

OHIO ETHICS COMMISSION

Santiago Feliciano, Jr.
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368

Website: <http://www.ethics.state.oh.us>

November 19, 1999

Informal Opinion 1999-INF-1119-3

Lisa A. Eliason, Esq.

Dear Ms. Eliason:

In your letter received by the Ethics Commission on May 24, 1999, you ask whether the Ohio Ethics Law and related statutes prohibit you from running for the office of county prosecuting attorney in light of the fact that your spouse serves as a member of the board of county commissioners of the same county.

As explained below, the prohibition imposed upon you by R.C. 102.03(D) and the actions that you would be required to take to avoid violating R.C.102.03(D) would effectively preclude you from serving as county prosecutor while your husband holds office as a member of the board of county commissioners in the same county. If you decide to run for county prosecuting attorney, and are elected to that position, you would be subject to a significant conflict of interest so long as you and your spouse serve in county positions simultaneously. If your spouse decides not to continue as county commissioner, the law does not prohibit you from running for, or serving as, county prosecuting attorney, even though you would be required to abstain in the defense of the county with respect to actions taken by the commissioners while your husband served.

Facts

You state that you are currently employed in an appointed position as City Prosecutor for the City of Athens. You state that your spouse was recently elected to the Board of County Commissioners of Athens County and began his term of office in January 1999. You state that you desire to run for the position of Prosecuting Attorney for Athens County for the term beginning on January 1, 2001.

Use of Authority to Secure a Thing of Value—R.C. 102.03(D)

Your present situation implicates R.C. 102.03(D) of the Ohio Ethics Law. R.C. 102.03(D) reads as follows:

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.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is an elected officer of a political subdivision. R.C. 102.01(B) and (C). A county prosecuting attorney is a "public official or employee" for purposes of R.C. 102.03. Ohio Ethics Commission Advisory Opinion No. 90-007.

The term "anything of value" is defined in R.C. 1.03 to include money, goods and chattels, any promise of future employment, and every other thing of value. R.C. 102.01(G). The Ethics Commission has held that the financial benefit or detriment that results from a decision by a public official is within the definition of anything of value. Adv. Ops. No. 85-012, 90-002, and 90-012.

The Ethics Commission has held that R.C. 102.03(D) prohibits a public official or employee from acting in any situation where she would have an inherent conflict of interest such that her independence of judgement and objectivity with regard to her official decisions and responsibilities could be impaired. Adv. Ops. No. 84-009, 85-006, and 88-009. Prior to the enactment of Am. Sub, H.B. 300, 116th Gen. A. (eff. Sept. 17, 1986), R.C. 102.03(D) prohibited a public official or employee from using his authority or influence to secure anything of value for herself if the thing of value were of a such a character as to manifest an improper influence upon her with respect to her duties. Am. Sub. H.B. 300 amended R.C. 102.03(D) to delete the requirement that the thing of value be for the official or employee herself, thus broadening the scope of the prohibition of R.C. 102.03(D). Adv. Ops. No. 87-004 and 88-004.

The Ethics Commission has held that R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of her office to secure anything of value for any party where the relationship between the public official or employee and the other party is such that the official's or employee's objectivity and independence of judgement could be impaired with regard to matters that affect the interests of that party. Adv. Ops. No. 88-005, 89-005, and 90-004. The Ethics Commission had held that R.C. 102.03(D) prohibits a public official or employee from participating in a matter that could definitely

and directly affect the personal pecuniary interests of the official's or employee's family members, including a spouse. Adv. Ops. No. 79-008, 82-003, and 90-004. In order to understand the implications of this statute in your situation, it is necessary to examine the duties performed by a county prosecuting attorney.

Duties of a County Prosecuting Attorney

A county prosecuting attorney is the legal advisor to the board of county commissioners. R.C. 309.09(A). The board of county commissioners acts after consideration of the legal advice provided to its members by the county prosecuting attorney. A board of county commissioners and its individual members are open to the possibility of legal challenge for their decisions. See State ex rel. Schoener v. Board of County Commissioners of Hamilton County, 84 Ohio App. 3d. 794 (1992) (landowners near a landfill sued the county and county officials, including the commissioners, seeking a writ of mandamus for the enforcement of zoning resolutions with the contention that the lack of enforcement by county officials had violated their constitution rights under Section 1983 of Title 42 of the United States Code); and Miami Valley Contractors, Inc. v. Montgomery County, 1996 Ohio App. Lexis 2310, TC Case 94-015 (2nd Dist., 1996) (the unsuccessful bidder to a contract sued the Board of County Commissioners of Montgomery County for compensatory damages alleged to have been incurred resulting from a violation of its federal constitutional rights under Section 1983 of Title 42 of the United States Code and violations of state statutory bidding procedures). In addition to providing the legal advice to the board of county commissioners that directed the board to act in a manner that was later challenged, the prosecuting attorney is also expected to defend the board of commissioners against the challenge.

Practical Application of the Restriction

If you are elected to the position of county prosecuting attorney, your ability to perform your statutorily defined duty to serve as legal advisor to, counsel to, and attorney for, the board of county commissioners would be compromised by the interests of your spouse. The dual loyalties of a county prosecuting attorney to the county, which is both her client and a public entity she has sworn to serve, and to her spouse, are clearly strong in nature. These loyalties would clearly be in conflict where the county's interests are not aligned with the interests of the individual county commissioner.

As county prosecuting attorney, you would be expected to serve the interests of your public office by providing legal advice to the board of county commissioners, and to other county office holders and county employees, in a manner that will advance the best interests of the county even if a legal challenge by those adversely affected by the decision is possible. It is likely and foreseeable that your anticipation of a legal challenge

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that could affect your spouse's personal financial interests may subject you to conflicting and divided loyalties to the extent that it would be impossible for you to provide independent and objective legal advice to the county.

Furthermore, your defense of the board against any challenge that resulted from your advice could also impair your independence and objectivity of judgement. For example, you could be more inclined to negotiate a settlement of a case affecting the commissioners rather than have it decided on its merits in court with the risk that the county and its officials would not prevail and thus be subject to a higher amount of monetary damages.

Even if a matter affects a county office that is independent from the board of county commissioners, the risk still exists that the prosecuting attorney's involvement could have an impact upon the board of county commissioners and its individual members. For example, in Jones v. Franklin County Sheriff's Department, 1999 Ohio App. Lexis 2856 (12th Dist., 1999), the board of county commissioners, along with other county officials, faced a challenge under Section 1983 of Title 42 of the United States Code. The challenge was based on the actions of the Sheriff's Office in an arrest. Although the county commissioners were not involved in the arrest, the county commissioners were sued along with other county officials. This case illustrates that there may be situations in which there would be no way to predict when the actions of county officials other than the commissioners could result in an action that could affect the interests of the board of county commissioners and its individual members. See also Rich v. Dept. of Human Resources, 106 Ohio App. 3d 88 (1995) (county commissioners, and other county officials and employees, sued under Section 1983 of Title 43 of the United States Code following a decision regarding placement of a child).

A county prosecuting attorney, like any other county elected official, is expected to exercise her authority in an independent and objective manner, with no motivation for her decisions beyond what she assesses to be the best interests of the citizens in her county. These examples demonstrate that situations could arise where a county prosecuting attorney who is married to a county commissioner would face conflicting and divided loyalties to the extent that her independent and objective judgment would be substantially impaired. Further, there is no way for the county prosecuting attorney to predict every situation in which her advice may result in legal challenge, or every situation where she will be called upon to defend the actions of other county officials.

Having established that a county prosecuting attorney who is married to a county commissioner faces conflicting and divided loyalties to the extent that her independent and objective judgment would be substantially impaired when her spouse's interests are directly affected, it is necessary to determine whether the conflict is irreconcilable.

Possibility of Withdrawal

The Ethics Commission has held that a public official who faces a conflict affecting a party may withdraw from matters that affect that party in order to satisfy the prohibitions of the Ethics Law. Adv. Ops. No. 82-002, 89-008, and 96-004. Accordingly, if you were to serve as county prosecuting attorney while your spouse serves as county commissioner, then you would be required to withdraw from all legal matters that could affect your spouse's individual interests as a county commissioner. In the instant situation, there is a mechanism for the county commissioners to employ legal counsel in lieu of the county prosecuting attorney. R.C. 305.14(A). See generally 1998 Op. Att'y Gen. No. 98-005 (a county judge may secure outside legal counsel if the county prosecuting attorney is unable to provide legal counsel due to a conflict of interest). The compensation of the attorney is paid from the county general fund. R.C. 309.09(C).

While there is a mechanism for withdrawal of the county prosecuting attorney, it would be impossible for the mechanism to be utilized, in the situation you have described, without substantial detriment to the functioning of the prosecuting attorney's office and the county. Outside counsel would have to be employed whenever the county prosecuting attorney faced a conflict of interest. As explained above, it may be difficult or impossible to predict when it would be necessary to withdraw from a county legal matter because an individual county commissioner may have a definite and direct personal interest in the matter. Even if the public official were able to make such a determination, the withdrawal of a public official from matters in which she is expected to participate will be detrimental to the functioning of her public agency. Adv. Op. No. 99-002.

In past advisory opinions, the Commission has concluded that there are some instances where the private interests of a person who aspires to public service are such that the person would be unable to effectively serve in the public position to which he aspires. In Advisory Opinion No. 89-016, the Commission concluded that an attorney would be prohibited from serving as city law director if other attorneys in his law firm represented clients in lawsuits against the city. The Commission stated that the attorney's loyalties, to his law firm and to the city, were both compelling, and that one person, with divided loyalties to two parties, cannot serve in a public position where the interests of the parties are not aligned.

In the situation you present, you have would compelling and potentially divided loyalties to two parties—your spouse and the county. Because the interests of those two parties may not always be aligned, and because it would be impossible for you to predict when, or how often, the interests may be adversarial, the Commission concludes that it would be impossible for you to effectively serve as county prosecuting attorney while your spouse serves as a county commissioner.

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Conclusion

As explained more fully above, the prohibition imposed upon you by R.C. 102.03(D) and the actions that you would be required to take to avoid violating R.C.102.03(D) would effectively preclude you from serving as county prosecutor while your husband holds office as a member of the board of county commissioners in the same county. If you decide to run for county prosecuting attorney, and are elected to that position, you would be subject to a significant conflict of interest so long as you and your spouse serve in county positions simultaneously. If your spouse decides not to continue as county commissioner, the law does not prohibit you from running for, or serving as, county prosecuting attorney, even though you would be required to abstain in the defense of the county with respect to actions taken by the commissioners while your husband served.

This informal advisory opinion was approved by the Ethics Commission at its meeting on November 19, 1999. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, 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.

Sincerely,



Jennifer A. Hardin

Chief Advisory Attorney