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David E. Freel,  
*Executive Director*

October 2, 2008      Informal Opinion 2008-INF-1002-3

Timothy Young  
State Public Defender

Dear Mr. Young:

On June 16, 2008, the Ohio Ethics Commission received your request for an advisory opinion. In your letter, you explained that the Ohio Public Defender's Office (OPD) contracts with the Ohio Association of Criminal Defense Lawyers (OACDL) to provide continuing legal education (CLE) courses for attorneys who represent indigent clients. You have asked three questions because of this contractual relationship:

- (1) Does an employee of OPD have an interest in the contract such that he or she would be prohibited from serving on the OACDL board of directors?
- (2) Does an employee of OPD have a conflict of interest such that he or she would be prohibited from serving on the OACDL board?
- (3) Does an employee of OPD, its Director, or its Commission commit a violation of R.C. 2921.42 if it enters into a contract with OACDL and an employee of OPD is on the OACDL board?

**Brief Answer**

As explained more fully below:

- (1) R.C. 2921.42(A)(4) prohibits an OPD employee from having an interest in an OPD contract. As a member of the OACDL board of directors, an OPD employee would have a prohibited interest in the OPD contract with OACDL unless he or she can comply with an exception;
- (2) While R.C. 102.03(D) and (E) do not prohibit an OPD employee from serving on the board of directors of an organization from which OPD purchases services, the laws would prohibit the OPD employee from participating, in any way, in any matters before OPD that affect the interests of OACDL; and
- (3) While the law does not prohibit OPD, its Director, the Commission, or other staff members from entering into a contract with OACDL while an OPD employee serves as a member of the OACDL board, a contract entered into in violation of R.C. 2921.42 will be void and unenforceable.

### **Facts**

You explained that OACDL is a non-profit association of criminal defense attorneys in the State of Ohio. Members of OACDL pay annual membership dues. Many employees of OPD are members of OACDL. OACDL board members are elected by membership vote and are uncompensated.

In addition to providing representation to indigent defendants, OPD provides continuing legal education (CLE) for attorneys. OPD issues an annual request for proposal for prospective bidders to provide these CLE courses. Although other organizations occasionally bid, historically OACDL is the only organization that provides these trainings and the only one that provides these services in bulk. You attached a list of the CLE courses OACDL has provided from 1995 through 2008.

### **Prospective Nature of an Advisory Opinion**

The purpose of an Ethics Commission advisory opinion is to provide guidance to a public official or employee upon which he or she can rely before engaging in an action that may be prohibited by the Ethics Law. The Commission has explained that its function in rendering an advisory opinion is not a fact-finding process. Ohio Ethics Commission Advisory Opinion No. 94-002. Thus, the Commission can render an advisory opinion only in response to a hypothetical question or a question that involves the prospective conduct of the person who requests the opinion. Adv. Ops. No. 75-037 and 94-002. This advisory opinion addresses only the prospective matters you have described and does not reach any conclusions with respect to matters that have already occurred.

### **Having an Interest in a OPD Contract—R.C. 2921.42(A)(4)**

An employee of OPD is a “public official” subject 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 the public official is connected.

R.C. 2921.01(A). See generally Adv. Op. No. 91-010.

The term “public contract” is defined 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. R.C. 2921.42(I)(1)(a). OPD’s acquisition of OACDL’s training services is a public contract. Adv. Ops. No. 78-001, 90-007, and 92-003. The Ethics Commission has concluded that a public official has a prohibited “interest” in a public contract if the official would have a definite and direct interest, of either a financial or fiduciary nature, in the contract. Adv. Ops. No. 81-008 and 88-001.

An officer, chief administrative official, or member of a board of a non-profit corporation has a fiduciary interest in the contracts of the non-profit corporation even if he or she is not compensated for the service. Adv. Ops. No. 92-004 and 96-005. Therefore, an OPD employee who serves as a board member of OACDL would have a prohibited fiduciary interest in any public contract between OPD and OACDL. An ODP employee would not have an interest in a contract between OPD and OACDL if he were to serve as a member of the organization. See also R.C. 102.03(J).

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

R.C. 2921.42(C) provides that R.C. 2921.42(A)(4) does not apply to a public official who can meet all four requirements in the exception. The application of each of the four requirements depends on the facts and circumstances. Adv. Ops. No. 80-003 and 82-007. The criteria are strictly construed against the public official who must show compliance with them. Adv. Ops. No. 83-004 and 84-011. R.C. 2921.42(C) provides:

- (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 the public official's 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.

R.C. 2921.42(C)(1) requires that the services that OACDL provides to OPD are necessary. You stated that, in order to fulfill its obligation, pursuant to R.C. 120.03(D)(2)(c), OPD issues an annual RFP for prospective bidders to provide training to attorneys representing indigent clients. See R.C. 120.03(D)(2)(c) (in administering the Office of the Ohio public defender commission, the commission may conduct programs having a general objective of training and educating attorneys and others in the legal representation of indigent persons.)

R.C. 2921.42(C)(2) requires that the services that OACDL provides to OPD are provided pursuant to a “continuing course of dealing” that began prior to the OPD employee’s service with OACDL or that the services OACDL provides are “unobtainable elsewhere for the same or lower cost” by OPD.

The Commission has explained that services provided under a “continuing course of dealing” are services provided during the term of an existing contract. Adv. Ops. No. 82-007 and 84-006. If, however, the existing contract is renewed by action of the governmental agency, or is modified, extended, or otherwise changed after the employee’s public service begins, the employee cannot meet the “continuing course of dealing” exception. Adv. Op. No. 90-003. You stated that OPD issues an annual RFP for prospective bidders to provide CLE training. Although the information you provided indicates that OPD has contracted with OACDL every year since 1995, each individual contract is a new contract entered into after the RFP process and does not demonstrate a continuing course of dealing. See Adv. Ops. No. 82-007, 84-006, and 88-008.

Because the “continuing course of dealing” prong of R.C. 2921.42(C)(2) cannot be met for any contracts between OPD and OACDL entered into after the person is employed by OPD, the employee must be able to show that the services OACDL provides to OPD are “unobtainable elsewhere for the same or lower cost.” The Ethics Commission has stated that the underlying principle of the requirement of Division (C)(2) is to permit a public official to have an interest in a public contract in limited situations where the contract is the best or only alternative available to the governmental entity. Adv. Op. No. 84-011. In order to meet this requirement, the employee must be able to show that OACDL offers its services to OPD for the lowest price as determined by some fair and impartial process, such as competitive bidding, in which OPD uses an objective price comparison and provides adequate notice to other suppliers of the same goods and services. Adv. Op. No. 86-002. While an RFP process has some competitive aspects, it is not a competitive bid. See *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.* (1994), 73 Ohio St. 3d 590, 600 (“The RFP method of procurement is not competitive bidding.”) See also Adv. Op. No. 88-006 (distinguishing between ‘competitive bidding’ and a political subdivision’s ‘selection process’ for purposes of the public contract provisions of the Ethics Law).

R.C. 2921.42(C)(3) requires that OACDL provides the same or better services to OPD than it would for any other client in similar transactions. Finally, Division (C)(4) requires that the transaction with OPD be conducted at arm’s length, that OPD has full knowledge of the employee’s interest in the acquisition of services from OACDL, and that the employee take no part in deliberations and decisions of OPD with respect to its acquisition of services from OACDL.<sup>1</sup> See also R.C. 2921.42(A)(1) and 102.03(D) and (E), described below.

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<sup>1</sup> In an arm’s length transaction: (1) both parties act voluntarily, without compulsion or duress; (2) the transaction occurs in an open market; and (3) both parties act in their own self-interest. *Walters v. Knox Cty. Bd. of Rev.* (1989), 47 Ohio St.3d 23, 25. An “open market” is a market in which any buyer or seller can trade, and the prices and product availability are determined by free competition. *Mildred Hine Trust v. Buster*, Franklin App. No. 07AP-277, 2007-Ohio-6999, ¶ 21.

If the employee can meet the exception in R.C. 2921.42(C), he or she would not be prohibited from serving on OACDL's board. However, the Ethics Law will limit the employee's conduct while he or she is on the board.

**Participating in Matters Affecting OACDL—R.C. 2921.42(A)(1) and 102.03(D) and (E)**

Even if the OPD employee can meet the R.C. 2921.42(C) exception, such that he or she is able to serve on the OACDL board, the employee will be prohibited from participating in matters that definitely and directly affect OACDL's interests. While the exception to R.C. 2921.42(A)(4) allows a public official, in narrow circumstances, to have an interest in a public contract, it does not allow a public official to participate in matters that affect an organization in which he or she has a fiduciary interest.

R.C. 2921.42(A)(1) prohibits a public official from authorizing or using the authority or influence of his or her public position to secure authorization of a public contract in which he or she has an interest. As indicated above, a board member of a non-profit organization would have a fiduciary interest in the contracts of the organization. See Adv. Op. No. 92-004. Therefore, R.C. 2921.42(A)(1) will prohibit an OPD employee who serves as an OACDL board member from participating, in any manner, formally or informally, in the consideration, recommendation, or authorization of OPD's contracts with OACDL.

Additionally, R.C. 102.03(D) and (E), the conflict of interest laws, prohibit a public official or employee from accepting, soliciting, or using his or her position to secure anything of value that is of a substantial and improper character for himself or herself or for persons or entities with which he or she has close fiduciary ties. See Adv. Op. No. 89-014. As a member of the board of a non-profit organization, an OPD employee would have a close fiduciary relationship with the organization. Therefore, the OPD employee would be prohibited from participating in matters before OPD in which OACDL has an interest or has taken a position. For example, if OACDL has taken a particular stance on a debate or legislative matter related to criminal defense law, and OPD has any authority on the debate or matter, the OPD employee would be prohibited from formally or informally lobbying fellow OPD officials and employees to exercise OPD's authority in favor of OACDL.<sup>2</sup>

**Application to OPD**

Finally, you have asked if the Director, the Public Defender Commission, or other OPD staff members would be in violation of the public contract law if OPD contracted with OACDL while an OPD employee served on the board. The restrictions of R.C. 2921.42 apply to an individual public employee, not the public agency he or she serves. See generally Adv. Op. No.

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<sup>2</sup> Additionally, R.C. 102.03(E) and (F) also prohibit an OPD employee from accepting, and OACDL from giving or promising, anything of substantial value to an OPD employee. For example, an OPD employee would be prohibited from accepting, and OACDL would be prohibited from providing payment of conference registration fees, or travel, meals, and lodging expenses for the employee to attend an OACDL seminar or meeting as a board member unless the employee could meet the exception in R.C. 102.03(H)(1). (R.C. 102.03(H)(1) applies to financial disclosure filers, and permits travel expenses for travel to conferences where the employee is a speaker or conferences of organizations to which a state agency pays membership dues.) Adv. Ops. No. 89-013, 89-014, and 2000-04.



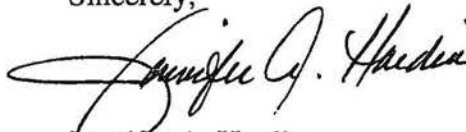
89-002. The OPD Director, Public Defender Commission, or other OPD staff, would not be in violation of R.C. 2921.42 for authorizing an OPD contract with OACDL if another OPD employee sits on the OACDL board. However, a public contract in which a public employee has an interest, in violation of R.C. 2921.42(A)(4), is void and unenforceable. R.C. 2921.42(H). Therefore, it would be in OPD's best interest to be mindful of the public contract prohibitions when making contractual decisions.

### Conclusion

As explained more fully above, R.C. 2921.42(A)(4) prohibits an OPD employee from having an interest in an OPD contract. As a member of the OACDL board of directors, an OPD employee would have a prohibited interest in the OPD contract with OACDL unless he or she can comply with an exception. While R.C. 102.03(D) and (E) do not prohibit an OPD employee from serving on the board of directors of an organization from which OPD purchases services, the laws would prohibit the OPD employee from participating, in any way, in any matters before OPD that affect the interests of OACDL. Finally, while the law does not prohibit OPD, its Director, the Commission, or other staff members from entering into a contract with OACDL while an OPD employee serves as a member of the OACDL board, a contract entered into in violation of R.C. 2921.42 will be void and unenforceable.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 2, 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,



Jennifer A. Hardin  
Chief Advisory Attorney