



OHIO ETHICS COMMISSION

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Advisory Opinion Number 93-004
February 12, 1993

Syllabus by the Commission:

(1) This advisory opinion expressly overrules the holding of Advisory Opinion No. 74-007 that a member of a county board of elections is not subject to the prohibition of Division (C) of Section 102.04 of the Revised Code. The holding of Advisory Opinion No. 74-007 that a member of a county board of elections is subject to the prohibition of Division (A) of Section 102.04 of the Revised Code is not overruled and is expressly affirmed;

(2) Division (C) of Section 102.04 of the Revised Code prohibits a member of a county board of elections who is an attorney in private practice from receiving or agreeing to receive, directly or indirectly, compensation for personally rendering services on behalf of clients in any case, proceeding, application, or other matter which is before the county administrator, the county commissioners, or any other governmental entity of the county where he serves, excluding the courts, unless the requirements of Divisions (D) and (E) of Section 102.04 of the Revised Code are met;

(3) Division (C) of Section 102.04 of the Revised Code and Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of a county board of elections who is an attorney in private practice from receiving compensation for personally rendering services on behalf of clients in any matter pending before the county board of elections. Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit him from representing employees of the county board of elections in any matter. Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit him from receiving a distributive share of client fees earned by other attorneys in his law firm for personally rendering services on behalf of clients on matters pending before the board of elections, and from participating in matters pending before the board of elections in which attorneys in his law firm are representing clients;

(4) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of a county board of elections who is an attorney in private practice from using the authority or influence of his office to secure anything of value for himself, his firm, or his clients, and from accepting or soliciting anything of value that is of such character as to manifest a substantial and improper influence upon him with respect to his official duties.

* * * * *

You have asked whether the Ohio Ethics Laws and related statutes prohibit a member of a county board of elections who is an attorney in private practice from representing county employees at grievance and disciplinary hearings before the county administrator and hearing officers appointed by the county commissioners.

In order to address this question, it is necessary to examine Divisions (A) and (C) of R.C. 102.04, which read as follows:

(A) Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, 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 that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts. . . .

(C) 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.

Divisions (A) and (C) of R.C. 102.04 prohibit a public officer or employee from receiving, directly or indirectly, compensation, except from the agency with which he serves, for personally rendering any service in any matter before any agency, department, or instrumentality of the entity of which he is an officer or employee. Division (A) imposes this prohibition on officers and employees of the State; Division (C) imposes the prohibition on officers and employees of local governmental entities. Ohio Ethics Commission Advisory Opinion No. 92-020. See also Advisory Opinion No. 74-001.

Divisions (D) and (E) of Section 102.04 of the Revised Code provide an exception to the prohibitions of R.C. 102.04 (A) and (C) for public employees and persons who are appointed to a non-elective office. As more fully explained below, Divisions (D) and (E) enable public employees and non-elected appointed officers to personally represent clients before agencies other than their own provided that, prior to rendering the personal services, they file a statement describing the services to be rendered and declaring that they will disqualify themselves from participation in any matter involving any official or employee of the agency before which the matter on which they rendered personal services is pending. See Advisory Opinion No. 92-006.

In Advisory Opinion No. 92-006, the Ethics Commission held that a member of a county board of elections is a state officer for purposes of R.C. 102.04 (A), and that R.C. 102.04 (A) prohibits a member of a county board of elections from receiving compensation for personally

rendering lobbying services on behalf of clients in matters which are before the General Assembly, or any other governmental entity of the State, excluding the courts, unless the requirements of Divisions (D) and (E) of Section 102.04 are met. The member of the county board of elections to whom Advisory Opinion No. 92-006 was addressed stated that he would not render services on behalf of clients in matters before agencies of the county where he served as a member of the county board of elections. Since the board member stated that he would not represent clients before agencies of the county where he served, the Commission found it unnecessary to address the issue whether a member of a county board of elections is also appointed to a county office and is thus subject to the prohibition imposed by Division (C). In the instant situation, the member of the county board of elections desires to represent employees of the county where he serves before the county administrator and hearing officers appointed by the county commissioners. Therefore, the issue whether a member of a county board of elections is also appointed to a county office and thus subject to the prohibition imposed by R.C. 102.04 (C) must be addressed.

The members of a county board of elections occupy a unique position in that they are appointed by, and act as the representative of a state officer, the Secretary of State, see R.C. 3501.06, yet the board's jurisdiction is limited to the county, and the board members are directly associated with the county where they serve through a series of significant contacts. See R.C. 309.09 (A) and In re Election of the Council of the Village of Oak Harbor, 57 Ohio Op. 426 (C.P. Ottawa County 1953) (the county prosecuting attorney is the legal adviser of a county board of elections); R.C. 3501.12 (the compensation of members of a county board of elections is paid from the county treasury and based upon the population of the county where they serve); R.C. 3501.17 (the expenses of a county board of elections are paid from the county treasury); R.C. 3501.10 (the board of county commissioners has the power to veto the board of election's choice of office space). See also Advisory Opinion No. 87-002.

In Advisory Opinion No. 92-006, the Commission relied on the holding of Advisory Opinion No. 74-007, and the case law supporting that holding, that a member of a county board of elections is a state officer and that R.C. 102.04 (A) prohibits a member of a county board of elections from representing clients before state agencies. In Advisory Opinion No. 74-007 the Commission addressed the issue whether a member of a county board of elections is prohibited from receiving compensation for services personally rendered by him in matters before governmental entities. The Commission held that, due to the statutory connections between the Secretary of State's Office and county boards of elections, a member of a county board of elections is a state officer and thus subject to R.C. 102.04 (A).

In Advisory Opinion No. 74-007, the Commission also examined the statutory connections between members of a county board of elections and the county in which they serve, relating to payment of the board member's compensation and expenses, and held that these connections do not establish "that county boards of elections are county rather than state offices" or "create the autonomy needed to make them county rather than state officers." Advisory Opinion No. 74-007 (emphasis added). The Commission determined in Advisory Opinion No. 74-007 that the prohibition imposed by what is now R.C. 102.04 (C) does not apply to a member of a county board of elections. It was further determined in Advisory Opinion No. 74-007 that a member of a county board of elections, as a state officer, is not prohibited from being

compensated as an employee of an office or agency of county government provided that in such position he does not receive compensation for representing clients before state agencies. The Commission held, "[a]s a state officer, there is no similar prohibition which applies to him at the county level." Id. (Emphasis in original.)

It is apparent from the manner in which the issue was addressed in Advisory Opinion No. 74-007 that the Commission approached the issue with a presupposition that, for purposes of R.C. 102.04, a member of a county board of elections must be either a state officer or a county officer. The possibility was not considered that, at least for purposes of R.C. 102.04, members of county boards of elections could be deemed both state and county officers due to their unique position.

In the nineteen years since the Ethics Commission rendered Advisory Opinion No. 74-007, R.C. 102.04 has been amended and R.C. 2921.42 has been added to the Commission's jurisdiction. In light of these statutory changes, some of the holdings of Advisory Opinion No. 74-007 must be re-examined. For example, the holding in Advisory Opinion No. 74-007 that R.C. 102.04 (A) prohibits a member of a county board of elections from representing clients before state agencies is not incorrect. However, as explained above, R.C. 102.04 (D) now provides an exception to the prohibition of R.C. 102.04 (A) for public employees and non-elected appointed officers, and enables them to personally represent clients before state agencies other than their own provided that they meet the requirements of Divisions (D) and (E). No such exception existed at the time Advisory Opinion No. 74-007 was rendered. (It is interesting to note that R.C. 102.04 did not contain an exception at the time Advisory Opinion No. 74-007 was issued, and thus imposed very strict limitations upon the ability of a public officer or employee to represent clients before governmental entities.)

Also, the holding in Advisory Opinion No. 74-007 that **R.C. 102.04** does not prohibit a member of a county board of elections from being compensated as an employee of an office or agency of county government if he does not receive compensation for representing clients before state agencies is not incorrect, regardless of whether Division (C), as well as Division (A), applies to a member of the board of elections. See Advisory Opinion No. 92-020. However, the Ethics Commission has since held that **R.C. 2921.42 (A)(4)**, which forbids a public official from having an interest in a public contract entered into by or for the use of the political subdivision with which he is "connected," prohibits a member of a county board of elections from contracting to provide goods or services to the county where he serves. Advisory Opinion No. 87-002. In reaching this conclusion, Advisory Opinion No. 87-002 examines the many "connections" between the county board of elections and the county. It is unnecessary to fully discuss in this opinion the prohibitions imposed by R.C. 2921.42 (A)(4) on a member of a county board of elections since, in the instant situation, the member of the board of elections does not wish to sell goods or services to the county where he serves. However, due to the "connection" between a member of a county board of elections and the county where he serves, R.C. 2921.42 (A)(4) prohibits a member of a county board of elections from contracting with the county where he serves to provide goods or services, including being compensated as an employee of an office or agency of county government. See Advisory Opinion No. 87-002. See also Advisory Opinions No. 91-002 and 92-020.

In light of the statutory developments discussed above, the issue of whether a member of a county board of elections is a county as well as a state officer for purposes of R.C. 102.04 must be re-examined.

Advisory Opinion No. 74-007 relied in part on the Ohio Supreme Court's decision in State ex rel. The Columbus Blank Book Manufacturing Company v. Ayres, 142 Ohio St. 216 (1943), which holds that members of a county board of elections are state rather than county officers. On page four of Advisory Opinion No. 74-007 Ayres is quoted: "members of the boards of elections act under the direct control [of] and are answerable only to the Secretary of State in his capacity as chief election officer of the state. They perform no county functions and are not county officers." However, a careful reading of Ayres, discloses that the specific issue addressed by the Court was extremely narrow. In that case, the county auditor refused to issue a warrant upon the treasurer of the county for payment to a company for materials which the county board of elections had ordered. The issue addressed was whether a county board of elections was subject to General Code Section 5625-33 (analogous to R.C. 5705.41) which prohibited a subdivision or taxing unit from making a contract involving the expenditure of money unless the subdivision's fiscal officer certified that the amount required to meet the expenditure had been lawfully appropriated and in the treasury or in the process of collection. The auditor argued that since the expenditures of the county board of elections were paid from the county treasury, the county board of elections were county officers for purposes of General Code Section 5625-33.

The Court declined to hold that members of the county board of elections were subject to the provisions of General Code Section 5625-33. The Court held that under the Ohio Constitution, all matters pertaining to the conduct of elections, including contracts for supplies necessary to conduct elections, are state, not county functions, and thus reasoned that to hold that the members of the boards of elections are county officers subject to the requirements of General Code Section 5625-33, "would in effect place in the hands of county officers the power to set at naught the mandatory provisions of Section 2, Article X and Section 1, Article XVII of the Constitution as to the holding of elections. Such a conclusion would do violence to manifest intent as well as the plain language of the Constitution." The Court thus determined that members of county boards of elections are state rather than county officers in light of the above Constitutional provisions; to hold that members of county boards of elections are county officers would have necessitated a finding that General Code Section 5625-33 was unconstitutional.

The issue whether members of a county board of elections are county officers for purposes of R.C. 102.04 (C) is an entirely different matter from that addressed in State ex rel. The Columbus Blank Book Manufacturing Company v. Ayres. In the instant situation, the issue does not involve any matter pertaining to the conduct of elections or the functioning of a county board of elections as established by statute and deemed by the Constitution to be state functions. Instead, the issue involves the personal conduct of a member of a county board of elections in his pursuit of private outside business activity.

R.C. 102.04 is part of Chapter 102., the Ohio Ethics Law, which establishes a standard of conduct for all public officers and employees within the State and prohibits them from using their official position to benefit their private interests or the interests of others with whom they hold certain business or personal relationships. See generally Advisory Opinion No. 89-014. The

Ohio Supreme Court has held that statutes "must be construed in light of the mischief they are designed to combat." City of Mentor v. Giordano, 9 Ohio St. 2d 140, 144 (1967). In Advisory Opinion No. 74-001, the Ethics Commission explained that the legislative intent of R.C. 102.04 is to prohibit abuse within the same level of government, "Section 102.04 (A) comprehends the possibility of abuse within the state level. Section 102.04 (B) [now Division (C)] is directed to abuse which may arise on the level of county government . . ." (emphasis in original). Thus, in determining whether R.C. 102.04 (C) imposes restrictions upon a member of a county board of elections who is an attorney in private practice and desires to represent clients before county agencies, it is necessary to recognize the significant contacts and connections between members of a county board of elections and the county where they serve.

In Advisory Opinion No. 87-002 the Commission based its determination that a member of a county board of elections is "connected" with the county where he serves for purposes of R.C. 2921.42 on the following factors: (1) a board of elections exercises its jurisdiction and duties on a county-wide basis; (2) the Secretary of State is compelled to appoint the nominee of the county executive committee of the political party entitled to the appointment, unless he believes the nominee would not be competent to serve; (3) the members of a county board of elections receive compensation which is determined by the population of the county where they serve; (4) the board of county commissioners pays the board member's compensation and the board's expenses from the county treasury; and (5) the board of county commissioners has the power to veto the actions of the board of elections in choosing suitable office space. In addition, it should be noted that the county prosecutor is the legal advisor of a county board of elections. See R.C. 309.09 (A) ("[t]he prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards"; In re Election of the Council of the Village of Oak Harbor, 57 Ohio Op. 426 (C.P. Ottawa County 1953) (nothing in R.C. 3501.05, which enumerates the powers of the Secretary of State over a county board of elections, derogates from the county prosecutor's power and duty to provide legal advice to a county board of elections). Furthermore, the Attorney General has held that board of elections personnel are "employed in offices of the county service" for purposes of the provisions of R.C. 124.38 and 124.39 (B) which relate to sick leave benefits, stating that "even though the employees of the boards of elections perform functions established by State law, there is no other legal or factual basis for distinguishing them from other county employees." Ohio Op. Att'y Gen. No. 81-015. See also Ohio Op. Att'y Gen. No. 88-091.

Thus, it is apparent that the General Assembly **has** established a number of significant contacts and connections and legal relationships between a county board of elections and the county in which they serve. The board's jurisdiction is limited to the county and the county is required to finance the operations of a county board of elections, including the compensation of the members of the board of elections and the board's employees. Also, a degree of authority has been placed in the hands of county officers over the activity of a county board of elections; a county prosecutor has the duty to provide legal advice to a county board of elections and the board of county commissioners may veto the actions of the board of elections in choosing office space. Therefore, to espouse that the holding of State ex rel. The Columbus Blank Book Manufacturing Company v. Ayres stands for the proposition that members of a county board of elections are not county officers for **all** provisions of the Revised Code sweeps too broadly. In fact, the Ohio Supreme Court in State v. Brennan, 49 Ohio St. 33 (1892) states on pages 38-39:

[I]t is safely within bounds to say that where, by virtue of law, a person is clothed, . . . with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office. And where such duties are wholly performed within the limits of a county, and for the people of that county, the salary to be paid by the disbursing officer of the county, from the funds of the county, the office is a county office, and, as one who is lawfully invested with an office is an officer, the person lawfully filling such place is necessarily a county officer.

It is apparent that the potential for abuse of authority by a member of a county board of elections is present on the county, as well as the state, level. Therefore, in light of the legislative intent of R.C. 102.04 to prevent abuse on the same level of government, the statutory changes since 1974, and because of statutory indicia that members of county boards of elections hold office on the county level, the Ethics Commission holds that a member of a county board of elections is a county, as well as a state officer for purposes of R.C. 102.04, and subject to the restrictions imposed by both Divisions (A) and (C). Accordingly, this advisory opinion expressly overrules the holding of Advisory Opinion No. 74-007 that a member of a county board of elections is not subject to the prohibition of R.C. 102.04 (C). The task becomes to determine the effect of this prohibition in the instant situation.

In Advisory Opinion No. 89-016 the Commission held that R.C. 102.04 (C) prohibits an attorney who serves on a public body from receiving or agreeing to receive, directly or indirectly, compensation for personally rendering services on behalf of clients in any case, proceeding, application, or other matter which is before any governmental entity of the political subdivision which he serves, excluding the courts, unless he can meet the exception provided by Division (D).

In the instant situation, for purposes of the prohibition of 102.04 (C), an attorney's representation of county employees at grievance and disciplinary hearings before the county administrator and hearing officers appointed by the county commissioners consists of "rendering services" on "matters" that are "before" an agency, department, board, bureau, commission, or other instrumentality of the county. See generally Advisory Opinions No. 75-018, 89-016 and 92-006. A member of a county board of elections is paid by the county on a monthly basis for his services. See R.C. 3501.12. Therefore, R.C. 102.04 (C) prohibits a member of a county board of elections who is an attorney in private practice from receiving "compensation," including retainers, fees, financial benefits, or other things of value, see R.C. 102.01 (A), directly or indirectly, other than as provided by R.C. 3501.12, for personally representing or rendering any service on behalf of clients, on any case, proceeding, application, or other matter pending before any agency, department, board, bureau, commission, or other instrumentality of the county with which he serves, excluding the courts.

However, as explained above, Division (D) of Section 102.04 of the Revised Code provides an exception to the prohibition of R.C. 102.04 (C) for public employees and persons who are appointed to a non-elective office. The Commission explained in Advisory Opinion No. 92-006:

In order to meet the exception provided by R.C. 102.04 (D) two conditions must be met: (1) the representation provided by the official or employee must be before a public agency other than his own; and (2) prior to rendering the personal services the official or employee must file a 102.04 (D) Statement which describes the personal services to be rendered and other information. The public official or employee must file the 102.04 (D) Statement with: (1) the Ohio Ethics Commission; (2) his own agency; and (3) the agency before which he will be rendering personal services. The public official or employee must declare on the 102.04 (D) Statement that he will disqualify himself for a period of two years from the date the statement is filed from participation as a public official or employee in any matter involving any public official or employee of the agency before which the matter is pending. Division (E) of Section 102.04 emphasizes that a public official or employee who files, or is required to file a 102.04 (D) Statement, must disqualify himself from any participation as a public official or employee in any matter involving any official or employee of the agency before which the matter on which he rendered personal services was pending.

In the instant situation, the member of the board of elections is capable of meeting the exception to the prohibition of R.C. 102.04 (C) which is provided by R.C. 102.04 (D), since: (1) he is appointed to a non-elective office; and (2) the matters for which he will render services on behalf of clients will be pending before county agencies other than the county board of elections. See Advisory Opinion No. 92-006 (describing the ability of a member of a county board of elections to meet the exception to the prohibition of R.C. 102.04 (A)).

Therefore, a member of a county board of elections who is an attorney in private practice may receive, or agree to receive, compensation from clients of his law firm for personally representing them on matters which are before the county administrator, hearing examiners appointed by the board of county commissioners, or any other governmental entity of the county where he serves, except for the county board of elections, provided that prior to rendering services on behalf of clients, he complies with the requirements of Divisions (D) and (E) of Section 102.04 by filing the appropriate statements. For example, if he receives compensation for personally rendering services on behalf of a client on a matter pending before the board of county commissioners, then he must file, prior to rendering the personal services, 102.04 (D) Statements with: (1) the Ohio Ethics Commission; (2) the county board of commissioners; and (3) the county board of elections, prior to rendering the services. He must disqualify himself for a period of two years from the date he files his 102.04 (D) Statement, from any participation, as a member of the county board of elections, on any matter involving any public official or employee of the board of county commissioners. Under no circumstances may a member of a county board of elections represent clients before the county board of elections. See Advisory Opinion No. 89-016. There is no exception to this prohibition. Id. See also R.C. 102.03 (D) and (E), described below.

You have also asked whether the prohibition imposed by R.C. 102.04 (C) affects attorneys of the board member's law firm.

The Ethics Commission has explained that the prohibition of R.C. 102.04 applies only to services rendered "personally" by the public officer or employee. See Advisory Opinions No. 74-

009, 75-025, and 92-006. Accordingly, the Commission has determined that R.C. 102.04 prohibits an officer or employee from receiving compensation from a client for rendering services himself; however, R.C. 102.04 prohibits neither the firm of a county officer or employee from representing clients before county agencies, nor a county officer or employee from receiving compensation in the form of a distributive share of profits from his firm, provided that some other person personally renders the services. See Advisory Opinions No. 74-009, 75-025, 77-001, 86-004, and 92-006. But see Advisory Opinion No. 75-025 (R.C. 102.04 in some circumstances could prohibit an affected person from personally engaging in behind-the-scenes consultations with a business partner who would then render services personally on behalf of clients on matters before state agencies).

A member of a county board of elections is not prohibited by **R.C. 102.04** from receiving a distributive share of clients fees earned by attorneys in his law firm for representing clients before county agencies, and the board member is not required to file R.C. 102.04 (D) Statements when attorneys in his law firm represent clients before the county. However, a member of a county board of elections is prohibited by statutes other than R.C. 102.04 from receiving a distributive share of profits from services rendered by attorneys in his law firm on matters pending before the board of elections or before another county office if there would be a conflict of interest under the specific facts and circumstances, and is prohibited from participating in matters pending before the board of elections in which attorneys in his law firm are representing clients. See R.C. 102.03 (D) and (E), discussed below, and Advisory Opinions No. 89-016, 90-008 and 92-006. See also Advisory Opinion No. 89-010 (explaining the interaction between the prohibitions imposed by R.C. 102.04 and 102.03 (D) and (E)).

The representation of clients who are county employees by the member of the board of elections or his law firm also implicates other statutes under the Ethics Commission's jurisdiction, specifically 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 his 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 him with respect to his 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 him with respect to his duties.

The term "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, or who is employed by, any department or board of the state or county. See R.C. 102.01 (B) and (C). A member of a county board of elections is a "public official or employee" for purposes of R.C. 102.03 (D) and (E). See Advisory Opinions No. 75-001 and 92-006. See also Advisory Opinion No 87-002.

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. See R.C. 102.01 (G). Fees received from clients

are within the definition of "anything of value" for purposes of R.C. 102.03 (D). See Advisory Opinions No. 89-016, 90-003, and 92-006.

R.C. 102.03 (D) and (E) prohibit a public official or employee from accepting, soliciting, or using his position to secure, anything of value, where the thing of value could impair his objectivity and independence of judgment with regard to his official decisions and responsibilities. See Advisory Opinions No. 77-006, 85-006, 87-006, 88-002, 89-006, 89-010, 90-002, and 92-006. The Commission has held that R.C. 102.03 (D) and (E) prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his office or employment to secure anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the agency with which he serves. See Advisory Opinions No. 79-002, 79-006, 84-009, 84-010, 86-011, 87-006, 87-009, 88-002, 89-010, 89-016, and 92-006.

As stated above, the member of the county board of elections desires to personally represent county employees before the county administrator and hearing examiners appointed by the county commissioners. The Ethics Commission has stated that a public official is not prohibited from representing a client of his private practice provided there is no conflict of interest and so long as the other provisions of the Ethics Law, such as R.C. 102.04, are met. See Advisory Opinion No. 92-006. See also Advisory Opinion No. 89-010 (explaining the interaction between the prohibitions imposed by R.C. 102.04 and 102.03 (D) and (E)). However, the Ethics Law and related statutes impose restrictions upon a public official or employee where such activity could impair his independence of judgment and objectivity with regard to his official decisions and responsibilities.

For example, in Advisory Opinion No. 89-016, the Ethics Commission held that R.C. 102.03 (D) and (E) prohibit a public official who is an attorney in private practice from participating in a matter pending before his commission where a member of his firm is representing a client before the official's commission on that matter, and from receiving a distributive share of fees paid by the client for services rendered on that matter, regardless of whether the official has complied with R.C. 102.04. See also Advisory Opinions No. 82-002, 84-008, 90-008, and 92-006.

In the instant situation, R.C. 102.03 (D) and (E), as well as R.C. 102.04, prohibit a member of a county board of elections who is an attorney in private practice from receiving compensation for personally representing clients before the county board of elections and the Office of the Secretary of State. R.C. 102.03 (D) and (E) prohibit him from receiving a distributive share of fees earned by an attorney of his law firm for rendering services on a matter before the county board of elections or the Office of the Secretary of State. In addition, R.C. 102.03 (D) would prohibit the board member from participating in matters before the board of elections on which an attorney in his law firm is representing a client. He is also prohibited from receiving a share of fees earned by another attorney on other matters if there would be a conflict of interest under the specific facts and circumstances. For example the member of the board of elections is prohibited from receiving a share of fees earned by an attorney in his law firm on a matter pending before another public agency where the client also has a matter pending before the board of elections.

Also, R.C. 102.03 (D) and (E) would prohibit the member of the board of elections from representing county employees, or receiving a share of fees from attorneys in his law firm representing county employees, before or against county elected officers who have matters pending before the county board of elections since the receipt of client fees in such situations could impair the board member's objectivity and independence of judgment in matters affecting the elected county officers who would make decisions regarding his or his law firms' clients or who would be in an adversarial position to his or his firm's clients. See also R.C. 102.04 (E). Furthermore, R.C. 102.03 (D) would prohibit him from representing employees of the board of elections as clients on any matter since the board of elections has the power to appoint, remove, and compensate board employees, and the receipt of client fees from board employees could impair the board member's objectivity and independence of judgment in matters affecting the employees of the board of elections. See generally R.C. 3501.11, 3501.14, and 3501.141.

R.C. 102.03 (D) and (E) prohibit a public official from performing his official duties, or using his official authority or influence, in any manner, to secure an economic advantage for himself or his business partners and clients. See Advisory Opinions No. 84-012, 84-013, 85-014, 90-003, and 92-006. The member of the board of elections is prohibited from using his authority or influence as a board member to secure clients, or to accept or solicit anything of an improper character. In Advisory Opinion No. 92-006, the Ethics Commission advised a member of a county board of elections:

In conducting any private business activity, you are prohibited from: (1) using your official position, or your authority or influence with other officials or employees of the Secretary of State's Office and the county board of elections, to secure any benefit for your firm or clients, or favorable decisions in matters affecting your business interests or the interests of your clients; (2) participating in any matter before the Secretary of State's Office or the county board of elections that involves your business interests or your client's interests, or recommending, as a member of the county board of elections, that your private business be patronized; (3) using public time, facilities, or resources to operate a private business; (4) using the title of your position in soliciting business or in advertising, marketing, or operating a private business; (5) receiving outside compensation for services or projects which you have recommended in your official capacity; or (6) refraining from performing your official duties, or otherwise performing your official duties, in order to secure patronage for a private business; (7) accepting as a client any party who has an interest in any matter in which you are participating as a member of the county board of elections; and (8) accepting, soliciting, or using your official position to secure client fees from parties who are doing business or seeking to do business with, regulated by, or interested in matters before the Secretary of State's Office or the county board of elections. See Advisory Opinions No. 84-012, 84-013, 85-013, 85-014, 89-004, 89-006, and 90-002. Furthermore, R.C. 102.03 (D) and (E) prohibit you from receiving compensation from your business or business clients for rendering services which are your duty to perform or provide as a member of a county board of elections. This conduct is also prohibited by R.C. 2921.42 (A)(3), which prohibits a public servant from accepting any compensation, other than provided by law to perform his official duties. See Advisory Opinion No. 89-012.

As a final matter, R.C. 102.03 (B) prohibits a member of a county board of elections who is an attorney in private practice from disclosing confidential information to his clients, the attorneys in his law firm, or to anyone else, or using such confidential information, without appropriate authorization. No time limitation exists for this prohibition which is in effect while he serves and after leaving the board of elections. See Advisory Opinion No. 90-007.

The holding that a member of a county board of elections is subject to Division (C) of Section 102.04 of the Revised Code, in addition to Division (A), does not work an unduly harsh result upon members of county boards of elections who wish to represent clients before public agencies within their own counties. As explained above, a board member is not prohibited from engaging in such representation, provided that he meets the requirements of Divisions (D) and (E) which protect against abuse by requiring disclosure and abstention from certain matters. Also, a board member would be prohibited by R.C. 102.03 (D) and (E) from representing clients before the board of elections even if R.C. 102.04 (C) were inapplicable.

The questions addressed in this advisory opinion may also raise issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. These issues are not within the Ethics Commission's jurisdiction, but should be referred to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court and perhaps the local bar association.

This advisory 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.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) This advisory opinion expressly overrules the holding of Advisory Opinion No. 74-007 that a member of a county board of elections is not subject to the prohibition of Division (C) of Section 102.04 of the Revised Code. The holding of Advisory Opinion No. 74-007 that a member of a county board of elections is subject to the prohibition of Division (A) of Section 102.04 of the Revised Code is not overruled and is expressly affirmed; (2) Division (C) of Section 102.04 of the Revised Code prohibits a member of a county board of elections who is an attorney in private practice from receiving or agreeing to receive, directly or indirectly, compensation for personally rendering services on behalf of clients in any case, proceeding, application, or other matter which is before the county administrator, the county commissioners, or any other governmental entity of the county where he serves, excluding the courts, unless the requirements of Divisions (D) and (E) of Section 102.04 of the Revised Code are met; (3) Division (C) of Section 102.04 of the Revised Code and Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of a county board of elections who is an attorney in private practice from receiving compensation for personally rendering services on behalf of clients in any matter pending before the county board of elections. Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit him from representing employees of the county board of elections in any matter. Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit him from receiving a distributive share of client fees earned by other attorneys in his law firm for personally rendering services on behalf of clients on matters pending before the board of elections, and from participating in matters pending before the board of elections in which attorneys in his law firm

are representing clients; and (4) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of a county board of elections who is an attorney in private practice from using the authority or influence of his office to secure anything of value for himself, his firm, or his clients, and from accepting or soliciting anything of value that is of such character as to manifest a substantial and improper influence upon him with respect to his official duties.


DE/ JACK PAUL DESARIO, Chair
OHIO Ethics Commission