

# OHIO ETHICS COMMISSION

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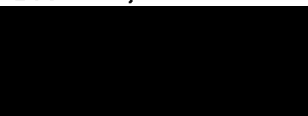
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November 16, 2001

Informal Opinion 2001-INF-1116

Thomas A. Teodosio  
Teodosio, Manos & Ward



Dear Mr. Teodosio:

You state that you were elected to the Summit County Council in 2000. You have asked whether the Ohio Ethics Law and related statutes prohibit you from accepting court-appointed criminal defense cases while you serve on the County Council.

### **Brief Answer**

As explained below, R.C. 2921.42(A)(4) prohibits you from accepting court-appointed criminal defense cases while you serve on the County Council.

Although R.C. 2921.42(C) provides an exception to this prohibition, as explained below, it may be extremely difficult for you to demonstrate that the legal services you would provide are "unobtainable elsewhere for the same or lower cost," which is one of the necessary requirements of the exception. If this difficult requirement, and all of the remaining criteria of the exception, can be met, and you may accept criminal defense cases while serving as a County Council member, the prohibitions imposed by R.C. 102.03(D) and (E) will require you to withdrawal from certain matters before the County Council as described below. Your withdrawal from these matters may create a detrimental effect upon the functioning of the County Council.

You should also be aware that any practice of law while serving as a member of County Council creates issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. These issues do not fall within the jurisdiction of the Ethics Commission. You should refer your questions to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court for more information about the Code of Professional Responsibility.

**Representation of Clients Before the Delaware County Courts—R.C. 102.04(C)**

Your attention is first directed to R.C. 102.04(C), which reads:

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

By serving as a member of County Council, you are “a person who is . . . appointed to an office of . . . a county” and 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. R.C. 102.01(A). The money that you would receive for representing indigent criminal defendants is “compensation” for purposes of R.C. 102.04(C).

Therefore, R.C. 102.04(A) 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 the county, excluding the courts.

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. Ohio Ethics Commission Advisory Opinion No. 75-006. 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. 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.

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. R.C. 102.04(D) sets out an exception to the prohibition in R.C. 102.04(C) that applies to public officials appointed to nonelective office and public employees. This exception would not be applicable to you because you serve in an elected position. Adv. Op. No. 89-016.

Therefore, you are prohibited from accepting compensation for any non-ministerial service that you personally render in any case, proceeding, application, or other matter before any agency, department, board, bureau, commission, or other instrumentality, of the county. However, because R.C. 102.04(C) specifically excludes the courts, you are not prohibited from accepting compensation for personally representing criminal defendants in any case, proceeding, application, or other matter before the courts of the county that you serve so long as you comply with other provisions of the Ethics Law and related statutes described below.

**Accepting an Appointment as a Public Defender—R.C. 2921.42(A)(4)**

Your attention is 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 term "public official" is defined, in R.C. 2921.01(A), for purposes of R.C. 2921.42, to include a person who serves a political subdivision in an elected position. A person who serves a county in an elected position is a "public official" for purposes of R.C. 2921.42. Adv. Op. No. 88-003.

An "interest" which is prohibited under R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. Adv. Op. No. 81-008. An individual who receives payment for services provided under a public contract has a definite and direct pecuniary interest in the public contract. Adv. Ops. No. 83-002 and 90-003.

The term "public contract" is defined in R.C. 2921.42(G)(1)(a) for purposes of R.C. 2921.42 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 or a political subdivision. The Ethics Commission has stated that the provision of legal services, or a contract to provide legal services, to the state or a political subdivision, is a public contract for purposes of R.C. 2921.42. Adv. Ops. No. 78-001, 90-007, and 92-003. Thus, a contract between the county and an attorney for the provision of court-appointed criminal defense representation for indigent persons is a "public contract" for purposes of R.C. 2921.42.

R.C. 120.33 establishes a statutory procedure for the appointment and payment of court-appointed attorneys to represent indigent persons in a county that does not use a county public defender or joint county public defender. See Att'y Gen. Ops. No. 92-038 and 94-079. In a county where counsel is provided to indigent persons in this manner, the board of county commissioners establishes, by resolution, a schedule of fees for legal services. R.C. 120.33(A)(3). Prior to establishing the schedule, the board of county commissioners must request a proposed schedule of fees from the county bar association. Id. This schedule is subject to review, amendment, and approval by the board of county commissioners. Id.

The appointment of court-appointed attorneys to represent indigent persons is made by the court. R.C. 120.33(A)(1)(b). The court approves the payment of compensation and expenses that do not exceed the amount fixed by the board of county commissioners. R.C. 120.33(A)(4). The county auditor draws a warrant on the county treasurer for the payment of counsel for compensation and expenses in the amount fixed by the court. *Id.* The county auditor must submit periodic reports, not less than annually, to the Ohio public defender commission, that document the amounts paid pursuant to the court's approval. *Id.* The board of county commissioners reviews and approves the auditor's report, and certifies it to the public defender's office for reimbursement. *Id.*

Therefore, if you were to receive compensation for providing legal services in court-appointed criminal defense cases, then you would have an interest in a public contract with the county that you serve as an elected official for purposes of R.C. 2921.42(A)(4). Thus, unless you can meet each of the requirements of the exception set forth below, R.C. 2921.42(A)(4) prohibits you from accepting court-appointed criminal defense cases while you serve on the County Council.

**Exception to the Prohibition—R.C. 2921.42(C)**

Division (C) of Section 2921.42 sets forth an exception to the prohibition of Division (A)(4). In order to meet the exception provided by R.C. 2921.42(C), four requirements must be met. R.C. 2921.42(C), 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.

Each of the criteria of Division (C) is a question of fact which, when applied to the circumstances of an individual situation, will determine whether a particular transaction fits within the exception. Adv. Ops. No. 80-003 and 82-007. The criteria of Division (C) are strictly construed against the public official, and the burden is on the official to demonstrate that he is in compliance with the exception. Adv. Op. No. 84-011.

Division (C)(2) is of particular importance in the instant situation and requires that the subject of the public contract be either: (a) furnished to the political subdivision as part of "a continuing course of dealing" established prior to the public official becoming associated with the political subdivision; or (b) "unobtainable elsewhere for the same or lower cost."

#### **Division (C)(2)—Continuing Course of Dealing**

A public contract that exists at the time an official takes office will fall within the continuing course of dealing exception, and the performance of the contract may be completed. Adv. Op. No. 84-006. Therefore, if you provide court-appointed criminal defense representation pursuant to a contract that was entered into prior to your service on the County Council, then the performance of that particular contract may be completed. For example, if two months before you became a member of County Council, you contracted to provide court-appointed criminal defense representation for a period of one year, then the continuing course of dealing exception found in Division (C)(2) would enable you to continue to perform legal services under the contract for ten more months.

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

If the appointments for criminal defense representation were made on a case-by-case basis or if you desire to enter into a new contract after the expiration of a contract that was entered into prior to your public service, then the "unobtainable elsewhere for the same or lower cost" exception of Division (C)(2) must be met. Adv. Op. No. 83-004. The Ethics Commission addressed this exception in Advisory Opinion No. 84-011, stating:

[T]he application of the exemption [provided in Division (C) of Section 2921.42] must be consistent with the principle underlying Section 2921.42 of the Revised Code that a public official should not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity.

Therefore, in order to meet the requirements of Division (C)(2), you must be able to justify objectively through appropriate documentation that your service as a court-appointed criminal defense counsel is either the least costly for the county that you serve or that you are uniquely suited to meet the needs of the particular criminal defendant because of your experience, knowledge, or legal specialization. Adv. Op. No. 88-001. In addition, the court must make every reasonable effort to open the process of selecting court-appointed counsel to all interested and qualified parties and award the appointment to the party that will provide the necessary

services at the lowest cost, and not have drawn specifications and requirements to favor any particular party. Adv. Ops. No. 83-004 and 89-004.

The Ethics Commission has previously addressed the requirements of Division (C)(2) in instances where the subject of the public contract was legal services. The Commission stated that "[i]t would be extremely difficult to demonstrate that [the] legal services 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. See also R.C. 102.03(D) and (E), set forth below.

### **Divisions (C)(4) and (C)(1)**

It should also be emphasized that Division (C)(4) requires that the transaction between the court and yourself be at "arm's length" with the court being fully aware of your public position and interest in the public contract with the court. In addition, Division (C)(1) requires that you demonstrate that the court's appointment of yourself as defense counsel is an objective and reasonable means of acquiring services that are necessary for it to meet its statutorily mandated duties. Finally, Division (C)(3) requires that the treatment that you accord to the court must be either the same as or preferential to the treatment you accord any other person or entity in similar transactions.

### **Use of Authority to Secure and Accepting Things of Value—R.C. 102.03(D) and (E)**

In addition, your question involves the application of the general conflicts of interest provisions of the Ethics Law, set forth in Sections 102.03(D) and (E) of R.C. Chapter 102., 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 or appointed to an office of a county. R.C. 102.01(B) and (C). Therefore, as an elected county official, you are subject to R.C. 102.03(D) and (E). Adv. Op. No. 88-003.

The term "anything of value" is defined in R.C. 1.03 to include money, any promise of future employment, and every other thing of value. R.C. 102.01(G). Payments received by you from a court for the provision of legal services for indigent criminal defendants falls within the definition of "anything of value."

R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting or accepting, or using the authority or influence of his office to secure, a definite and direct personal pecuniary benefit for himself. The Ethics Commission has recognized that a public official or employee will develop working relationships by cooperating with other public officials and employees while performing his official duties. Adv. Op. No. 90-002. R.C. 102.03(D) prohibits a public official or employee who engages in private outside employment or business activity from using relationships developed while performing his public duties to secure a favorable decision by another public official or employee affecting his private interests. Adv. Op. No. 96-004.

The problems created by an elected county official serving as court-appointed criminal defense counsel were addressed in Attorney General Opinion No. 94-079. In that opinion, the Attorney General applied common law conflicts of interest analysis and held that the county commission was required to abstain "from discussions or votes by the board of county commissioners on any matter that may concern or affect the compensation paid to court appointed criminal defense counsel." In addition, the Attorney General held:

[A]n individual who serves simultaneously as a county commissioner and defense counsel in a criminal case prosecuted by the county prosecuting attorney may be tempted to use his position as a county commissioner to influence the county prosecuting attorney with respect to matters pertaining to that criminal case.

..

[A]n individual who serves simultaneously as a county commissioner and defense counsel in a criminal case prosecuted before the court of common pleas may be tempted to use his position as a county commissioner to influence the court with respect to matters pertaining to that criminal case.

A copy of Att'y Gen. Op. No. 94-079 is enclosed for your reference.

Similarly, R.C. 102.03(D) and (E) would also prohibit you from participating in any matter that may concern or affect the compensation paid to court appointed criminal defense counsel. If you were to serve as court-appointed criminal defense counsel, then you would be required to withdraw, as a member of County Council, from all matters affecting the compensation paid to court appointed criminal defense counsel, and very likely, matters involving the county prosecutor's office and the county court of common pleas.

The Ethics Commission has held that the withdrawal of a public official from matters that affect his outside employer may be detrimental to the functioning of his public agency. Adv. Op. No. 99-002. If other members of County Council were also required to withdraw from the same matters due to a personal interest, or one affecting a family member or business associate, then the county could be unable, or find it difficult, to act on a particular matter. See Att'y Gen. Op. No. 99-004 (Where all but one member of a board are required to abstain because of conflicts of interest, the one member, acting alone, cannot take an action that requires a "unanimous" vote of the board). In addition, in such a situation, citizens may feel that they are being denied representation

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because you have placed your personal interests above their interests and such a situation may create the appearance of impropriety.

This advisory opinion does not reach a conclusion on the appearance or advisability of your proposed employment. The creation of a detrimental effect upon the functioning of your public agency or an appearance of impropriety are factors that you must consider as a public official when contemplating outside employment with public entities that are closely connected to the political subdivision that you serve as an elected official. See Adv. Op. No. 99-002.

### Conclusion

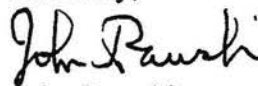
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Although R.C. 2921.42(C) provides an exception to this prohibition, as explained below, it may be extremely difficult for you to demonstrate that the legal services you would provide are "unobtainable elsewhere for the same or lower cost," which is one of the necessary requirements of the exception. If this difficult requirement, and all of the remaining criteria of the exception, can be met, and you may accept criminal defense cases while serving as a County Council member, the prohibitions imposed by R.C. 102.03(D) and (E) will require you to withdrawal from certain matters before the County Council as described below. Your withdrawal from these matters may create a detrimental effect upon the functioning of the County Council.

You should also be aware that any practice of law while serving as a member of County Council creates issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. These issues do not fall within the jurisdiction of the Ethics Commission. You should refer your questions to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court for more information about the Code of Professional Responsibility.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on November 16, 2001. The Commission commends you for requesting guidance before taking any actions that could be prohibited by the Ethics Law. 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,



John Rawski

Staff Attorney

Enclosure: Attorney General Opinion No. 94-079