

Ben Rose, *Chair*  
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Ann Marie Tracey

David E. Freel,  
*Executive Director*



OHIO ETHICS COMMISSION  
8 East Long Street, 10<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 466-7090  
Fax: (614) 466-8368

[www.ethics.ohio.gov](http://www.ethics.ohio.gov)

November 4, 2009

Informal Opinion 2009-INF-1104

Robert B. Newman  
Newman & Meeks

Dear Mr. Newman:

On February 13, 2009, the Ohio Ethics Commission received your request for an advisory opinion. In your letter, you asked whether the Ethics Law and related statutes prohibit a member of a county public defender commission from acting as appointed counsel for criminal defendants in the same county. You are not a member of a county public defender commission, but you are a member of the state public defender commission.

**Brief Answer**

As explained more fully below, R.C. 2921.42(A)(4) prohibits a member of a county public defender commission from acting as appointed counsel for criminal defendants in the same county unless the member can meet the exception contained in R.C. 2921.42(C). In order to meet the exception, the commission member must demonstrate that the member's unique combination of skills and experience makes him or her the best available representative for criminal defendants. It must also be demonstrated that assignment of the commission member as counsel and approval of payments to the commission member are made either by a person or persons at the same or higher level of authority as the commission member or by a neutral process.

Even if the commission member can meet the exception in R.C. 2921.42(C), and is able to serve as appointed counsel for criminal defendants in the same county, the commission member is prohibited, by R.C. 102.03(D) and (E), from taking any action within the scope of his or her authority, to secure appointments, establish rates for counsel, or obtain benefits related to representation that are greater than or unavailable to other attorneys accepting appointments.

### **Purpose of an Advisory Opinion**

The purpose of Ethics Commission advisory opinions is to provide guidance to public officials or employees upon which they can rely before engaging in actions 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 question that involves the prospective conduct of the person who requests the opinion. Adv. Ops. No. 75-037 and 94-002.

However, in these circumstances, the Commission issued an advisory opinion in 1976 on a related topic. The Commission concluded that R.C. 102.04 does not prohibit a member of a county public defender commission from practicing law before the courts in the county. Adv. Op. No. 76-001.<sup>1</sup> At that time, the Commission was not asked, and did not consider, whether a county public defender commission member was prohibited from providing legal representation to any specific group of individuals or in any specific type of case. In addition, the Commission has issued advisory opinions applying the Ethics Laws in limited circumstances where the practice at issue has existed for many years and public officials and employees, and those who interact with them, have relied on past practice, without the guidance of precise and uniform legal precedent to address the specific issue.

Therefore, this opinion will consider whether the Ohio Ethics Law and related statutes prohibit a member of a county public defender commission from being appointed or selected to provide legal representation to indigent criminal defendants in the county.

### **Facts**

You submitted a letter to the Commission asking whether the Ethics Law and related statutes would prohibit two members of the Hamilton County Public Defender Commission from also representing indigent defendants in the Hamilton County Courts.

Revised Code Chapter 120. governs public defenders. A county public defender provides legal representation to indigent criminal defendants in the county and assesses indigency. R.C. 120.16(A). In lieu of using a county public defender or joint county public defender (organized under R.C. 120.25) to represent indigent persons, a board of county commissioners may adopt a resolution to pay counsel who are either personally selected by indigent persons or appointed by the court. R.C. 120.16(E) and R.C. 120.33.

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<sup>1</sup> While this opinion does not overrule the holding in Advisory Opinion No. 76-001, it is important to note that the opinion was adopted on January 29, 1976, prior to an enactment that expanded the prohibitions of R.C. 102.04 by adding a new Division (B) (applicable to state officials or employees) and enacting a new exception in Division (D).

In Ohio's eighty-eight counties, there are four different methods used to provide public defender services. Nine counties contract with a non-profit corporation and eleven counties contract with the Ohio Public Defender Commission for public defenders. In forty counties, public defender attorneys are appointed by the court. The remaining twenty-eight counties, including Hamilton County, use a county public defender.<sup>2</sup>

In addition to your letter setting forth the question, the Commission has received extensive correspondence and other information regarding this matter, including two additional letters from you. Among the submitted information are two letters from the Hamilton County Public Defender Commission, one letter from the Public Defender, and one letter from each of the judges of the Hamilton County Court of Common Pleas. Also provided to the Commission were two recent assessments of the Hamilton County Public Defender's Office in which related questions are discussed. The first, from July 2008, was conducted by the National Legal Aid & Defender Association (NLADA), on behalf of the Hamilton County Board of Commissioners. The second, completed in December 2008, was conducted by the Ohio Public Defender.

All of the information the Commission has received lauds the work of the Hamilton County Public Defender Commission and the Public Defender. Further, the Commission understands that the two attorneys who are members of the Public Defender Commission are accomplished and dedicated to the service of the Commission. This opinion of the Ethics Commission applies the Ethics Law and related statutes, as they address conflicts to the public interest, to the situation presented; it does not, in any way, question the intentions or service of the highly regarded Hamilton County Officials involved.

### **Ohio Public Defender Report**

The Report of the Ohio Public Defender was completed after a review of the Office of Public Defender in Hamilton County by staff of the Ohio Public Defender's Office. According to the report conducted by the Ohio Public Defender, the administration of the assigned counsel system in Hamilton County is unique among other systems in the state. The Ohio Public Defender Report states: "[T]he Ohio Revised Code vests exclusive control of the appointment process in the judiciary. There is no reference in the ORC to Public Defender involvement in the appointment or payment process." Report by the Ohio Public Defender on the Hamilton County Public Defender Office (December 2008), 2.

However, in Hamilton County, the "Public Defender controls not only the appointment, but also the payments and retention of assigned counsel." PD Report, 2. The question of potential conflicts of interest and appearances of conflicts is discussed in the Report, although the Report does not specifically note the Ethics Law. The Ohio Public Defender Commission has concluded:

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<sup>2</sup> The Ohio Public Defender Commission's Web site is the source of these statistics.

One of the primary reasons for having appointed counsel is to handle cases in which a conflict of interest exists due to co-defendant status, witness conflict, or prior representation that causes a conflict. Allowing the Public Defender to become involved in the appointment process when these conflicts exist gives the appearance of an impropriety and causes ethical concerns.

To then insert the Public Defender into the approval of payments aggravates the conflict. This gives the Public Defender monetary influence, whether intended or not, over how much an attorney can make when choosing how to defend someone whose interests are in direct conflict with the interests of those the Public Defender represents.

Id. With respect to the specific issue of defense attorneys serving on the county public defender commission, the PD Report concludes: “[S]ome members of the county’s Public Defender Commission are on the assigned counsel list. The Public Defender’s involvement in assigning cases and approving payment to members of the Public Defender Commission—[which is] the employer of the Public Defender—presents an ethical dilemma.” Id.

#### **Basis of the Commission’s Analysis**

In rendering this Advisory Opinion, the Commission is limited to an analysis of the Ohio Ethics Law and related statutes. This opinion does not address other statutes, rules, ordinances, policies, or guidelines that may apply to the members of a county public defender commission. As noted later in this opinion, the members of the Hamilton County Public Defender Commission may want to contact the Supreme Court of Ohio or the Ohio Public Defender Commission for guidance on these other issues. Further, the opinion does not address appearances of impropriety that may result from this service. However, all parties involved in this issue should be aware that there may be appearances of impropriety.

#### **Public Contract—R.C. 2921.42(A)(4) and Definitions**

R.C. 2921.42(A)(4) 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.*

(Emphasis added.) R.C. 2921.01(A) defines “public official” as “any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity.” This restriction applies to all individuals who are elected or appointed to, employed by, or agents of a county. Adv. Op. No. 88-003. The restriction applies whether the person’s public position is: (1) compensated or uncompensated; (2) full time or part time; or (3) temporary or permanent. A member of a county public defender commission is a “public official” subject to the prohibitions of R.C. 2921.42. Adv. Op. No. 76-001.

The term “public contract” is defined in R.C. 2921.42(I)(1)(a) as:

The purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either.

A public contract can include bid or unbid, and written or oral, contracts. Adv. Op. No. 87-002. In most cases, a public contract exists when a public agency buys goods or services directly from a provider. Adv. Ops. No. 93-007 and 93-009. However, a public agency can acquire goods or services in other ways. For example, the Ethics Commission has explained that services purchased by a third party, for the use of a public agency, fall within the definition of the term “public contract,” even if the public agency does not expend any money for the goods or services. Adv. Op. No. 90-003. In Advisory Opinion No. 93-007 the Commission explained:

The key factor in determining whether a contract is a “public contract” is whether the governmental entity is acquiring, either through purchase, grant, tax abatement, donation, loan, or other method, property or services.

A county is required to provide legal representation for criminal indigent defendants in the county. R.C. Chapter 120. The purchase or acquisition of legal services for indigent persons by or for the use of the county is a public contract. Adv. Ops. No. 78-001, 90-007, and 92-003.

An “interest” which is prohibited under R.C. 2921.42 must be definite and direct and may be either financial or fiduciary in nature. Adv. Op. No. 81-008. An attorney who is paid to provide legal services to indigent persons has a definite and direct financial interest in a public contract with the county. Adv. Ops. No. 83-002 and 90-003.

R.C. 2921.42(A)(4) prohibits a public official from having an interest in the profits or benefits of a public contract entered into by the political subdivision with which the official is “connected.” Although the Ethics Law does not define the phrase “with which the public official is connected,” the Commission has stated that common usage indicates that to be connected with a public entity is to be related to, or associated with, that entity. Adv. Ops. No. 99-002 and 87-002. R.C. 2921.42(A)(4) prohibits a county official from contracting with the county as a whole, and not just with the department, agency, office, or board with which he or she serves. See Adv. Op. No. 99-002 (a county commissioner is prohibited from being employed by a county hospital) and 87-002 (a member of a county board of elections is connected with the county that he serves, including any board, commission, bureau, division, or agency of the county). See also *State v. Rousseau* (2004), 159 Ohio App. 3d 34, ¶ 22 (“We agree with the [Ethics] Commission that as a member of the board of elections, [a board member’s] jurisdiction, duties, actions, and compensation certainly “connect,” i.e. relate or associate, him to the county of that board of elections.”) A member of a county public defender commission is connected to



the county and prohibited from having an interest in a public contract entered into by or for the use of any commission, bureau, division, or agency of the county.

Therefore, a member of a county public defender commission is prohibited from receiving compensation for providing legal services to indigent persons in the same county, because in providing such services, he or she would have a definite and direct prohibited interest in a public contract with the county. However, R.C. 2921.42(C) sets forth a statutory exception to the prohibition of Division (A)(4), which the Commission must apply and the members of the Hamilton County Public Defender Commission must follow.

**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 criteria are strictly construed against the public official who must show compliance with them. Adv. Ops. No. 83-004 and 84-011. The four requirements in R.C. 2921.42(C) are:

- (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.

Because Ohio law requires that a county provide legal representation to indigent criminal defendants, these services are necessary for the county, and a county public defender commission member who is appointed or selected to represent indigent persons can meet the requirement in Division (C)(1).

R.C. 2921.42(C)(2) requires that the services the county public defender commission member provides to the county are either: (a) unobtainable elsewhere for the same or lower cost; or (b) provided to the county as part of a continuing course of dealing established before the commission member became associated with the county.

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 political subdivision or governmental agency, or is modified, extended, or otherwise changed after the official’s public service begins, the official cannot meet the “continuing course of dealing” exception. Adv. Op. No. 90-003. Because appointments to represent indigent criminal defendants are individual engagements, each is a new contract. If an attorney had been engaged to represent a criminal defendant before his or her appointment to the county public defender commission, the continuing course of dealing exception would apply to that engagement. See Adv. Ops. No. 82-007, 84-006, and 88-008. However, the exception would not apply to any contract under which a person was engaged to represent an indigent criminal defendant in the same county after his or her appointment to the county public defender commission.

If the public defender commission member cannot show that he or she meets the “continuing course of dealing” requirement of R.C. 2921.42(C)(2), he or she must be able to show, through appropriate documentation, that the legal services he or she provides to the county are “unobtainable elsewhere for the same or lower cost.” 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), below.

The commission member must be able to objectively show that his or her service as appointed or selected counsel is either the least costly for the county or that the commission member is uniquely suited to meet the needs of criminal defendants that the commission member has been assigned to represent because of the attorney’s experience, knowledge, legal specialization, or familiarity with the specific matter. Adv. Op. No. 88-001. The county must also make every reasonable effort to open the process of selecting indigent counsel to all interested and qualified parties and not have drawn specifications and requirements to favor any particular person. Adv. Ops. No. 83-004 and 89-004.

Costs to the county for all appointed counsel are based on a fee scale or fixed rate. If the services are otherwise available to the county from all attorneys at the same cost, the public defender commission member must be able to show that the county cannot acquire the particular services that the commission member provides from any other source. Where an attorney is selected by a defendant, the attorney can assert that, in the estimation of the person most interested in effective legal representation, the attorney provides services that are unobtainable elsewhere for the same or lower cost. Even if attorneys are selected by the defendant, however, they must meet the minimum requirements discussed below.

Where a member of the county public defender commission is selected to provide legal representation for indigent criminal defendants, the commission member must demonstrate that his or her unique combination of skills and experience make the member the best available representative for criminal defendants in order to meet this requirement. Because there are many individuals who need representation, and a limited number of qualified attorneys to provide it, the need exceeds availability. Where there are an insufficient number of attorneys to fully serve the population needing representation, an attorney who is a member of the public defender commission could meet the requirement in (C)(2) by showing that he or she meets the experience and expertise requirements established for criminal defense attorneys by an individual or group who is not subject to the authority of the commission member or public defender.

In May 2007, the Hamilton County Public Defender Commission established a Peer Review Advisory Committee (PRAC). The PRAC is composed of five members: the head of the Felony Division of the County Public Defender's Office, two members appointed by the County Public Defender Commission, and two members appointed by the Cincinnati Bar Association. The PRAC acts as an advisory committee regarding the composition and categorization of attorneys serving as assigned counsel or contract attorneys. The PRAC has established qualifications that an attorney must demonstrate before he or she can be appointed to represent indigent defendants. If there are insufficient numbers of attorneys available to provide services to indigent defendants, and a Public Defender Commission member can show that he or she meets the standards established by the PRAC, based on the independent review of the PRAC, the attorney can meet the "unobtainable elsewhere for the same or lower cost" requirement in R.C. 2921.42(C)(2). It must be clear that neither the Public Defender, nor any person reporting to the Public Defender (including the employee who is a member of the PRAC), has participated in the determination that a particular Commission member meets these standards.

The third requirement in R.C. 2921.42(C) is that the treatment the commission member provides to the county is the same as, or better than, the treatment the commission member would provide to any other client. The attorney is, of course, required to provide competent representation by the Ohio Rules of Professional Conduct. See Supreme Court of Ohio Rules of Professional Conduct 1.1.

Finally, R.C. 2921.42(C)(4) requires that the entire transaction is conducted at arm's length, that the county has full knowledge that the public defender commission member is providing legal services to indigent criminal defendants, and that the commission member takes *no part* in the decision of the county with respect to the acquisition of his or her services. See also R.C. 2921.42(A)(1). In an arm's length transaction: (1) both the commission member and the county act voluntarily, without compulsion or duress; (2) the transaction occurs in an open market; and (3) all parties to the transaction 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.



A member of a public defender commission can meet the requirement in R.C. 2921.42(C)(4) if he or she is selected or appointed to represent a criminal defendant by: (a) the defendant; or (b) the judge in the case. The Public Defender Commission has stated that, of the two defense attorneys who serve on the commission, one receives all of his appointments directly from the trial judges.<sup>3</sup>

In order for a county public defender commission member to meet the requirement of R.C. 2921.42(C)(4) where an attorney has not been selected by the defendant or the judge, the appointment of counsel to represent defendants must be made: (1) by a person or persons who have the same level, or a higher level, of authority as the member of the public defender commission; or (2) using a completely neutral methodology that is not dependent on the decisions of individuals who are appointed by, or employees of, the commission. Therefore, a member of the public defender commission can meet the requirement in R.C. 2921.42(C)(4) if he or she is selected to represent a particular defendant by the other members of the commission or by some objective method where cases are assigned to *equally qualified* attorneys in a neutral, rotary assignment system from a list of attorneys who are qualified based on skill, years of practice, and experience. In its Report, the Ohio Public Defender Commission noted this particular methodology as a way to resolve its concerns about professional conflicts of interest under the Rules of Professional Conduct that results from the current system in use in Hamilton County. For more information about the application of the Rules of Professional Conduct that apply to attorneys in Ohio, you may want to contact the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.

Further, in order to meet the R.C. 2921.42(C)(4) requirement that the transaction is at arm's length, where the commission member and county act voluntarily without compulsion or duress, any decisions related to approval of bills or payments to attorneys representing criminal defendants must be made by the commission, without the participation of the commission member who is representing criminal defendants, or by a person or entity at a level equivalent to or above the commission. For example, this requirement can be met if bills and payments are approved by judges or the commission, rather than by any official or employee who is subordinate to the county public defender commission, such as the public defender.

If a county public defender commission member can meet each of the requirements of R.C. 2921.42(C), he or she is not prohibited from receiving compensation for serving as appointed counsel for indigent criminal defendants in the county. However, even if he or she is able to meet the exception, the commission member must also comply with other provisions of the law.

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<sup>3</sup> In your letter dated August 12, 2009, you noted that the NLADA has questioned judicial selections of counsel to represent indigent defendants for reasons outside the Ethics Law and related statutes. The Commission has no authority over the provisions cited by the NLADA and can reach no conclusions about whether judicial selection is an appropriate method for the appointment of counsel for indigent defendants.

**Conflict of Interest Law— R.C. 102.03(D) and (E) and Definitions**

R.C. 102.03(D) and (E) 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 "any person who is elected or appointed to an office or is an employee of any public agency." R.C. 102.01(B). A "public agency" is "the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, or township, the five state retirement systems, or any other governmental entity." R.C. 102.01(C). The restrictions apply regardless of whether the official or employee is serving in a position that is: (1) compensated or uncompensated; (2) full-time or part-time; or (3) temporary or permanent. A member of a county public defender commission is a "public official" subject to the prohibitions of R.C. Chapter 102.

"Anything of value" has "the same meaning as provided in section 1.03 of the Revised Code." R.C. 102.01(G). Payment(s) received for the providing legal services to indigent criminal defendants is within the definition of "anything of value." R.C. 1.03.

A thing of value is "of such a character as to manifest a substantial and improper influence" on a public official or employee if it is "of such a quality, nature or kind that it could have a substantial and improper influence on the public official or employee." Adv. Op. No. 76-005 (emphasis in original).<sup>4</sup> The Commission has explained that it is unnecessary that the thing of value actually has a substantial and improper influence on the official provided that it is of such a character that it could have such influences. *Id.*

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<sup>4</sup> R.C. 102.03(E), the statute under consideration in this opinion, was not enacted until 1986, after Advisory Opinion No. 76-005 was adopted. R.C. 102.03(D) was amended at the same time R.C. 102.03(E) was adopted. However, the phrase "of such a character as to manifest a substantial and improper influence" was not revised in or removed from R.C. 102.03(D), and was used again in R.C. 102.03(E). Further, while the Commission has had the authority to interpret R.C. 2921.42 in advisory opinions since 1976, authority to investigate allegations under that section was not granted until 1986.

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

### **Public Defender Commission Member Participating in Matters Affecting Appointed Counsel**

A county public defender commission appoints the county public defender and may remove him or her for good cause. R.C. 120.14(A)(1). The commission also determines the qualifications and size of the supporting staff and facilities and other requirements needed to maintain and operate the office of the county public defender. R.C. 120.14(B).

In administering the office of the county public defender, the county public defender commission recommends to the county commissioners an annual operating budget which is subject to the review, amendment, and approval of the board of county commissioners and makes reports to the county commissioner. R.C. 120.14(C)(1). The commission also makes an annual report to the county commissioners and the Ohio Public Defender Commission on the operation of the county public defender's office. R.C. 120.14(C)(2). In some counties, the public defender's office and/or the public defender commission may also play an integral role in the administration of the county's appointed counsel system.

The issues created by a 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 a common law conflicts of interest analysis and held that the county commissioner was required to abstain "from any 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."<sup>5</sup> 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.

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<sup>5</sup> In an informal advisory opinion, the Ohio Ethics Commission has concluded that R.C. 2921.42(A)(4) prohibits an elected county commissioner from serving as court appointed criminal defense counsel in the same county unless he or she can meet the exception in R.C. 2921.42(C). Both R.C. 2921.42 provisions are discussed above.

Similarly, R.C. 102.03(D) and (E) would prohibit a county public defender commission member from participating in any matter that would have a definite and direct affect on the compensation of appointed criminal defense counsel, including related budgetary matters. The commission member would also be required to withdraw from all matters before the public defender commission regarding the administration of the county's appointed counsel system, such as the delegation of assignments to appointed counsel, the determination of the qualifications or standards appointed counsel must meet, the consideration of complaints filed against appointed counsel or any resulting disciplinary actions, or any administrative decisions regarding the public defender's office that would definitely and directly affect the appointed counsel system. For example, a member of the county public defender commission who also represented indigent defendants would be prohibited from serving as a member of the PRAC or voting to appoint a particular individual to the PRAC.

A member of a public board, such as county public defender commission, can withdraw from matters before the board, because it is the board itself that is empowered to make decisions.<sup>6</sup> Adv. Op. No. 92-009. However, it is always expected that a public official will perform the tasks assigned to him or her by the public agency where not prohibited by the law. Adv. Op. No. 89-010. Where a public official's ability to exercise his or her public authority is significantly compromised by the official's private concerns, the official will have to make a choice between public service and private activities. Adv. Op. No. 89-010.

### **Other Considerations**

A county public defender commission member who wishes to provide legal services to indigent persons may be subject to additional restrictions outside of the Ethics Law. For example, the Ohio Public Defender Commission establishes rules for the conduct of the offices of the county and joint county public defenders and for the conduct of county appointed counsel systems in the state, including standards of indigency and minimum qualifications of legal appointed counsel, standards for hiring outside counsel, and rules prescribing minimum qualifications of appointed counsel. R.C. 120.03(B).

Additionally, the Ohio Rules of Professional Conduct govern the conduct of attorneys in private and public practice in the Ohio. The Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court, rather than the Ethics Commission, has the statutory authority to render an opinion applying provisions of these rules to a particular situation. A county public defender commission member who wishes to provide legal services to indigent persons may wish to contact the Ohio Public Defender Commission and the Board of Commissioners on Grievances and Discipline for guidance on whether the rules or other of either of these two entities apply to these actions of these attorneys.

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<sup>6</sup> By contrast, an individual office holder who does not serve on a governing board, and in whom decision-making power is vested by statute, cannot withdraw from matters before his or her office in order to seek outside employment unless there is a specific statute that enables his or her withdrawal. Adv. Op. No. 92-009; R.C. 109.04.



**Conclusion**

As explained more fully above, R.C. 2921.42(A)(4) prohibits a member of a county public defender commission from acting as appointed counsel for criminal defendants in the same county unless the member can meet the exception contained in R.C. 2921.42(C). In order to meet the exception, the commission member must demonstrate that the member's unique combination of skills and experience makes him or her the best available representative for criminal defendants. It must also be demonstrated that assignment of the commission member as counsel and approval of payments to the commission member are made either by a person or persons at the same or higher level of authority as the commission member or by a neutral process.

Even if the commission member can meet the exception in R.C. 2921.42(C), and is able to serve as appointed counsel for criminal defendants in the same county, the commission member is prohibited, by 102.03(D) and (E), from taking any action within the scope of his or her authority, to secure appointments, establish rates for counsel, or obtain benefits related to representation that are greater than or unavailable to other attorneys accepting appointments.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 30, 2009. 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