

OHIO ETHICS COMMISSION

Merom Brachman
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368

Web site: <http://www.ethics.state.oh.us>

September 7, 2001

Informal Opinion 2001-INF-0907-1

Thomas J. Smith, Esq.
McCray, Muzilla, Smith & Meyers Co., L.P.A.

Dear Mr. Smith:

In a letter received by the Ohio Ethics Commission on August 22, 2000, you ask several questions regarding the application of the Ohio Ethics Law and related statutes to situations involving the representation of parties by you, or by other attorneys in your law firm. In your letter to the Ethics Commission, you explain that you are a member of the Lorain County Board of Elections. You also explain that one of the partners in your office has represented the Lorain County Regional Airport Authority (LCRAA) for the past twenty years. The partner in charge of the account is entering partial retirement and you state that the firm needs to reassign matters involving the LCRAA.

You ask whether you may represent the LCRAA on matters that involve the county government, including the County Commissioners. Second, you ask whether you may represent the LCRAA on matters that do not involve the county government. Third, you ask whether other members of your law firm may represent the LCRAA on matters either dealing with county government or not dealing with county government, and whether you may share in a distribution of the income stream arising from such representation. Finally, you ask whether other members of your law firm may represent clients other than the LCRAA in matters dealing with or pending before county government, including the County Commissioners, and whether you may share in the distribution of the income stream arising from such representation.

Brief Answer

While the Ethics Law and related statutes do not prohibit members of your law firm who are not public officials or employees from representing any client, the Ethics Law and related statutes place restrictions on your ability, based on your position on the board of elections, to represent certain clients, and to participate in certain matters. Also, where other members of your law firm represent clients, the Ethics Law restricts your ability to receive a distributive share of client fees in certain situations.

R.C. 102.04(C) prohibits you from representing the LCRAA or any other client before any county entity unless you file the statement required by R.C. 102.04(D). R.C. 102.04(D) would concomitantly remove you as a Board of Elections member in the participation of matters affecting any personnel of those county entities. R.C. 102.03(D) and (E) prohibit you from representing the LCRAA, or any other client, in any matter before the board of elections and from representing employees of the board of elections in any matter. Further, R.C. 102.03(A) prohibits you from representing any person, including the LCRAA or any county entity, before any public agency, on any matter in which you personally participated as a member of the board of elections.

The Ethics Law prohibits you from receiving a distributive share of client fees in certain instances. In particular, R.C. 102.03(D) and (E) prohibit you from receiving a distributive share of client fees in any matter in which a member of your law firm represents any client before the board of elections. Further, R.C. 102.03(D) and (E) prohibit you from participating in any matter before the board of elections involving a person who is represented by your law firm at the time the matter is pending before the board of elections.

Having a Prohibited Interest in a Public Contract—R.C. 2921.42(A)(4)

Your questions implicate 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 term “public official” includes any person who is elected to, or employed by, any political subdivision. R.C. 2921.01(A). As a member of the Lorain County Board of Elections, you are a public official for purposes of R.C. 2921.42(A)(4), and are subject to the restrictions in the law. Ohio Ethics Commission Advisory Opinions No. 87-002 and 92-006. Therefore, R.C. 2921.42(A)(4) would prohibit you from having an interest in any public contract entered into by, or for the use of, the county, and any other political subdivision or governmental agency or instrumentality with which you are connected.

Before further addressing the prohibition of R.C. 2921.42(A)(4), it is first necessary to determine with which agencies you are connected as a member of the board of elections. Clearly, you are connected with the county, and with any agency of the county, for purposes of the prohibition of R.C. 2921.42(A)(4). See Adv. Op. No. 92-006. The question is whether a member of the county board of elections is also “connected with” the LCRAA.

In Advisory Opinion No. 87-002, the Ethics Commission stated that “common usage indicates that to be ‘connected with’ something is to be related to, or associated with, that entity.” The Commission has stated that a public official or employee may be connected with more than one political subdivision or governmental entity. For instance, in Advisory Opinion No. 89-012, the Commission stated that a city law director is connected with the city he serves

and with a port authority where: (1) the city created the port authority; (2) jurisdictional boundaries of the port authority are coextensive with the territorial boundaries of the city; (3) the member of the port authority board of directors are appointed by the mayor of the city; and (4) a myriad of other connections exist, such as the appropriation of city funds to the port authority. The Commission stated that the city law director was also connected with the port authority, even though: (1) a port authority is deemed to be a body corporate and politic and is governed by its own board of directors; (2) a port authority is an independent political subdivision of the state; and (3) a port authority is not a city body and its officers and employees are not city officers and employees.

A county and a regional airport authority that serves the county have connections similar to those of a city and a port authority that is created by a city. A regional airport authority is created by the adoption of a resolution by the board of county commissioners of each county to be included in the regional airport authority, which must state the following: (1) The necessity for the creation of the regional airport authority; (2) The counties to be included within the regional airport authority; (3) The official name by which the regional airport authority shall be known; (4) The place in which the principal office of the regional airport authority will be located or the manner in which it may be selected; (5) The number, term, compensation if any, and manner of selecting the members of the board of trustees of the regional airport authority; (6) The manner in which vacancies on the board of trustees of the regional airport authority shall be filled; and (7) The manner and to what extent the expenses of the regional airport authority shall be apportioned among the counties creating it. See R.C. 308.03(A) through (G). The territorial boundary of the regional airport authority is coextensive with the territorial boundaries of the counties included within the regional airport authority. Id. The board of county commissioners of any county included within a regional airport authority may appropriate the portion of the expense of the regional airport authority to be paid by such county as provided in the resolution creating the regional airport authority. R.C. 308.17. You have further indicated, in your letter to the Commission, that the board of trustees of the LCRAA is appointed by the county and that the county commissioners contribute annually to the LCRAA budget.

A regional airport authority, like a port authority, is a body politic and corporate and has several independent powers as enumerated in R.C. 308.06. See R.C. 308.06(A). Employees of a regional airport authority created under R.C. Chapter 308. are neither state employees nor county employees within the meaning of R.C. Chapter 143. See 1965 Op. Att'y Gen. No. 65-47.

The fact that the county and the LCRAA may have significant connections does not mean that all county officials and employees will be considered "connected" with the LCRAA. R.C. 2921.42(A)(4) states that a public official is subject to a restriction on contracting with those public agencies with which the official is connected, not any agency which his public agency is connected. The Commission stated, in Advisory Opinion No, 89-004:

The purpose of R.C. 2921.42 is to prevent public officials from personally benefiting from the contracts of a public agency where such personal benefit is to the detriment of the public interest, and that the potential for a public officials private interest to conflict with the public interest is greatest where the public

official is doing business with an agency with regard to which he is authorized to exercise authority, discretion, or other official responsibilities. It is apparent that the purpose of R.C. 2921.42 is best served if the statute is interpreted as prohibiting a public official from doing business with all political subdivisions, governmental agencies, and instrumentalities with which he [the public official] is connected. (Emphasis added.)

The question, then, is whether a member of the county board of elections is connected with the LCRAA.

Based on the several connections between the LCRAA and the county, some county officials are certainly connected with the LCRAA for purposes of the prohibition of R.C. 2921.42(A)(4). For example, members of the board of county commissioners would be connected with the LCRAA because of their extensive authority with respect to the creation, composition, and funding of the authority. See Adv. Op. No. 89-012. Other county officials, such as the county prosecutor, who may be required to provide legal services to the county with respect to the operation of the airport authority, are also connected with the LCRAA. See Adv. Op. No. 89-012. Because these elected officials are connected with the LCRAA, the officials and employees of their offices would also be connected with the LCRAA.

However, there is no suggestion that the county board of elections has any role in the counties activities with respect to the LCRAA. The LCRAA is not an agency with regard to which a member of the county board of elections is authorized to exercise authority, discretion, or other official responsibilities. Therefore, a member of the Lorain County Board of Elections is not “connected” with the LCRAA for purposes of R.C. 2921.42(A)(4). R.C. 2921.42(A)(4) does not prohibit a member of a county board of elections from entering into a contract with the LCRAA.¹

Prohibition Against Influence Peddling—R.C. 102.04(C)

Your questions also implicate R.C. 102.04(C), which provides the following:

Except as provided in division (D) of this section, no person who is elected or appointed to an office of or employed by a county, township, municipal corporation, or any other governmental entity, 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 which is before any agency, department,

¹ It should be noted that this advisory opinion does not address the question of whether the Ethics Law and related statutes prohibit you, or members of your firm, from entering into a contract for the representation of other boards, commissions, and other bodies that fall under the auspices of the county. Although you are generally prohibited from doing so, except under specific circumstances, if you, or members of your law firm, seek to represent other county entities, you should contact this Office for guidance on the application of R.C. 2921.42(A)(4) and (C) to the receipt of client fees for the particular representation.

board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which he is an officer or employee. (Emphasis added.)

A member of a county board of elections is “a person . . . appointed to an office of . . . a county” and is subject to the prohibitions imposed by R.C. 102.04(C). “Compensation” is defined for purposes of R.C. 102.04 as money, a thing of value, or a financial benefit, and would include the money that an attorney receives from clients for legal services, whether from hourly fees or a contingency agreement. R.C. 102.01(A); Adv. Op. No. 92-006.

Therefore, as a member of the Lorain County Board of Elections, unless you meet the exception described below, you are prohibited from accepting “compensation” for any service rendered or to be rendered by you personally in any case, proceeding, application, or other matter that is before any agency, department, board, bureau, commission, or other instrumentality, of Lorain County, excluding the courts.

R.C. 102.04(C) focuses on the public official or employee “personally” rendering services. The Ethics Commission has repeatedly reinforced the premise that R.C. 102.04(C) prohibits an individual who holds an elected office of a political subdivision from receiving compensation from a client for personally rendering services before an agency, department, board, bureau, commission, or other instrumentality, of the political subdivision. Adv. Op. No. 89-016.

The Ethics Commission has defined the rendering of services, for purposes of R.C. 102.04, as “the performing of services such as advising, consulting, representing or the like which involve matters ‘before’” an agency, department, board, bureau, commission, or other instrumentality, of the county. Adv. Op. No. 75-006. The Commission has also explained that, for purposes of R.C. 102.04, a matter is “before” a governmental agency “when it is being considered by, decided by, in the presence of or under the official purview of an agency of a governmental entity.” Adv. Op. No. 76-009. (However, R.C. 102.04(F) provides that the prohibition does not extend to 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.)

Division (D) of Section 102.04 provides an exception to the prohibition of R.C. 102.04(C) and is available to nonelected officials and public employees. Both of the following criteria must be met before the exception will apply:

- (1) The agency to which the official or employee wants to sell the goods or services, or before which the matter that involves the rendering of his services is pending, is an agency other than the one with which he serves;
- (2) Prior to rendering the personal services or selling or agreeing to sell the goods or services, he files a statement with the appropriate ethics commission, with the public agency with which he serves, and with the public agency before which the matter is pending or that is purchasing or has agreed to purchase goods or services.

Division (D) specifies the information that must be contained in the statement filed pursuant to that provision, including a declaration that the official or employee disqualifies himself for two years from participating in any matter involving any public official or employee of the agency before which the matter is pending or to which goods or services are to be sold. Division (E) emphasizes this disqualification, in providing the following:

No public official or employee who files a statement or is required to file a statement under division (D) of this section shall knowingly fail to disqualify himself from any participation as a public official or employee of the agency with which he serves in any matter involving any official or employee of an agency before which a matter for which he rendered personal services was pending or of a public agency that purchased or agreed to purchase goods or services.

R.C. 102.04(C) prohibits you from accepting compensation for any service rendered or to be rendered by you personally in any case, proceeding, application, or other matter that is before any agency, department, board, bureau, commission, or other instrumentality, of Lorain County, excluding the courts. The prohibition applies unless you file a statement in accordance with 102.04(D) and disqualify yourself, for two years, from any participation as member of the board of elections, in any matter involving any official or employee of the county agency before which you are providing the representation. The two-year period runs from the date of the most recently filed statement regarding the agency before which you are providing the representation.

Using a Public Position to Secure Something of Value for a Client—R.C. 102.03(D) and (E)

Even where you adhere to the restrictions imposed by R.C. 102.04(C), you must also adhere to the restrictions imposed by R.C. 102.03(D) and (E), which provide the following:

- (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 or appointed to an office or is an employee of any public agency. R.C. 102.01(B). A member of a county board of elections falls within the definition of "public official or employee" for purposes of R.C. 102.03 and is subject to the prohibitions imposed by Divisions (D) and (E). R.C. 102.01(B) and (C). See generally Adv. Ops. No. 92-006 and 93-004.

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. See R.C. 102.01(G). Fees received from clients are within the definition of “anything of value” for purposes of R.C. 102.03(D). See Adv. Ops. No. 89-016, 90-003, and 92-006.

R.C. 102.03(D) and (E) prohibit a public official or employee from accepting, soliciting, or using his position to secure, anything of value, where the thing of value could impair his objectivity and independence of judgment with regard to his official decisions and responsibilities. See Adv. Ops. No. 89-006, 92-006, and 95-001. The Commission has stated that R.C. 102.03(D) and (E) prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his office or employment to secure anything of value from a party that is interest in matters before, regulated by, or doing or seeking to do business with, the agency with which he serves. See Adv. Ops. No. 89-010, 89-016, 92-006, and 95-001.

R.C. 102.03(D) and (E) prohibit you from receiving compensation for personally representing clients, including the LCRAA, before the county board of elections. Adv. Op. No. 93-004. R.C. 102.03(D) and (E) also prohibit you from receiving a distributive share of fees earned by an attorney of your law firm for rendering services on a matter before the county board of elections. See Adv. Op. No. 89-016. In addition, R.C. 102.03(D) prohibits you from participating in matters before the board of elections on which an attorney in your law firm is representing a client. Id.

R.C. 102.03(D) and (E) prohibit you from representing county employees, or receiving a share of fees from attorneys in your law firm representing county employees, before or against county elected officers who have matters pending before the county board of elections since the receipt of client fees in that situation could impair your objectivity and independence of judgment in matters affecting the elected county officers who would make decisions regarding your law firm’s clients or who would be in an adversarial position to your or your firm’s clients. See Adv. Op. No. 93-004. See also R.C. 102.04(E). Furthermore, R.C. 102.03(D) prohibits you from representing employees of the board of elections as clients on any matter since the board of elections has the power to appoint, remove, and compensate board employees, and the receipt of client fees from board employees could impair your objectivity and independence of judgment in matters affecting the employees of the board of elections. Id. See also R.C. 3501.11, 3501.14, and 3501.141.

Finally, R.C. 102.03(D) and (E) prohibit you from performing your official duties, or using your official authority or influence, in any manner, to secure a financial advantage for yourself or your law firm and clients. See Adv. Ops. No. 85-014, 90-003, and 92-006. You are prohibited from using your authority or influence as a board member to secure clients, or to accept or solicit anything of an improper character. For additional information on the general application of R.C. 102.03(D) and (E) to a member of a county board of elections who is also an attorney in private practice, you may, if you have not already done so, wish to review Advisory Opinion No. 92-006.

Revolving Door Prohibition—R.C. 102.03(A)

Even where you adhere to the restrictions imposed by R.C. 102.03(D) and (E) and 102.04, you must, in addition, comply with the “Revolving Door” prohibition of R.C. 102.03(A)(1), which provides as follows:

No present or former public official or employee shall, during 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 the public official or employee 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.

The pertinent elements of this provision are: (1) a present or former public official or employee; (2) is prohibited from representing a client or acting in a representative capacity for any person; (3) before any public agency; (4) on any matter in which she personally participated as a public official or employee; (5) during government service and for one year thereafter. See Adv. Ops. No. 86-001, 89-009, 91-009, and 92-005. The Franklin County Court of Appeals upheld the “Revolving Door” prohibition as constitutional in State v. Nipps, 66 Ohio App. 2d 17, 22 (1979).

As stated above, you are a “public official or employee” for purposes of R.C. 102.03, and are subject to the statutory prohibition of R.C. 102.03(A)(1). Accordingly, R.C. 102.03(A)(1) prohibits you, while you are a member of the county board of elections and for a period of one year from the date you leave your position with the board, from representing the LCRAA or any other party, before any public agency, on any matter in which you personally participated as a member of the board of elections. Adv. Ops. No. 91-009 and 92-005.

The term “represent” is defined in R.C. 102.03(A)(5) to include “any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person.” Examples of the types of activities that would fall within the definition of the term “represent,” for purposes of this section, were described by the Ethics Commission in Advisory Opinion No. 86-001:

[T]his would include activities ranging from an appearance on behalf of a private client in a formal proceeding or meeting to informal “lobbying” of agency personnel by telephone or in person. It also includes written communications ranging from formal documents and filings to informal letters and notes. Even if the attorney or consultant does not sign the documents, letters, or notes, the prohibition would apply if she prepared the communication. If she merely consulted with the attorneys or other personnel who prepared the documents, letters, or notes, the prohibition would not apply.

R.C. 102.03(A) prohibits a former public official or employee from "representing" a client, new employer, or any other party, on a matter in which he personally participated, before any public agency, and not just before the agency with which he was previously employed. See Adv. Ops. No. 86-001, 87-001, and 92-005.

A "person," for purposes of R.C. 102.03(A)(1), has been interpreted by the Commission to include governmental agencies, individuals, corporations, business trusts, estates, trusts, partnerships, and associations. See R.C. 1.59(C) and Adv. Ops. No. 82-002 and 89-003.

The prohibition in R.C. 102.03(A) applies to any "matter" in which the official or employee personally participated. The term "matter" is defined, for purposes of R.C. 102.03(A)(1) and (3), to include "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 term "matter" is broadly defined under R.C. 102.03(A) and includes any issue or question, as well as particular cases, proceedings, applications, and determinations. See Adv. Ops. No. 91-009 and 92-005. In Advisory Opinion No. 99-001, the Ethics Commission further defined "matter" as follows:

"Matter" includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, or investigation, a lawsuit or legal proceedings, an oral or written application, and a settlement of a dispute or question. "Matter" also includes such abstract items as a dispute of special or public importance and a controversy submitted for consideration. It is also apparent, however, that the term "matter" cannot be interpreted so broadly as to include a general subject matter.

R.C. 102.03(A) defines "personal participation" to include "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion." In Advisory Opinion No. 91-009, the Ethics Commission held that "personal participation" in a matter also includes the exercise of "supervision or general oversight" over other personnel in their work on that matter, since supervision of a public official's or employee's activities involves decision-making, approval or disapproval, recommendation or advice, and other exercises of administrative discretion, by the supervisor, regarding that matter. See also Adv. Op. No. 92-005.

If you have any questions regarding the application of the Revolving Door prohibition to a specific situation, please contact this Office for further information. Also, as stated above, if you, or members of your law firm, represent county entities other than LCRAA, you should contact this Office for guidance on the application of R.C. 2921.42(A)(4) and (C) to the receipt of client fees for the particular representation.

Matters Outside of the Jurisdiction of the Ohio Ethics Commission

You should be aware that the situations that you have presented may raise issues under provisions of law outside of the jurisdiction of the Ohio Ethics Commission. For instance, local provisions of law that govern the operation of certain county entities may contain restrictions that are applicable to the situations you have described. You should direct any questions involving the application of local provisions to the situations you have described to the county prosecutor, or another designated legal advisor for the county. In addition, the situations you have described may implicate provisions outside the Ethics Law and related statutes that govern the conduct of attorneys. You should direct any questions involving the application of these provisions to the situations you have described to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

Conclusion

As explained above, while the Ethics Law and related statutes do not prohibit members of your law firm who are not public officials or employees from representing any client, the Ethics Law and related statutes place restrictions on your ability, based on your position on the board of elections, to represent certain clients, and to participate in certain matters. Also, where other members of your law firm represent clients, the Ethics Law restricts your ability to receive a distributive share of client fees in certain situations.

R.C. 102.04(C) prohibits you from representing the LCRAA or any other client before any county entity unless you file the statement required by R.C. 102.04(D). R.C. 102.04(D) would concomitantly remove you as a Board of Elections member in the participation of matters affecting any personnel of those county entities. R.C. 102.03(D) and (E) prohibit you from representing the LCRAA, or any other client, in any matter before the board of elections and from representing employees of the board of elections in any matter. Further, R.C. 102.03(A) prohibits you from representing any person, including the LCRAA or any county entity, before any public agency, on any matter in which you personally participated as a member of the board of elections.

The Ethics Law prohibits you from receiving a distributive share of client fees in certain instances. In particular, R.C. 102.03(D) and (E) prohibit you from receiving a distributive share of client fees in any matter in which a member of your law firm represents any client before the board of elections. Further, R.C. 102.03(D) and (E) prohibit you from participating in any matter before the board of elections involving a person who is represented by your law firm at the time the matter is pending before the board of elections.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 7, 2001. The Commission commends you for requesting guidance before taking any actions that could be prohibited by the Ethics Law.

Thomas J. Smith, Esq.
September 7, 2001
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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 questions or desire additional information, please contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy L. Gates". The signature is written in a cursive style with a large, stylized initial "T".

Timothy L. Gates
Staff Attorney