

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

April 21, 2008

Informal Opinion 2008-INF-0421-2

Brian J. Laliberte, Esq.
Baker & Hostetler

Dear Mr. Laliberte:

On December 21, 2007, the Ethics Commission received your request for an advisory opinion. In your letter, you explained that you would be resigning as the Deputy First Assistant Attorney General (AAG) for the Ohio Attorney General's Office (AG's Office) to accept an associate position with Baker and Hostetler, LLP (Baker), a law firm that was retained as special counsel by the AG's Office during your tenure. You have asked whether the Ethics Law and related statutes prohibit you, as an associate of Baker, from: (1) representing the state if you recused yourself from all decisions concerning the AG's Office's retention of the firm; (2) representing the state in matters in which you substantially participated as an employee of the AG's Office; or (3) responding to requests for proposals (RFPs) to obtain additional special counsel work for the firm on matters in which you may or may not have been involved.

Brief Answer

As explained more fully below, and in specific response to your questions:

- (1) Provided that you did not participate in any aspect of the authorization of the special counsel contract between the AG's Office and Baker, you are not prohibited, as an employee of the firm, from representing any state agency under the contract;
- (2) You are prohibited from representing a state agency or other party, before any public agency, on matters in which you personally participated as an employee of the AG's Office, unless you are representing the agency because of a special counsel contract; and

- (3) You are not prohibited from responding to RFPs to obtain additional special counsel work for the firm regardless of whether you were involved in the matters.

Facts

In your letter, you explained that, for the first three months of your service with the AG's Office, you were responsible for reviewing and reforming the special counsel selection process. You managed the special counsel section until March 2007, when this responsibility was reassigned. You explained that, prior to your employment with the AG's Office, you were an associate with two law firms, including Baker. You stated that you were aware that Baker represented the state and had applied for additional special counsel work. For that reason, you recused yourself from matters involving the AG's Office's retention of Baker and matters in which the firm represented clients adverse to the state.

During your tenure with the AG's Office, you were also involved in an initiative regarding predatory lending. You stated that you exercised substantial administrative discretion with respect to this initiative. You noted, however, that you never participated in any predatory lending matters in which Baker was involved or for which Baker had been retained.

At the time you sought an opinion from the Commission, you had already accepted employment at Baker.¹ You indicated that, as an associate with Baker, you desire to continue working on predatory lending issues and other issues for the state through the services of special counsel for the AG's Office. You have asked several questions regarding how the post-employment restrictions of the Ethics Law will apply to you in your new position.

Now that you have begun your employment with Baker, there are three post-employment restrictions that apply to you. The three restrictions are set forth in R.C. 2921.42(A)(3) (regarding profiting from authorized contracts), R.C. 102.03(A)(1) (regarding representation), and R.C. 102.03(B) (regarding use and disclosure of confidential information).

Public Contract

As the former Deputy First AAG, you are subject to R.C. 2921.42(A)(3), which states that, for one year after leaving public service, no former public official shall knowingly:

[O]ccupy any position of profit in the prosecution of a public contract authorized by the public official or by a legislative body, commission, or board of which the public official was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

¹ The Commission has explained that restrictions in R.C. 102.03(D) and (E) that apply to public employees seeking employment. See Adv. Op. No. 96-004. However, because you had already accepted employment before submitting your request for an opinion, the Commission cannot provide advice to you on these restrictions.

The prohibition of R.C. 2921.42(A)(3) is pertinent whenever a former public official seeks employment with a party that has contracts with his former public agency. Special counsel contracts for legal services are public contracts. R.C. 2921.42(I)(1)(a); Adv. Op. No. 95-004.

A public official has authorized a public contract where the contract could not have been awarded without the approval of the official, or the office or position in which the public official serves, or the board on which he sits. See Adv. Ops. No. 88-008, 91-009, and 92-017. The Commission has explained that a public official will be deemed to profit from a public contract if any of the following apply: (1) the establishment or operation of the company with which the official serves is dependent upon receipt of the contract; (2) the creation or continuation of the official's position with the company is dependent upon the award of the contract; (3) the contract moneys would be used by the company to compensate the official or as a basis for the official's compensation; or 4) the official would otherwise profit from the contract. Adv. Ops. No. 87-004 and 88-008.

If you were involved in the authorization of special counsel contracts, R.C. 2921.42(A)(3) will apply to you regarding those contracts in which you participated. If you authorized any special counsel contracts to Baker, R.C. 2921.42(A)(3) would prohibit you from being compensated by Baker from the proceeds of those contracts. However, you stated that you did not participate in any matters regarding the retention of Baker as special counsel. In that case, R.C. 2921.42(A)(3) does not apply. Provided that you did not participate in any aspect of the authorization of the special counsel contract between the AG's Office and Baker, you are not prohibited, as an employee of the firm, from representing any state agency under the contract.

Revolving Door Law—R.C. 102.03(A)(1)

As the former Deputy First AAG, you are a "public official," subject to the revolving door prohibition in R.C. 102.03(A)(1) for twelve months after you leave the AG's Office. R.C. 102.01(B) and (C). R.C. 102.03(A)(1) provides:

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.

(Emphasis added.) R.C. 102.03(A)(1) is designed to protect the public interest by prohibiting situations from arising where a former public official or employee "will engage in a conflict of interest or realize personal gain at public expense from the use of 'inside' information." State v. Nipps (1979), 66 Ohio App.2d 17, 21. The Court in State v. Nipps held that the Revolving Door prohibition was constitutional, and determined: "The state has a substantial and compelling interest to restrict unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government." Id.

A “person,” for purposes of R.C. 102.03(A)(1), includes Baker and its clients, the AG’s Office, and any other state or local public agency. R.C. 1.59(C). See Adv. Ops. No. 82-002, 89-003, and 93-011. The term “represent” includes “any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person.” R.C. 102.03(A)(5); Adv. Op. No. 86-001.

The prohibition in R.C. 102.03(A)(1) applies to any “matter” in which you personally participated in your position with the AG’s Office. The term “matter” is defined, in R.C. 102.03(A)(5), to include “any case, proceeding, application, determination, issue, or question.” “Matter” includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, or investigation, a legal proceeding, an application, and a settlement of a dispute or question. Adv. Op. No. 99-001. “Matter” also includes such items as a dispute of special or public importance and a controversy submitted for consideration. Id. However, “matter” is not so broadly applied as to include a general subject matter. Id. The law also does not prohibit a former public official or employee from representing an employer or client on new matters or matters in which he had not participated as a public official or employee. Adv. Op. No. 84-005.

“Personal participation” includes “decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion,” and includes the direct supervision of other public officials and employees. Adv. Op. No. 91-009.

Application of the Restriction

You indicated that you made decisions, approvals, recommendations, rendered advice and exercised administrative discretion in matters involving the AG’s Office’s predatory lending initiative. Because of your personal participation in these matters, R.C. 102.03(A)(1) prohibits you, for a period of one year after you have left the AG’s Office, from representing any person, before any public agency, on predatory lending issues, unless you can meet an exception to the law.

Exception—R.C. 102.03(A)(6)

The General Assembly enacted an exception to the representation prohibition that allows public agencies to make independent decisions on whether to retain the services of public officials or employees after they leave their public positions. R.C. 102.03(A)(6) provides:

Nothing contained in division (A) of this section shall prohibit, during such period, a former public official or employee from being retained or employed to represent, assist, or act in a representative capacity for the public agency by which the public official or employee was employed or on which the public official or employee served.

(Emphasis added). The Ethics Commission has explained that the exception of R.C. 102.03(A)(6) is available to a former public official or employee only where the official or employee is representing, assisting, or acting in a representative capacity for his former public agency. Adv. Ops. No. 91-005 and 91-009.

The exception of R.C. 102.03(A)(6) recognizes an absence of a conflict of interest or the realization of personal gain at public expense provided that the former official or employee is retained to represent or assist the public agency by which he had been employed. But see R.C. 102.03(D) and (E); Adv. Op. No. 87-008 (a member of a governing board of a public agency is prohibited from accepting employment with the public agency, even after he leaves the board position, if he used his position while on the board to secure the employment opportunity.)

Because special counsel contracts are entered into by the AG's Office, an attorney retained or providing services under a special counsel contract is assisting the AG's Office even if the attorney is representing a public agency other than the AG's Office. Where the AG's Office, independent of any recommendation or involvement by you, were to decide that it was in the best interest of the AG's Office and its public client for you to act as special counsel in cases involving predatory lending, the exception in R.C. 102.03(A)(6) would apply.

Because of the exception, you would not be prohibited from representing the state in matters in which you substantially participated as an employee of the AG's Office, including predatory lending, *under a special counsel contract entered into by the AG's Office*. You are also not prohibited from responding to a new RFP issued by the AG's Office to obtain additional special counsel work for the firm, even if you or the firm would be representing a state agency on matters in which you were previously involved and regardless of whether the RFP uses the format or review process in which you personally participated while employed at the AG's Office. But see Ohio Rules of Professional Conduct for any relevant restrictions.

However, R.C. 102.03(A)(1), as explained above, would prohibit you from representing state agencies or other parties, before any public agencies, on matters in which you personally participated during your public employment, if you are *not* assisting the AG's Office under a special counsel contract.

Confidential Information

Finally, you are bound by R.C. 102.03(B), which prohibits you from disclosing or using any confidential information you acquired while employed at the AG's Office. There is no time limit to this prohibition, and it applies to you as long as the information remains confidential.

If you were privy to attorney-client privileged information while employed at the AG's Office, you would be prohibited from using or disclosing that information. However, consistent with the exception in R.C. 102.03(A)(6), described above, you are not prohibited from using confidential or privileged information if you are assisting the AG's Office by providing special counsel representation to public agencies.

Other Issues

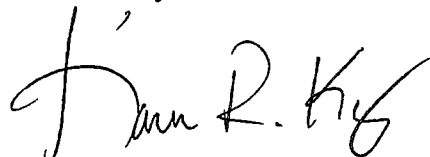
The situation you have described may also raise issues under the Ohio Rules of Professional Conduct. See, e.g., Rule 1.11. For more guidance about these Rules as they apply to your situation, you should contact the Board of Commissioners on Grievances and Discipline for the Supreme Court of Ohio.

Conclusion

As explained more fully above, and in specific response to your questions: (1) Provided that you did not participate in any aspect of the authorization of the special counsel contract between the AG's Office and Baker, you are not prohibited, as an employee of the firm, from representing any state agency under the contract; (2) You are prohibited from representing a state agency or other party, before any public agency, on matters in which you personally participated as an employee of the AG's Office, unless you are representing the agency because of a special counsel contract with the AG's Office; and (3) You are not prohibited from responding to RFPs to obtain additional special counsel work for the firm regardless of whether you were involved in the matters.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 11, 2008. 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 feel free to contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen R. King". The signature is fluid and cursive, with a large initial "K" and a long, sweeping underline.

Karen R. King
Advisory Staff Attorney