



**OHIO ETHICS COMMISSION**

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February 18, 1994

Informal Opinion 1994-INF-0218-1

J. Michael Westfall  
Office of the Public Defender  
Athens County Branch

Dear Mr. Westfall:

In your letter to the Ethics Commission you have asked whether the prohibitions which the Ohio Ethics Laws and related statutes impose upon a member of the Ohio Public Defender Commission preclude the Ohio Public Defender from contracting with an attorney to provide legal representation for indigent criminal defendants if the attorney is a law partner of a member of the Ohio Public Defender Commission.

By way of history, you state a series of facts necessary to answering your question. The Ohio Public Defender has recently contracted with the Board of Commissioners of Jackson County to provide legal representation for indigent criminal defendants in that county as part of the Ohio Public Defender MultiCounty Branch Office. The Ohio Public Defender intends to contract with three attorneys who practice in Jackson County to provide legal representation for indigent criminal defendants. One of these three attorneys has expressed an intent to become a law partner with a member of the Ohio Public Defender Commission.

You further state that if the attorney and the member of the Ohio Public Defender Commission become law partners, the Ohio Public Defender will contract exclusively with the attorney, not the legal partnership. The contract between the Ohio Public Defender and the attorney will be under the attorney's social security number, not the law firm's tax identification number. There will be no co-mingling of funds and the attorney's caseload will remain separate and apart from any partnership business. The member of the Public Defender Commission who contemplates becoming a law partner with the attorney will abstain from matters that concern the MultiCounty program.

Based upon the facts which you have presented, the Ohio Ethics Law and related statutes do not preclude the Ohio Public Defender from contracting with an attorney to provide legal representation for indigent criminal defendants if the attorney is a law partner of a member of the Ohio Public Defender Commission. However, as explained below, the member of the Ohio Public Defender Commission is prohibited from deriving a financial benefit from the contract and from authorizing, or using the authority or influence of his office, in any manner, to secure, the contract.

The Ohio Public Defender Commission is a statutorily created State commission charged with the duty of providing, supervising, and

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coordinating legal representation at State expense for indigent and other persons. See R.C. 120.01. The Ohio Public Defender Commission consists of nine members; a statutorily determined number of the nine members are required to be attorneys admitted to the practice of law in Ohio. Id. The Ohio Public Defender Commission appoints the State Public Defender who serves at the pleasure of the Ohio Public Defender Commission. See R.C. 120.03 (A). The State Public Defender must be an attorney admitted to the practice of law in Ohio with a minimum of four years experience in the practice of law and be admitted to the practice of law in Ohio at least one year prior to his appointment. See R.C. 120.04.

The State Public Defender is statutorily empowered to contract with a board of county commissioners of a county which is not served by a county public defender commission or a joint county public defender commission for the provision of legal representation of indigent persons. See R.C. 120.04 (C)(7) and R.C. 120.33 (B). Whenever the State Public Defender contracts with a board of county commissioners to provide legal representation for indigent persons, the state public defender provides legal representation in accordance with the contract. See R.C. 120.06 (A)(6). It is apparent from a review of these statutes that the authority to enter into contracts with a board of county commissioners and to provide legal representation of indigent persons in accordance with the contract resides in the individual whom the Ohio Public Defender Commission has appointed to serve as the State Public Defender, not the Ohio Public Defender Commission.

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 he is connected;

R.C. 2921.01 (A) defines the term "public official" for purposes of R.C. 2921.42 to include an elected or appointed officer, employee, or agent of the state or any political subdivision. A member of the Ohio Public Defender Commission is a "public official" for purposes of R.C. 2921.42 and is subject to the provisions therein.

R.C. 2921.42 (F)(1) defines the term "public contract" for purposes of R.C. 2921.42 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. The Ethics Commission has stated that the provision of legal services, or a contract to provide legal services, for the state or a political subdivision is a public contract for purposes of R.C. 2921.42. See Ohio Ethics Commission Advisory Ops. No. 78-001, 83-002, 84-002, 86-004, 88-007, 90-007, and 92-003. Thus, the contemplated contract

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between the State Public Defender and the three Jackson County attorneys for the provision of legal representation for indigent persons is a "public contract" for purposes of R.C. 2921.42.

An "interest" which is prohibited under R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. See Advisory Op. No. 81-008. An individual who receives payment for services provided pursuant to a public contract has a definite and direct pecuniary interest in the public contract. See Advisory Ops. No. 83-002 and 90-003. Also, a partner in a law firm who receives a distributive share of partnership profits has an interest in the contracts of the firm, even where he does not personally render the legal services. See Advisory Ops. No. 78-001, 86-004, 89-004, and 90-007.

As set forth above, you state that the contemplated contract for the legal representation of indigent persons will be between the State Public Defender and the individual attorney, not the legal partnership. Thus, for purposes of R.C. 2921.42, an attorney who enters into a contact with the State Public Defender to provide legal representation of indigent persons has a definite and direct interest in a "public contract." However, for purposes of R.C. 2921.42 (A)(4), the member of the Ohio Public Defender's Commission will not have an interest in a public contract between the State Public Defender and an attorney with which he has entered into a legal partnership, provided that, as you have described: (1) the State Public Defender contracts exclusively with the attorney, not the law partnership; (2) the payments made under the contract use the attorney's social security number, not the law firm's tax identification number; (3) the funds received by the attorney from the State Public Defender are not co-mingled with those of the partnership or used to pay partnership expenses; and (4) the cases assigned to the attorney from the State Public Defender remain separate and apart from any partnership business. See also R.C. 102.03 (E), described below.

Your attention is also directed to R.C. 2921.42 (A)(1) which provides that no public official shall knowingly:

Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

The pertinent elements of this provision are: (1) a public official; (2) is prohibited from authorizing, or employing the authority or influence of his office to secure authorization; (3) of any public contract; (4) in which he, a member of his family, or any of his business associates; (5) has an interest. See Advisory Ops. No. 78-002, 85-015, and 92-008, respectively.

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R.C. 2921.42 does not define the term "business associates" but the Ethics Commission has held that a business association is created whenever persons join together to pursue a common business purpose. See Advisory Op. No. 86-002 (setting out the standard for determining the existence of a business association for purposes of R.C. 2921.42). See also Advisory Op. No. 92-003. The Ethics Commission has held that law partners are business associates for purposes of R.C. 2921.42. See Advisory Ops. No. 79-001, 90-007, and 92-003.

R.C. 2921.42 (A)(1) prohibits a public official from "authorizing" the employment of a business associate, or employing the "authority or influence of his office" to secure authorization of the employment of a business associate. A public official will be deemed to have "authorized" a contract for public employment for purposes of R.C. 2921.42 where the employment could not have been awarded without the approval of the official. See Advisory Ops. No. 87-004, 88-008, 90-010, 91-007, 92-008, and 92-012. Accordingly, R.C. 2921.42 (A)(1) prohibits a public official from authorizing, or discussing, deliberating, recommending, formally or informally lobbying, or otherwise using the authority or influence of his position to secure authorization of a public contract for a business associate. See Advisory Op. No. 92-003.

In the instant situation, as explained above, it is the State Public Defender, not the Ohio Public Defender Commission, which will enter into a public contract with the attorneys who will provide the legal representation for indigent persons. Therefore, as long as there is no participation by the member of the Ohio Public Defender Commission in the proposed contract, this prohibition of R.C. 2921.42 (A)(1) is not applicable in the instant situation.

It must be noted that R.C. 2921.42 (A)(1) also prohibits a public official from employing the "authority or influence of his office" to secure authorization of any public contract in which a business associate has an interest. The words "authority or influence" are not defined for purposes of R.C. 2921.42. A primary rule of statutory construction requires that words used in a statute which are not defined must be construed according to rules of grammar and common usage. See R.C. 1.42. The word "authority" is defined in Webster's New World Dictionary of the American Language as "power or influence resulting from knowledge, prestige, etc." Webster's New World Dictionary of the American Language 94 (2d College ed. 1970). The word "influence" is defined as "the power of persons . . . to affect others, seen only in its effects" and "the ability of a person . . . to produce effects indirectly by means of power based on . . . high position." Webster's New World Dictionary of the American Language 722 (2d College ed. 1970).

The General Assembly's use of the words "authority or influence" in R.C. 2921.42 (A)(1) specifically characterize a broader range of activity than that described by the word "authorize." See Dougherty

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v. Torrence, 2 Ohio St. 3d 69, 70 (1982) (effect must be given to words used in a statute); Dungan v. Kline, 81 Ohio St. 371, 380-81 (the presumption is that every word in a statute is designed to have effect); Advisory Op. No. 74-001 ("it is to be assumed that the Legislature used the language contained in a statute advisedly and intelligently and expressed its intent by the use of the words found in the statute").

Therefore, the prohibition which R.C. 2921.42 (A)(1) imposes against a public official employing the "authority or influence of his office" to secure a public contract in which a business associate bars the member of the Ohio Public Defender Commission from exercising the power and influence inherent in his position over the State Public Defender to affect the State Public Defender in his decision to contract with an attorney for the provision of legal representation for indigent persons if the attorney is a law partner of a member of the Ohio Public Defender's Commission. This prohibition includes, but is not limited to, discussing, recommending, or otherwise using the authority or influence of his position as a member of the Ohio Public Defender Commission, either formally or informally, in order to persuade the State Public Defender to utilize the services of an attorney is a law partner of a member of the Ohio Public Defender's Commission.

In addition, the Ethics Commission has held that the prohibition of R.C. 2921.42 (A)(1) extends beyond the initial creation of a public contract and prohibits a public official from participating in any matter or decision which would affect the continuation, implementation, or terms and conditions of a public contract in which a business associate has an interest. See generally Advisory Ops. No. 82-003, 89-005, and 92-012 (addressing the prohibition imposed by R.C. 2921.42 (A)(1) in situations where a public official's family member is employed by the official's political subdivision). These matters and decisions include, but are not limited to, the authorization or approval of payments to the business associate for services rendered, and the renewal, modification, termination, or renegotiation of the public contract in which a business associate has an interest. See generally Advisory Op. No. 92-012.

Therefore, R.C. 2921.42 (A)(1) prohibits the member of the Ohio Public Defender Commission from discussing, recommending, or otherwise using the authority or influence of his position as a member of the Ohio Public Defender Commission, either formally or informally, in any matter which would affect the terms and conditions of the contract between the State Public Defender and an attorney who is his law partner.

Your attention is further directed to 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 employed by any institution of the State. See R.C. 102.01 (B) and (C) and R.C. 3362.03. A member of the Ohio Public Defender Commission is a public official or employee and subject to R.C. 102.03 (D) and (E).

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). A definite pecuniary benefit to a person or his business is considered to be a thing of value under R.C. 102.03 (D) and (E). See Advisory Ops. No. 79-008, 80-003, 85-006, 85-011 and 86-007. The payment of fees for legal services falls within the definition of "anything of value" for purposes of R.C. 102.03 (D). See Advisory Ops. No. 86-004, 89-015, 90-007, 90-008, and 92-003.

The Ethics Commission has held that R.C. 102.03 (D) and (E) do not prohibit a public official or employee from engaging in private business activity so long as no conflict of interest exists between the public official's or employee's public position and private financial interests. See Advisory Ops. No. 84-009, 85-006, 86-007, 86-008, 87-006, 89-010, and 90-002. See also Advisory Op No. 93-001. However, R.C. 102.03 (D) prohibits a public official or employee from using the authority or influence of his office or employment to secure, anything of value where the thing of value could impair his objectivity and independence of judgment with respect to his official actions and decisions for the agency with which he serves or is employed. See Advisory Ops. No. 79-002, 80-004, 84-009, 84-010, 87-006, 87-009, 89-006, 90-012, and 92-008.

The Ethics Commission has held that, generally, for purposes of the prohibition imposed by R.C. 102.03 (D), a matter which affects the personal financial interests of the public official or employee, or of his business associates, is such that the official's or employee's objectivity and independence of judgment could be impaired. See Advisory Op. No. 88-004. See also Advisory Ops. No. 89-005, 90-008, and 92-008. Therefore, R.C. 102.03 (D), as well as R.C. 2921.42 (A) (1), prohibits the member of the Ohio Public Defender Commission from discussing, recommending, or otherwise using the authority or influence of his position as a member of the Ohio Public

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Defender Commission, either formally or informally, in any matter which would affect the terms and conditions of the contract between the State Public Defender and an attorney who is his law partner.

Also, R.C. 102.03 (E) prohibits a public official from accepting or soliciting anything of value which could manifest a substantial and improper influence upon a him with respect to his duties. Thus, R.C. 102.03 (E), as well as R.C. 2921.42 (A)(4), prohibits the member of the Ohio Public Defender Commission from receiving any benefit from the funds received by the attorney from the State Public Defender for the provision of legal representation for indigent criminal defendants in that county as part of the Ohio Public Defender MultiCounty Branch Office. See also R.C. 2921.42 (A)(4), described above.

As set forth above, you state that the member of the Public Defender Commission who contemplates becoming a law partner with the attorney will abstain from matters that concern the MultiCounty program.

The Ohio Public Defender Commission is statutorily charged with establishing rules and standards regarding the provision of legal representation for indigent criminal defendants. See generally R.C. 120.03 (B) and (C). Also, the Ohio Public Defender Commission is required to approve an annual budget and may provide educational programs regarding the legal representation of indigent persons. See generally R.C. 120.03 (D).

The Ethics Commission has explained in some instances the prohibition imposed by R.C. 102.03 (D) will not prohibit a public official or employee from participating in actions made by his public agency if the actions have a uniform effect upon all individuals who are subject to the public official's or employee's public agency, or a large portion thereof. See Advisory Op. No. 88-004 (R.C. 102.03(D) does not prohibit a city council member from participating in the enactment of a general zoning code for his city which would affect him as a property owner only in a general or indefinite manner and in a manner similar to other property owners, but would prohibit him from participating in a decision to approve a zoning change or variance which would definitely and directly affect property in which he has an interest). See also Advisory Ops. No. 85-006, 88-004, 91-004, 92-010, 92-012, 92-013, and 92-019.

It is possible that some actions by the Ohio Public Defender Commission which affect the MultiCounty program may have a uniform effect upon all attorneys who contract with the State Public Defender to provide legal representation for indigent criminal defendants including an attorney who is a law partner of a member of the Ohio Public Defender's Commission. In such an instance, R.C. 102.03 (D) would not require that the member of the Ohio Public Defender Commission abstain from such matters. However, since you state that

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the member of the Ohio Public Defender Commission has decided to abstain from matters that concern the MultiCounty program, it is unnecessary to address this issue further. However, such abstention from matters pertaining to the MultiCounty program by a member of the Ohio Public Defender Commission who is a law partner of an attorney who contracts with the State Public Defender will aid in avoiding even the appearance of impropriety.

Your attention is directed to R.C. 102.03 (B), which reads:

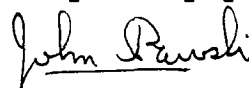
No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

R.C. 102.03 (B) prohibits the member of the Ohio Public Defender Commission from disclosing confidential information which he has acquired in his position to his law partner or any other person, or using such information, without appropriate authorization. See Advisory Op. No. 89-006. This limitation is applicable during his public service, and after, and remains in effect as long as the information remains confidential. Id.

As a final matter, you should be aware that this question 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.

This informal advisory opinion was approved by the Ethics Commission at its meeting on February 18, 1994. The opinion is based on the facts presented and 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 further questions, please feel free to contact this Office again.

Very truly yours,



John Rawski  
Staff Attorney