

OHIO ETHICS COMMISSION

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May 8, 2003

Informal Opinion 2003-INF-0508-2

Paul J. Stergios
[REDACTED]

Dear Mr. Stergios:

In a letter that the Ethics Commission received on February 27, 2003, you state that your son, who had been an equal shareholder in Stergios & Kurtzman, Co. LPA (Stergios LPA), has recently been appointed to the position of Law Director for the City of Massillon (City). You ask whether the prohibitions that the Ohio Ethics Law and related statutes impose on your son preclude members of Stergios LPA from representing: (1) clients in municipal court who have been charged with criminal offenses; and (2) the City in litigation wherein they are retained and paid by the City's insurer.

At the outset, it should be noted that the Ohio Ethics Law and related statutes do not impose any restrictions, within the facts you have described, on the partners of Stergios LPA. However, the law does impose restrictions on the Massillon Law Director and those restrictions may preclude your son from serving as Law Director in circumstances where he has a direct conflict. This opinion will address the restrictions on the Law Director.

Brief Answer

As explained more fully below, under the facts you have presented, the Law Director, your son, has multiple family and business conflicts of interest. The Commission recognizes and appreciates that the Law Director has taken steps to reduce these conflicts of interest. However, due to the extensiveness of the conflicts, the Law Director must take further steps to resolve the multiple conflicts of interest present.

Because of his multiple family and business interests, your son is prohibited from participating, as Law Director, in legal actions in which Stergios LPA is defending clients in municipal court or representing the City in litigation after being retained by the City's insurer. (The Law Director cannot cure this conflict simply by assigning legal matters to his subordinates.)

In order to resolve his business conflicts of interest and effectively serve as Law Director if Stergios LPA is to do further work involving the City, your son must completely sever his business relationship with the law firm. In order to protect against his family conflict, the Law Director is also prohibited from participating in cases involving the law firm unless you, his father, waive your distributive share of partnership profits attributable to cases involving the City. Finally, the Law Director is prohibited from participating, in any way, formally or informally, with respect to the authorization of any contract whereby the City or the City's insurer engages Stergios LPA to represent the City.

Facts

As explained below, the Law Director is: (1) a former member and shareholder of Stergios LPA; (2) related to two attorneys who are members and shareholders of Stergios LPA; (3) a current party to an office-sharing arrangement with Stergios LPA; and (4) an ongoing tenant of a building owned by a partnership that includes two members of Stergios LPA. In addition, the Law Director could be faced with issues that come before him in his capacity as a City official that involve clients of Stergios LPA.

You state that, until recently, five attorneys were equal-share stockholders of Stergios LPA. Your son, Pericles G. Stergios, had been an equal shareholder until he was appointed City Law Director. Another attorney in Stergios LPA is your brother and is the uncle of the Law Director.

You state that the Law Director has transferred the stock he owns to the other stockholders and formed a new corporation in which he is the sole stockholder. The Law Director will continue to work out of the same office used by Stergios LPA and will pay Stergios LPA for his use of their secretarial services and incidental overhead expenses. Two of the four remaining attorneys in Stergios LPA are in a partnership with two individuals who are not connected with the law firm. This partnership owns the building in which the Stergios LPA has its office. The Law Director will pay rent to the partnership.

You state that the other three attorneys in Stergios LPA routinely defend clients in municipal court against criminal charges. Two of the attorneys routinely represent the City in litigation wherein they are retained by the City's insurer. In addition, you state that, in the past, Stergios LPA has represented the City with regard to annexation matters. It appears, from your letter, that you do not actively participate in any of these matters.

The core issue before the Ethics Commission is whether a City Law Director may participate in matters that are before the City that would affect the interests of a legal professional association with which he shares office space and secretarial expenses, and in which his father is a shareholder.

Conflict of Interest Provisions—R.C. 102.03(D) and (E)

R.C. 102.03(D) and (E) read:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.
- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

The term "public official and employee" is defined to include any person who holds an appointed city office. R.C. 102.01(B) and (C). A city law director is a public official for purposes of the prohibitions set forth in R.C. 102.03(D) and (E). Ohio Ethics Commission Advisory Opinion No. 89-012.

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. R.C. 102.03(G). A definite, pecuniary benefit to a public official or another person or entity is considered to be a thing of value under R.C. 102.03(D) and (E). Adv. Op. No. 88-004. The Ethics Commission has determined that the beneficial or detrimental financial impact created by the actions of a public agency is a thing of value for purposes of R.C. 102.03(D). Adv. Ops. No. 88-005, 92-019, and 98-002.

R.C. 102.03(D) prohibits a public official or employee from participating in any matter if he would secure anything of value that would have substantial and improper influence upon him with respect to his duties. Adv. Op. No. 91-004. R.C. 102.03(E) prohibits a public official or employee from merely soliciting or accepting an improper thing of value, and does not require that he use the authority or influence of his position to secure it. Adv. Ops. No. 86-011 and 89-006. The application of R.C. 102.03(D) and (E) is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 87-007 and 89-003.

Prior to 1986, R.C. 102.03(D) prohibited a public official or employee from using his official position to secure anything of value for himself "that would not ordinarily accrue to him in the performance of his official duties, which thing is of such character as to manifest a substantial and improper influence upon him with respect to his duties." (Emphasis added.) This statutory language prohibited a public official or employee from participating in matters that would benefit the public official's or employee's own financial interests, and the property, business, or other financial interests of his family or business associates if the official would also derive some benefit as a result of his actions. Adv. Ops. No. 80-003, 80-007, and 84-010. R.C. 102.03(D) did not "apply to things of value accruing to a family member or business associate, provided the public official does not benefit personally." Adv. Op. No. 86-007.

In Am. Sub. H.B. 300, effective September 17, 1986, the General Assembly amended R.C. 102.03(D) to delete the requirement that the thing of value be for the public official or employee, and broadened the scope of the prohibition imposed by R.C. 102.03(D). Adv. Op. No. 87-004. As a result, the law is not limited in its application to situations where the public official or employee would secure a benefit. Adv. Op. No. 88-004. However, R.C. 102.03(D) still requires that the thing of value, whether it is secured for the official or for someone else, is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. Id.

In Advisory Opinion No. 93-003, the Commission stated:

R.C. 102.03(D) prohibits a public official or employee from using his authority or influence to secure anything of value, not only for himself, but for members of his family, . . . for his business associates, . . . for a professional organization on which the public official or employee serves as a board member, . . . [and] for his private outside employer.

The Commission has taken care not to apply the law every time a person affected by a decision has a relationship to a public official or employee who will participate in making the decision. The Commission has examined the type of relationship between the official or employee and the person who will be affected to determine whether the relationship could result in a substantial and improper influence upon the official or employee.

In the cited opinions, where a definite and direct thing of value accrues, as a result of a public official's or employee's action, to a person or entity that has a close familial, economic, or fiduciary relationship to the official or employee, the thing of value is of such a character as to manifest a substantial and improper influence upon the official or employee with respect to the performance of his duties. Consequently, where a matter is pending before a public agency that definitely and directly affects the financial interests of a party with a close familial, economic, or fiduciary relationship to an official or employee of the agency, R.C. 102.03(D) prohibits the official or employee from securing anything of value for the related party by participating in the matter.

In addition to amending R.C. 102.03(D) in Am. Sub. H.B. 300, the General Assembly enacted R.C. 102.03(E). R.C. 102.03(E) prohibits a public official or employee from soliciting anything of value for himself and for any other party with whom he has a close familial, economic, or fiduciary relationship, because the thing of value is capable of manifesting a substantial and improper influence upon the official.

The prohibitions imposed by R.C. 102.03(D) and (E) serve the public interest in effective, objective, and impartial government by preventing situations where public officials and employees are influenced by things of value secured or solicited for themselves or other parties with whom they have a close tie or nexus. This tie impairs the objectivity and independence of judgment of a public official or employee, which the public reasonably expects,

and subsequently erodes the effectiveness of the public agency he serves. Adv. Ops. No. 89-014 and 90-002.

Application of Precedent—Interest of Business Associates

The first question is whether the Law Director can participate in matters affecting Stergios LPA if he rents office space from a partnership in which you and another attorney in Stergios LPA are partners, continues to work out of the same office used by Stergios LPA, and pays Stergios LPA for his use of their secretarial services and incidental overhead expenses.

As noted above, the Commission has stated that a public official or employee is prohibited from participating with respect to matters pending before his public office that affect his business associates, such as an outside employer or business partner, including partners in a law firm. Adv. Ops. No. 89-015 and 90-007. In Advisory Opinion No. 89-015, the Commission concluded that a person is prohibited from serving as law director of a municipality if the law firm of which he is a member represent clients in adversarial matters against the municipality. The Commission has also stated that attorneys are "business associates" when they are affiliated in an association where only expenses, and not fees, are shared. See Adv. Ops. No. 83-002 and 92-003. In Advisory Opinion No. 92-003,¹ the Commission examined the application of R.C. 102.03(D) to a county prosecuting attorney and concluded:

Payments made, directly or indirectly, from the county commissioners to attorneys with whom you share expenses are of such a character as to manifest a substantial and improper influence upon you in the performance of [your responsibilities], since such payments could aid the attorneys in the payment of their share of expenses, thereby freeing you of any potential liability for their share of the expenses.

In Advisory Opinion No. 89-016, the Ethics Commission concluded that R.C. 102.03(D) prohibits a member of a public board who is also a partner or associate in a private law firm from voting, discussing, participating in deliberations, or otherwise using his official position, formally or informally, with regard to matters pending before his public body on which a business associate is representing a client. This conclusion was reiterated in Advisory Opinion No. 90-008, in which the Commission explained that R.C. 102.03(D) prohibits a city council member who is an employee of a law firm from participating in a matter pending before city council if an employee or partner of his employing law firm is representing a client on the matter pending before council. See also Adv. Op. No. 86-004.

In the situation you have described, it is apparent that the Law Director has partially severed his connection with Stergios LPA. However, there is an ongoing relationship because the Law Director intends to continue to occupy the same office space as Stergios LPA and share

¹ Advisory Opinion No. 92-003 concerned a county prosecuting attorney who wished to hire his business partners as assistant county prosecutors, and that R.C. 102.03 was later amended, in concert with the enactment of R.C. 2921.421, to allow such hires. R.C. 2921.421 need not be discussed here because is not directly relevant to your question. However, the discussion in Advisory Opinion No. 92-003 of the relationship between attorneys who share expenses, and not fees, is directly relevant to your question, and it is for that purpose that the opinion is cited here.

expenses with Stergios LPA, as well as rent the space in which his office is located from two of the partners in Stergios LPA. This ongoing relationship is of such a character as to have a substantial and improper influence on the Law Director such that he is prohibited from participating in any decision-making that affects partners in Stergios LPA who represent clients in the municipal court in cases involving the City, and represent the City, through the City's insurer.

The Law Director cannot cure this conflict by assigning legal matters in which Stergios LPA is involved to an assistant city law director. The Ethics Commission has explained that a subordinate employee of a city law director cannot participate in a matter in which the law director has a conflict. Adv. Op. No. 89-015. In Advisory Opinion No. 89-015, the Commission stated:

There is no one to whom an assistant law director could report, other than the law director, with respect to the legal aspects of the progress or decisions to be made regarding a case against the city. It would be impossible for the law director to abstain from any case in which the city is a party, even though one of his subordinates may handle the daily details of the case. See generally Advisory Opinions No. 85-002 and 89-006. Furthermore, the law director is generally empowered to employ, dismiss, and set the compensation for assistant law directors. It would be an untenable position for the assistant law director to objectively fulfill his duties in a case where his employer's law firm served as opposing counsel.

Therefore, your son will be unable to effectively fulfill the role of Law Director if he retains his affiliation with Stergios LPA and the law firm is representing the City or clients in matters before the City. However, the Ethics Commission has determined that a public official can sever a business association in order to resolve a conflict of interest under the Ethics Law and related statutes. Adv. Op. No. 92-004. See also Adv. Op. No. 90-011 (R.C. 102.03(D) does not generally prohibit a public official from participating in a matter presented to his agency by a former client of his law firm or law partner). In order for your son to participate as Law Director in matters affecting the City where Stergios LPA is involved, he must completely sever his association with the law firm by relocating his office to a site where he is not paying rent to partners in Stergios LPA and is not sharing any expenses with Stergios LPA.

Application of Precedent—Interest of Family Member

Even if the Law Director completely severs his business relationship with Stergios LPA, the fact remains that you are the Law Director's father and a partner and shareholder of Stergios LPA. Unlike a business association, which can be severed, a parent-child relationship is enduring. As stated above, R.C. 102.03(D) prohibits a public official or employee from using his authority or influence to secure anything of value, not only for himself, but also for a member of his family. Adv. Op. No. 92-012. R.C. 102.03(E) prohibits a public official or employee from merely soliciting an improper thing of value not only for himself, but also for a member of his family.

A legal professional association is a corporate entity formed pursuant to Chapter 1785. of the Revised Code and the Supreme Court Rules for the Government of the Bar of Ohio. A legal professional association is authorized to practice law only through officers, agents, or employees who are admitted to the practice of law in Ohio and so long as they and all shareholders, directors, and officers of the legal professional association are not disqualified to engage in the practice of law. See Gov. Rule III Sect. 1. The Supreme Court of Ohio has held that an attorney-shareholder of a legal professional association is not protected by the personal limited liability due a shareholder in a private corporation because a shareholder of a legal professional association is an attorney who actually practices the profession and has direct contact with running the corporation. South High Development, Ltd. v. Weiner, Lippe & Cromley Co. L.P.A., 4 Ohio St. 3d 1, 3 (1983). Therefore, it is apparent that all attorney shareholders in a legal professional association have a fiduciary interest in the activities of the legal professional association to which they belong. Further, it is clear that any attorney shareholder in a legal professional association who is accepting anything greater than a de minimis distributive share of partnership profits has a definite and direct pecuniary interest in the activities of the legal professional association to which he belongs.

A City Law Director whose father has a definite and direct interest in cases handled by a legal professional association that defends clients in municipal court against criminal charges and represents the City in litigation by being retained by the City's insurer would have impaired objectivity and independence of judgment as Law Director with respect to those matters.² Therefore, the City Law Director is prohibited from participating in a legal action involving the City in which Stergios LPA is defending a client in municipal court or representing the City in litigation by being retained by the City's insurer if you have a definite and direct pecuniary interest in the legal work performed by Stergios LPA. As discussed above, the Law Director cannot cure this conflict by assigning matters in which Stergios LPA is involved to an assistant city law director.

However, if you do not have a definite and direct pecuniary interest in matters in which Stergios LPA is involved, your son would not be prohibited from participating in those matters. It appears from your letter that you do not personally represent any parties in matters involving the City. However, as stated above, if you are receiving anything greater than a de minimis distributive share of the partnership's profits attributable to those matters, you will have a definite and direct pecuniary interest in those matters. Therefore, in order to remove your definite and direct pecuniary interest in those matters, you must waive anything greater than a de minimis distributive share of the partnership's profits attributable to those matters. See generally Adv. Ops. No. 89-016 and 90-008 (regarding distributive shares of partnership profits). If you waive your distributive share of the partnership's profits attributable to the matters on which Stergios LPA is representing clients involving the City of Massillon, your son is not prohibited from acting as Law Director with respect to those matters because his participation those matters will have not result in any thing of substantial value for you.

² The fact that the Law Director's uncle also has an interest in the contracts of Stergios LPA is not sufficient, in and of itself, to have a substantial and improper influence on the Law Director with respect to the performance of his public duties.

Public Contract—Representation of City

You have also asked whether the Ethics Law prohibits two of the attorneys of Stergios LPA from continuing to represent the City in litigation where they are retained by the city's insurance company and paid by the insurance company. As stated above, the Ohio Ethics Law and related statutes apply to the Law Director, rather than the attorneys in Stergios LPA. However, assuming that the Law Director has completely severed his relationship with Stergios LPA and that you have waived anything greater than a de minimis distributive share of the partnership profits earned by Stergios LPA from matters involving the City, such that R.C. 102.03(D) and (E) do not prohibit your son from serving as Law Director, your son must also comply with the provisions of R.C. 2921.42(A)(1).

R.C. 2921.42(A)(1) prohibits a public official, including a city law director, from authorizing a public contract, or using his position to secure authorization of a public contract, in which the official, a family member, or a business associate, has an interest. R.C. 2921.42(G) defines the term "public contract" to include any purchase or acquisition of property or services by or for the use of a political subdivision of the state, including a city. When the City's insurance company engages an attorney to represent the City in a legal matter, the City is acquiring services for its use, even if the City is not directly selecting, engaging, or compensating that attorney. The legal services provided by Stergios LPA in the situation you have presented is a public contract as that term is defined in R.C. 2921.42(G).

Therefore, R.C. 2921.42(A)(1) prohibits your son, as Law Director, from authorizing, or using his position to secure authorization of, the contract for legal representation you have described, if his family member has an interest in the contract. As set forth above, a partner in a legal professional association has a fiduciary and pecuniary interest in the association. Even if you waive your financial interest in Stergios LPA's contracts to represent the city, you will continue to have a fiduciary interest in those contracts as a partner in the law firm. The law does not prohibit the City's insurer from selecting Stergios LPA to represent the City in these kinds of matters in the future simply because you are a partner in the law firm. However, the law does prohibit your son, as Law Director, from using his position in any way to secure the business for the law firm of which you are a partner and from securing any payments to the law firm.

Conclusion

As explained more fully above, under the facts you have presented, the Law Director, your son, has multiple family and business conflicts of interest. The Commission recognizes and appreciates that the Law Director has taken steps to reduce these conflicts of interest. However, due to the extensiveness of the conflicts, the Law Director must take further steps to resolve the multiple conflicts of interest present.

Paul J. Stergios
May 8, 2003
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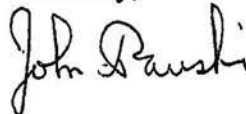
Because of his multiple family and business interests, your son is prohibited from participating, as Law Director, in legal actions in which Stergios LPA is defending clients in municipal court or representing the City in litigation after being retained by the City's insurer. (The Law Director cannot cure this conflict simply by assigning legal matters to his subordinates.)

In order to resolve his business conflicts of interest and effectively serve as Law Director if Stergios LPA is to do further work involving the City, your son must completely sever his business relationship with the law firm. In order to protect against his family conflict, the Law Director is also prohibited from participating in cases involving the law firm unless you, his father, waive your distributive share of partnership profits attributable to cases involving the City. Finally, the Law Director is prohibited from participating, in any way, formally or informally, with respect to the authorization of any contract whereby the City or the City's insurer engages Stergios LPA to represent the City.

As a final matter, you should be aware that your question raises issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. These issues are not within the jurisdiction of the Ethics Commission, but should be referred to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on May 8, 2003. 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 questions or desire additional information, please contact this Office again.

Sincerely,



John Rawski
Staff Attorney