

# OHIO ETHICS COMMISSION

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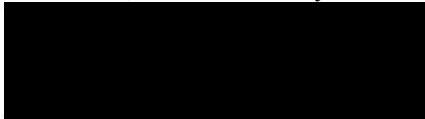
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David E. Freel, *Executive Director*

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September 10, 2003      Informal Opinion 2003-INF-0910-1

John M. Carey  
Watkins, Bates & Carey



Dear Mr. Carey:

In a letter that the Ethics Commission received on May 29, 2003 you ask whether the Ohio Ethics Law and related statutes prohibit a member of the Board of Trustees of the Medical College of Ohio (MCO) from investing in a corporation that is owned by an MCO faculty member. The corporation is commercializing patents owned by MCO.

### **Brief Answer**

As explained below, the trustee is prohibited from investing in a corporation that is owned by a faculty member and commercializing patents owned by MCO.

### **Facts**

You state that the trustee who desires to personally invest in the faculty member's corporation is a personal friend of the faculty member and that the friendship predates the faculty member's service with MCO. The faculty member is a physician engaged in genetic research. The faculty member developed a patented invention while he was on the faculty of an out-of-state university. The out-of-state university has licensed the invention to a private corporation in which the faculty member holds an ownership interest.

The faculty member, while at MCO, developed patented improvements to his initial invention. MCO holds these patents and has licensed these improvements to the faculty member's private corporation. You state, "MCO is determined to support the faculty member's genetic research and the commercialization of the patents that it holds." You also state that the connection between the initial invention and its subsequent improvements makes the faculty member's corporation the only entity to which MCO could license its patents to achieve commercialization.

MCO and the faculty member's corporation entered into the licensing arrangement before the enactment of R.C. 3345.14. After the enactment of R.C. 3345.14, MCO adopted rules for the commercialization of technology developed by faculty members that are consistent with the Model Rules described in that section. However, the present licensing arrangement between MCO and the faculty member continues on an informal basis subject to review under MCO's internal conflict of interest policies.

Under its rules, MCO is organizing a technology commercialization oversight committee that will negotiate with the faculty member and his corporation. The oversight committee will include a member of the board of trustees, but not the trustee who desires to invest in the faculty member's corporation. You state, however, that the trustee who desires to invest in the faculty member's corporation may be required to vote to approve the contracts negotiated by the technology commercialization oversight committee.

#### **R.C. 3345.14—Application of Exception for Entrepreneurship**

Before addressing your question, it is necessary to determine whether R.C. 3345.14, and the rules adopted by the MCO board of trustees pursuant to Division (D) of R.C. 3345.14, apply to your question. In 2000, in consultation with the Ethics Commission, the General Assembly amended R.C. 3345.14 to include a provision that boards of trustees of state universities can adopt rules to set forth circumstances under which an employee of the university may have a financial interest in discoveries or inventions made or created by that employee or in patents issued to that employee. R.C. 3345.14(D).

However, in R.C. 3345.14(E), the General Assembly clearly indicated that such rules apply to "employees" of the university and that, in implementing the rules, all members of the college or university board of trustees continue to be governed by existing protections against conflicts of interest contained in Chapter 102. and sections 2921.42 and 2921.43 of the Revised Code. R.C. 3345.14(D)(2)(c) and (E). Therefore, the answer to your question is determined by the Ohio Ethics Law and related statutes, rather than any rules or policies adopted by MCO.

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

R.C. 2921.42(A)(3) provides that no public official shall knowingly:

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.

The term "public official" is defined, for purposes of R.C. 2921.42 in R.C. 2921.01(A), to include any appointed officer of the state. A state college or university is an instrumentality of the state. R.C. 3345.011 ("state university" means a public institution of higher education which is a body politic and corporate"); Wolf v. Ohio State University Hosp., 170 Ohio St. 49 (1959).

Therefore, a member of the board of trustees of MCO is a "public official" for purposes of R.C. 2921.42(A)(3). Ohio Ethics Commission Advisory Opinion No. 95-004.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (G)(1)(a) of that section and includes 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 any of its political subdivisions, or any agency or instrumentality of either." R.C. 2921.42(G). As set forth above, the purpose of the licensing arrangement between MCO and the faculty member's corporation is to enable MCO to achieve the commercialization of the patents it holds. Therefore, the present licensing arrangement falls within the definition of a "public contract" because MCO is acquiring the services of the faculty member's corporation to achieve the commercialization of the patents it holds.

The position of profit that a public official occupies in the prosecution of a public contract for purposes of R.C. 2921.43(A)(3) must be definite and direct. Adv. Op. No. 92-013. A public official occupies a position of profit in a public contract when he will realize a pecuniary advantage, gain, or benefit, which is a definite and direct result of the public contract. Adv. Op. No. 92-017.

In Advisory Opinion No. 92-013, the Ethics Commission explained that the word "profit" in R.C. 2921.42(A)(3) connotes a pecuniary gain or benefit. See also Adv. Op. No. 93-001. For purposes of R.C. 2921.42(A)(3), a public official is deemed to profit from a public contract where: (1) the establishment or operation of the company with which he serves is dependent upon the award of the public contract; (2) the creation or continuation of the public official's position with the company with which he serves is dependent upon the award of the contract; (3) the proceeds from the contract would be used by the company to compensate the official or serve as a basis for the official's compensation; or (4) he would otherwise profit from the contract. Adv. Ops. No. 87-004 and 88-008. The Commission has determined that under these criteria, a person with an ownership interest in a business occupies a position of profit in the contracts of the business for purposes of R.C. 2921.42(A)(3). Adv. Op. No. 90-003.

In the instant situation, if the trustee invested in the faculty member's corporation, then the trustee would occupy a position of profit in the present licensing arrangement or any future agreement under rules adopted by MCO, the institution that he serves as a fiduciary, under R.C. 3345.14.

A contract is considered to be "authorized" by a public official, employee, or entity when the contract could not have been awarded without the approval of the individual or the board on which the individual serves. Adv. Op. No. 87-004. Accordingly, the statutory proscription applies to a public official who serves on a legislative body, commission, or board regardless of whether he participates in discussions or votes on the public contract as a member of the legislative body, commission, or board. Adv. Ops. No. 88-006, 88-008, and 91-005.

R.C. 2921.42(A)(3) prohibits a university trustee from occupying a position of profit in the award of any university contracts, which are not competitively bid and awarded to the lowest and best bidder, if he authorized the contracts, or if they were authorized by the board of trustees upon which he serves, even if he abstained from the authorization. Adv. Op. No. 90-005. See also 1971 Op. Att'y Gen. No. 71-020 (holding that a Youngstown State University trustee was prohibited, by the statute that preceded R.C. 2921.42, from having an interest in the lease of real property to the university, even if he abstained from the vote of the trustees on the transaction).

R.C. 3350.03 provides that the board of trustees of MCO shall do all things necessary for the creation, proper maintenance, and successful and continuous operation of the college. In addition, R.C. 3345.14(C) specifically addresses the role of a college's board of trustees in matters pertaining to the profitable use of technology developed by faculty members. R.C. 3345.14(C) reads in pertinent part:

As may be determined from time to time by the board of trustees of any state college or university, the college or university may retain, assign, license, transfer, sell, or otherwise dispose of, in whole or in part and upon such terms as the board of trustees may direct, any and all rights to, interests in, or income from any such discoveries, inventions, or patents which the college or university owns or may acquire. Such dispositions may be to any individual, firm, association, corporation, or governmental agency, or to any faculty member, employee, or student of the college or university as the board of trustees may direct. (Emphasis added).

Thus, in the instant situation, the MCO board of trustees would be required to approve of relationships between MCO and the faculty member's corporation. Because any relationship between MCO and the faculty member's corporation cannot be entered into without action or approval of the board of trustees of MCO, then R.C. 2921.42(A)(3) prohibits the trustee from investing in a corporation that is owned by a faculty member and that is commercializing patents owned by MCO unless the choice of selecting the faculty member's corporation to commercialize patents owned by MCO resulted from competitive bidding and the faculty member's corporation made the lowest and best bid.

As stated above, the connection between the faculty member's initial invention and its subsequent improvements made the faculty member's corporation the only entity to which MCO could license its patents to achieve commercialization. Because the connection between the faculty member's initial invention and its subsequent improvements was the criterion that determined the current licensing arrangement, it is apparent that it was entered into without competitive bidding. This fact also makes it extremely unlikely that any future arrangement under MCO's rules between MCO and the faculty member's corporation could lend itself to a competitive bidding process. See Adv. Op. No. 88-006 (distinguishing between 'competitive bidding' and a political subdivision's 'selection process' for purposes of R.C. 2921.42(A)(3)).

The requirement that a public contract be competitively bid, and be the lowest and best bid, before a public official may properly profit from a public contract that is entered into by the board upon which he serves, protects the public interest. Under R.C. 2921.42(A)(3), a public official is not deprived from engaging in private outside business activity, provided that the public contract was competitively bid and was the lowest and best bid.

Therefore, under the facts presented, R.C. 2921.42(A)(3) prohibits the trustee from investing in a corporation that is owned by a faculty member and that is commercializing patents owned by MCO.

**Soliciting or Using of Position to Secure Anything of Value—R.C. 102.03(D) and (E)**

In addition to R.C. 2921.42(A)(3), your question also implicates R.C. 102.03(D) and (E), which read as follows:

- (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.

The term "public official or employee" is defined for purposes of R.C. 102.03 to include any appointed official or employee of any "public agency." R.C. 102.01(B). The term "public agency" is defined to include any institution or instrumentality of the state. R.C. 102.01(C). A state college or university is a public agency as that term is defined in R.C. 102.01(C). Adv. Op. No. 77-005. Therefore, a member of the board of trustees of a state university is an appointed official of a public agency and subject to the prohibitions imposed by R.C. 102.03(D).

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. 102.01(G). An ownership interest in a private business and the income that is derived from the operation of the business falls under the definition of "anything of value." Adv. Ops. No. 89-010, 90-003, and 92-009. Furthermore, any beneficial or detrimental economic impact that results from a decision of a public agency is a thing of value for purposes of R.C. 102.03(D) and (E). Adv. Op. No. 90-002.

**Prohibitions Imposed By R.C. 102.03(D) and (E)**

R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his office to secure anything of value for himself, or any person, business, or other entity, if the relationship between the official and that person or other entity is such that the official's objectivity or independence of judgment could be impaired with

respect to matters that affect the interests of that party. Adv. Ops. No. 87-009, 89-008, and 90-012.

In the instant situation, even where the licensing arrangement for commercialization of MCO's patents had been entered into with the faculty member's corporation through a fair and open competitive bidding process, R.C. 102.03(D) would prohibit the trustee from voting, discussing, deliberating, formally or informally lobbying, or taking any other official action with respect to any matter pending before the MCO board of trustees that affects his personal financial interests in the corporation. This would include MCO's decisions regarding the support and commercialization of other intellectual properties that may compete with the faculty member's corporation for licensing arrangements with MCO. In addition, the trustee would be prohibited from participating in matters that directly affected MCO faculty and staff who were either engaged in activity that would either support or could possibly compete with the faculty member's research.

Thus, the trustee's withdrawal from these matters would substantially interfere with the performance of his duties as a member of the board of trustees of MCO and create an insurmountable conflict of interest and divided loyalties between his public duties and private financial interests. Therefore, R.C. 102.03(D) and (E) prohibit the trustee from investing in a corporation owned by a faculty member and that is commercializing patents owned by MCO.

In addition, the Ethics Commission has explained that 102.03(D) and (E) prohibit an official or employee who engages in private outside employment or business activity from receiving fees for providing services on projects that he has recommended in his official capacity. Adv. Op. No. 96-004. A public official or employee who advocates that his public agency proceed with a project is prohibited by R.C. 102.03(D) and (E) from soliciting or receiving future compensation, employment, consulting fees, or any other thing of value from his public agency on the same project regardless of whether he resigns or retains his public position. *Id.* See also Adv. Ops. No. 84-012, 84-013, and 85-013. Therefore, if the trustee were to be involved in the decision of the college to license the faculty member's invention to the corporation in which the faculty member has an ownership interest, then R.C. 102.03(D) and (E) could impose further restrictions upon the trustee's ability to profit from an investment in the faculty member's corporation.

### **Conclusion**

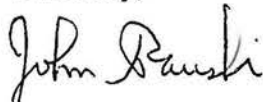
As explained above, the trustee is prohibited from investing in a corporation that is owned by a faculty member and commercializing patents owned by MCO.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 10, 2003. The Commission commends you for requesting guidance before taking any actions that could be prohibited by the Ethics Law.

John M. Carey  
September 10, 2003  
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The opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 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 cursive script that reads "John Rawski". The signature is written in black ink and is positioned above the printed name and title.

John Rawski  
Staff Attorney