. Op. No. 93-001 and 93-008. The Ethics Commission explained in Advisory Opinion No. 92-013, "a public official may be deemed to have an 'interest' in a public contract, but not 'profit' from the public contract, if his interest is only fiduciary."

In the instant situation, it is apparent that the proposed contract for legal services will not be entered into pursuant to competitive bidding. Therefore, R.C. 2921.42(A)(3) prohibits the council member from profiting from the proposed public contract while he serves on city council and for one year after he leaves office.

The issue becomes whether the council member's share in the partnership profits of the law firm, which would include revenue generated by his law partner's contract with the city, constitutes occupying a position of profit in the contract. In Advisory Opinion No. 92-013, the Commission held: "The word 'profit' is defined in The New Lexicon Webster's Dictionary of the English Language as 'to obtain financial gain or other benefit.'" The Ethics Commission has held that a public official occupies a position of profit in the prosecution of a public contract when he realize a pecuniary advantage, gain, or benefit that is a definite and direct result of the public contract. Adv. Ops. No. 92-013, 92-017, and 93-008. There is no exception to the application of R.C. 2921.42(A)(3) for profits under any certain amount. Adv. Op. No. 90-005. For example, the Ethics Commission has held that a school board member, who has an ownership interest as a minority stockholder in a corporation that is a vendor to the school district, profits from the vendor's sale of goods to the district. *Id.*

Thus, if the council member received a distributive share of partnership profits attributable to the proposed contract, he would receive a pecuniary gain or benefit from the contract, albeit probably a very small one, and be considered to "occupy [a] position of profit" in the contract. R.C. 2921.42(A)(3) prohibits the council member from occupying a position of profit in the proposed contract by receiving a distributive share of the earnings from the contract. However, in Advisory Opinion No. 93-008, the Ethics Commission held that in order to "occupy

a position of profit," a public official must actually obtain or realize a financial gain or benefit, and that a public official may forgo a financial gain or benefit to which he is entitled as a means of meeting the prohibition imposed by R.C. 2921.42(A)(3).

Therefore, the prohibition that R.C. 2921.42(A)(3) imposes upon the council member does not preclude his law partner from contracting, without competitive bidding, with the city to provide legal services. However, R.C. 2921.42(A)(3) prohibits the council member from receiving a distributive share of any partnership earnings attributable to the contract. See R.C. 102.03(E) (set forth below).

Conflict of Interest Prohibitions—R.C. 102.03(D) and (E)

Your attention is also directed to R.C. 102.03(D) and (E), which read:

- (D) No public official or employee shall use or authorize the use of the authority or influence of 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 the public official or employee with respect to that person's 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 the public official or employee with respect to that person's duties.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected to an office of a city. R.C. 102.01(B) and (C). Adv. Op. No. 88-004.

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, 102.01(G). Payment to the council member's law partner for legal services rendered falls within this definition of "anything of value." Adv. Ops. No. 86-004, 89-015, and 90-007. A distributive share of partnership profits also falls within the definition of "anything of value" for purposes of R.C. 102.03(D) and (E). Id.

R.C. 102.03(D) prohibits a public official from using his official position to secure anything of value for himself, his partner in a private law firm, or the law firm itself. Adv. Ops. No. 89-015, 89-016, and 90-007. Any payments made to the council member's law partner for representing the city would financially benefit the council member's law partner and the law firm, and would be of such a character as to manifest a substantial and improper influence upon the council member with respect to his duties as a member of city council, even if he does not accept his share of partnership profits attributable to the contract.

Therefore, in the instant situation, R.C. 102.03(D) prohibits the council member from using his official authority or influence to secure a contract for his law partner's legal services with the city. He is prohibited from making any formal or informal recommendations or suggestions

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concerning his law partner to city officials and employees, and from acting to secure a contract for his law partner with the city. See also R.C. 2921.42(A)(1) (set forth above).

Division (E) of Section 102.03 would prohibit the council member from soliciting the city to contract with his law partner. Adv. Op. No. 90-007. In addition, R.C. 102.03(E) would prohibit the council member from receiving a distributive share of client fees earned by his law partner for representing the city. Id. See also R.C. 2921.42(A)(4) (set forth above).

Conclusion

In conclusion, as explained above, the city is not precluded from retaining this attorney to represent it in combination with the other cities provided that the council member: (1) does not participate in the decision to retain his law partner; (2) can demonstrate that he meets the exception to having an interest in a public contract provided by R.C. 2921.42(C); and (3) does not receive a distributive share of partnership funds received by his law partner.

Your question may also raise issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. These issues are not within the jurisdiction of the Ohio Ethics Commission, but should be referred to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

This informal advisory opinion was approved by the Ethics Commission at its meeting on October 29, 1998. The opinion is based on the facts presented and 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 further questions, please feel free to contact this Office again.

Sincerely,



John Rawski
Staff Attorney