

# OHIO ETHICS COMMISSION

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November 19, 1999

Informal Opinion 1999-INF-1119-4

Dennis E. Pfeifer  
Pfeifer & Pfeifer

Dear Mr. Pfeifer:

In a letter to the Ethics Commission, you asked two questions about the prosecuting attorney in the county where you live. First, you ask whether the Ohio Ethics Law and related statutes prohibit a full-time county prosecutor, who has chosen not to engage in the private practice of law, from retaining his partnership with the assistant county prosecutor. Second, you ask whether the county prosecutor and assistant county prosecutor can continue to share office space. You have stated that the assistant county prosecutor will continue to operate his private practice. You also note that the prosecutor will be paid by the county to use the building that he and the assistant county prosecutor own, rather than the county providing office space for the county prosecutor.

It must be noted at the outset that your question involves a person other than yourself. The purpose of an Ethics Commission advisory opinion is to provide guidance to a public official or employee before he or she engages in an action. For that reason, the Commission generally will not provide advisory opinions in response to questions that concern the future actions of someone other than the requester. While the Commission cannot provide you with an advisory opinion about another individual, the Commission can give you some general information about the issues that you have raised in your question.

In addition, your question may involve actions that have already taken place. The Commission has stated that it will render an advisory opinion only in response to a hypothetical question or a question that involves prospective conduct. Ohio Ethics Commission Advisory Opinions No. 75-037 and 94-002. The Commission has explained that its function in rendering an advisory opinion is not a fact-finding process and it cannot, in an advisory opinion, determine whether a public official or employee has violated a criminal law. Id.

An advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes, and sets forth the standards that a public official or employee must observe to avoid violating these laws in a given set of circumstances. Adv. Ops. No. 75-037, 90-013, 92-003, and 92-015. If a question is raised with regard to activity that has already occurred, the Ethics Commission can only act through its confidential investigative authority to determine whether the facts indicate that the Ethics Law may have been violated and to refer the matter for prosecution. Adv. Ops. No. 92-003 and 94-002. Therefore, the Commission will not provide an advisory opinion with respect to any questions that concern past conduct. However, once again, this Office can provide general information about the questions that you have posed.

### **Prosecuting Attorney Retaining Partnership with Assistant Prosecuting Attorney**

In your first question, you have asked whether the county prosecutor and the assistant county prosecutor are prohibited from continuing to retain their partnership while also acting as prosecutor and assistant prosecutor. However, you have also stated that the county prosecutor has elected to be a full-time prosecutor. The Commission has been advised that the county prosecuting attorney will not be pursuing a private practice, and has not continued the partnership with the assistant county prosecuting attorney. Because the county prosecuting attorney will not be pursuing a private practice, and has not maintained a private practice with the assistant county prosecuting attorney, there is no need to consider this question. See R.C. 325.111(B)(1) and (2).

However, to provide you with general guidance on your question, the Commission notes R.C. 309.06(B), which provides:

Subject to section 2921.421 [2921.42.1] of the Revised Code, a prosecuting attorney may appoint, as an assistant prosecuting attorney, clerk, stenographer, or other employee, a person who is an associate or partner of, or who is employed by, the prosecuting attorney or an assistant prosecuting attorney in the private practice of law in a partnership, professional association, or other law business arrangement. (Emphasis added.)

R.C. 2921.421 sets forth certain requirements that a county prosecuting attorney must meet in order to appoint his business associate to the position of assistant prosecuting attorney. Pursuant to R.C. 2921.421(B), a county prosecuting attorney may appoint a business associate to the position of assistant prosecuting attorney if all of the following apply:

- (1) The services to be furnished by the appointee or employee are necessary services for the political subdivision or are authorized by the legislative authority, governing board, or other contracting authority of the political subdivision.
- (2) The treatment accorded the political subdivision is either preferential to or the same as that accorded other clients or customers of the appointee or employee in similar transactions, or the legislative authority, governing

board, or other contracting authority of the political subdivision, in its sole discretion, determines that the compensation and other terms of appointment or employment of the appointee or employee are fair and reasonable to the political subdivision.

- (3) The appointment or employment is made after prior written disclosure to the legislative authority, governing board, or other contracting authority of the political subdivision of the business relationship between the prosecuting attorney, the chief legal officer or official designated as prosecutor in a municipal corporation, or the township law director and the appointee or employee thereof. In the case of a municipal corporation, the disclosure may be made or evidenced in an ordinance, resolution, or other document that does either or both of the following:
  - (a) Authorizes the furnishing of services as required under division (B)(1) of this section;
  - (b) Determines that the compensation and other terms of appointment or employment of the appointee or employee are fair and reasonable to the political subdivision as required under division (B)(2) of this section.
- (4) The prosecuting attorney, the elected chief legal officer, or the township law director does not receive any distributive share or other portion, in whole or in part, of the earnings of the business associate, partner, or employee paid by the political subdivision to the business associate, partner, or employee for services rendered for the political subdivision.

R.C. 102.03(K) and R.C. 2921.42(F) provide that, so long as the requirements in R.C. 2921.421 are met, it is not a violation of the conflict of interest law (R.C. 102.03) or the public contract law (R.C. 2921.42) for a county prosecuting attorney to hire his business associate as an assistant prosecuting attorney.

By the language it used in R.C. 309.06(B), 102.03(K), and 2921.42(F), the General Assembly has clearly indicated its intent that county prosecuting attorneys are not prohibited, by the Ethics Law or any other provision of the Ohio Revised Code, from employing their law partners or associates in private practice to be assistant county prosecuting attorneys. However, the General Assembly has also recognized significant public policy concerns that exist when a county prosecuting attorney hires his business associates. For this reason, the General Assembly has required that a county prosecuting attorney demonstrate compliance with the provisions of R.C. 2921.421, including disclosure to the public entity and a showing that the entity either agrees to the arrangement or is well served by the arrangement, before he hires his business associate.

There is nothing in R.C. 309.06(B), or R.C. 2921.421, that indicates that a county prosecuting attorney must discontinue his law partnership with any person whom he appoints as an assistant prosecuting attorney. In fact, R.C. 2921.421(B)(4), which states that the county prosecuting attorney cannot receive any part of the money earned by his business associates for services rendered to the county, indicates that the General Assembly presumed that the business association between the county prosecuting attorney and his partner could continue after the prosecuting attorney hired his partner as an assistant. Once again, although this issue is not present in the situation you raise, you may wish to review R.C. 309.06(B) and 2921.421.

### **Prosecuting and Assistant Prosecuting Attorneys Providing Office Space to County**

In your second question, you have asked whether the county prosecuting attorney and assistant prosecuting attorney may continue to share office space. You note that the prosecuting attorney and assistant prosecuting attorney own a building jointly, and that the county will pay them for the use of that building, rather than the county providing office space.

This question would generally be governed by restrictions contained in R.C. 2921.42(A)(1) and (A)(4), which provide that no public official shall knowingly:

- (1) 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;

...

- (4) 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;

A county prosecutor, and an assistant county prosecutor, are both public officials, subject to the Ohio Ethics Law. The term "public contract" is defined in R.C. 2921.42(G)(1)(a) to include:

The purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of . . . any . . . political subdivisions [of the state]. (Emphasis added.)

The Commission has specifically stated that the purchase or acquisition of the use of property, by or for the use of a public agency, is a public contract for purposes of R.C. 2921.42(A). Adv. Op. No. 88-003. The Commission has also stated that the lease of publicly owned property, to a private individual, is a public contract. Adv. Op. No. 86-009.

R.C. 2921.42(A)(4) prohibits a public official from having an interest in a public contract with any public agency with which he is connected. R.C. 2921.42(A)(1) prohibits a public official from authorizing, or using his position to secure authorization of, a public contract in which he or a business associate has an interest.

In Advisory Opinion No. 88-003, the Commission stated that R.C. 2921.42(A)(4) generally prohibits a county official from having any interest in a public contract by selling real property to the county. In Advisory Opinion No. 86-009, the Ethics Commission stated that R.C. 2921.42(A)(4) prohibits a public official from having any interest in the lease of real property by the public agency to a private party. Generally, then, a public official is prohibited from having an interest in the sale or lease of real property by or to the public agency he serves.

However, there is a limited exemption to the restriction in R.C. 2921.42(A), set forth in R.C. 2921.42(C). The Commission described the exemption, as it applies to the acquisition of real property, in Advisory Opinion No. 88-003. R.C. 2921.42(C) provides that a public official is not considered to have an interest in a public contract if the official can demonstrate that the four requirements of the exemption are met. R.C. 2921.42(C) states:

- (C) This section does not apply to a public contract in which a public official, member of his family, or one of his business associates has an interest, when all of the following apply:
  - (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 his 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.

In its past opinions, the Commission has noted that one significant restriction in this requirement is that the goods or services are unobtainable elsewhere for the same or lower cost. As Advisory Opinion No. 84-011 states:

[T]he application of the exemption [provided in Division (C) of Section 2921.42] must be consistent with the principle underlying Section 2921.42 of the Revised Code that a public official should not have an interest in a public contract with the

governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity. (Emphasis added.)

In Advisory Opinion No. 88-003, when assessing a purchase of property by a county from a county official, the Commission concluded that the county commissioners have the discretion, within all pertinent constitutional and statutory restrictions, to purchase or appropriate such property which possesses those characteristics that will best meet the county's needs. Giesy v. Cincinnati, Wilmington & Zanesville Railroad Co., 4 Ohio St. 308, 327 (1854); Board of Education v. Holding Corp., 29 Ohio App. 2d 114, 123-125 (1971).

In order to meet the requirements of Division (C)(2), the county commissioners must have some way to demonstrate that they have acted objectively and reasonably in determining that it wishes to obtain a particular piece of property, so as not to favor the private interests of a county officer or employee. See generally Adv. Ops. No. 84-011 and 88-001. There must also be appropriate documentation to demonstrate that the property of the county official is either the least costly property for the county or is uniquely suited to meet the county's needs because of the property's location, size, or other characteristics. See generally Adv. Ops. No. 87-003 and 88-001. If the public official can establish that the property he wishes to lease to the county for the purpose of providing office space is the most appropriate property for that purpose, meets the needs of the county, and that the county could not obtain a space that would be equally or more appropriate for the same or lower cost, this aspect of the exemption would be met. Adv. Op. No. 88-003. The official must also be able to demonstrate compliance with sections (C)(1), (3), and (4) to rely on the exemption set forth.

Assuming that the criteria of Division (C) can be established so that a county officer may properly convey real property to the county, the Commission has stated that the prohibitions of Division (A)(1) of R.C. 2921.42 must be observed. R.C. 2921.42(A)(1) prohibits a public official from authorizing or employing the authority or influence of his office to secure authorization of a public contract in which he, a member of his family, or any of his business associates has an interest.

In Advisory Opinion No. 88-003, the Commission concluded that R.C. 2921.42(A)(1) would prohibit a county official from voting, discussing, deliberating, or otherwise using his official authority or influence, formally or informally, to secure the acquisition of his property by the county. See also R.C. 2921.42(C)(4) (set forth above), and R.C. 102.03(D) (which prohibits a public official from using his authority to secure anything of value, if the thing of value would have a substantial and improper influence upon him with respect to his duties.) In Advisory Opinion No. 86-009, the Commission stated that a public official is prohibited, by R.C. 2921.42(A)(1), from authorizing a lease agreement between the agency he serves and his employer, who is a business associate for purposes of the restriction.

The Ethics Commission has held that a business association is created whenever individuals join together to pursue a common business purpose. Adv. Op. No. 86-002. The Commission has stated that attorneys in a partnership, as well as attorneys who share expenses in certain circumstances, are "business associates" for purposes of R.C. 2921.42(A)(1). Adv.

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Op. No. 92-003. The Ethics Commission has also held, however, that, where a business relationship has been terminated, the existence of a past business relationship does not dictate that a public official must refrain from participating in matters affecting his former associate's interests. Adv. Op. No. 90-011. Therefore, where a partnership has been dissolved, and there is no other business connection between a public official and another party, the public official will not be prohibited from acting on matters that affect his former partner.

However, as stated above, the Commission has determined that individuals engaged in a common business purpose are business associates. Adv. Ops. No. 85-004 and 90-008. While the Commission has not issued a specific opinion on the issue of joint property ownership, there may be some instances in which the joint ownership of property creates a business association among the owners. The joint ownership of property may constitute a business association where the property produces income via leases, contracts, rental payments, or a commercial enterprise operated by the owners. Where a public official and another person own property that produces income, the official and the other person may be considered to be engaged in a common business purpose, and, therefore, may be business associates. Once again, the Commission has not specifically opined on this issue.

This letter was presented to the Ethics Commission at its meeting on November 19, 1999. The letter 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. This letter does not reach any conclusions as to the specific facts in the situation that you have set forth. I apologize for the delay in providing you this information and regret any inconvenience that resulted from the delay.

If you have any additional questions, please do not hesitate to contact this Office.

Sincerely,



Jennifer A. Hardin  
Chief Advisory Attorney

Enclosure: Advisory Opinion No. 88-003