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

www.ethics.ohio.gov

March 5, 2009 Informal Opinion 2009-INF-0305-2

Scott Elisar, Deputy Legal Counsel
Office of Governor Ted Strickland
[redacted]

Dear Mr. Elisar:

On November 24, 2008, the Ohio Ethics Commission received your letter requesting an advisory opinion on behalf of a prospective appointee to the Owens State Community College (College) Board of Trustees (Board). Pursuant to R.C. 3358.03, the Governor has the authority to appoint the members of the College Board. You have explained that the Governor intends to delay making the appointment until the Commission is able to provide guidance regarding the prospective appointee.

In your letter, you explained that the prospective appointee is the managing partner of a law firm. Another partner in the firm represents three employee unions at the College (the Owens Faculty Association, the Owens Federation of Safety and Security Employees, and the Owens Support Staff Union) in negotiations on collective bargaining agreements.[1] The agreements are ultimately approved by the Board.

Your specific question is whether the Ethics Law and related statutes would prohibit a managing partner from serving as a member of the Board when a member of his law firm provides legal representation to unions representing employees of the college. You have also asked whether the answer would differ if the prospective appointee were merely an equity partner in the firm rather than the managing partner.

[1] It appears, from your letter, that the prospective appointee is not personally representing the unions or any of the employees in the unions. If the prospective appointee seeks to personally provide any services to the unions or their members, additional restrictions in the Ethics Law and related statutes would apply. See R.C. 102.04(A) and 2921.42(A)(3). The prospective appointee should contact this Office for further guidance if he does or may represent or otherwise provide legal services to any of the unions, union employees, or other persons or entities whose interests come before the College.

Brief Answer

As explained more fully below, R.C. 102.03(D) and (E) prohibits the prospective appointee from serving on the College Board while a partner in his law firm represents three unions of College employees unless he: (a) withdraws from any formal or informal participation, as a member of the College Board, in any matters before the Board on which the firm is representing a union or union employee or has provided any advice, guidance, or other services; and (b) declines any distributive share of the partnership's profits attributable to the firm's representation of the unions, employees, or other parties on matters before the College. The prospective appointee would also be required to waive any share of the partnership's profits attributable to legal services on matters related to the collective bargaining agreements in order to avoid a prohibited interest in the collective bargaining agreements between the College and the unions.

If the prospective appointee is able to meet these requirements, neither R.C. 102.03(D) and (E) nor R.C. 2921.42(A)(4) would prohibit him from serving on the Board. However, the prospective appointee is also prohibited from: (a) authorizing or participating in the authorization of any public contract in which the law firm or its other partners or employees have an interest; and (b) using or disclosing confidential information acquired during the course of his public service.

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

A College Board member is a "public official" subject to R.C. 102.03(D) and (E), which provide that:

> (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;
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> (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.

R.C. 102.01(B) and (C); R.C. 3358.01 (a state community college district is a political subdivision) and R.C. 3358.03 (the government of a state community college district is vested in the board of trustees appointed by the Governor).

The benefit or detriment to a public official, or any of his business associates, that definitely and directly results from the decisions of the official or the agency he serves is within the definition of "anything of value." Ohio Ethics Commission Advisory Opinion No. 93-016. Client fees generated by the practice of law also fall within the definition of "anything of value." See Adv. Ops. No. 89-016 and 90-008.

In Advisory Opinion No. 90-008, the Commission explained that R.C. 102.03(D) prohibits a public official from participating, in his official capacity, in any matters before the public agency that would result in a definite and direct benefit or detriment for the trustee or his business associates. The Commission stated:

> Division (D) of Section 102.03 of the Revised Code prohibits a public official or employee from acting in any situation where the public official or employee would have an inherent conflict of interest such that his independence and objectivity of judgment could be impaired. (Citations omitted.) In previous advisory opinions, the Ethics Commission has held that R.C. 102.03(D) prohibits a public official from reviewing, in his official capacity, work that members of his law firm have prepared. (Citations omitted.) If a public official were to review and act upon matters in which members of his law firm have earned client fees, then the official would be subject to an inherent conflict of interest which could impair his objectivity and independence of judgment in carrying out his official decisions and responsibilities with respect to that matter.

Adv. Op. No. 90-008. Therefore, the Commission held that a public official who is also an attorney is prohibited from acting on matters before his public agency that definitely and directly affect the interests of his law firm. The public official is prohibited from (a) voting; (b) discussing; (c) deliberating; (d) recommending; (e) formally or informally lobbying other governing board members, officials, or employees of the agency; (f) directing agency employees; and (g) using his or her position in any other way to secure a particular outcome on a matter that affects the interests of his law firm. The official is prohibited from participating in any matter before the agency if the law firm is representing a client on the matter, or has provided advice, guidance, consultation or other legal services to any party in connection with the matter, even if the law firm is not appearing directly before the agency.

The Commission further held that R.C. 102.03(E) would prohibit a public official who is a partner or employee in a law firm from accepting a share of the client fees earned by members of his law firm for: (1) representing a client on a matter before the public agency; or (2) providing advice, guidance, consultation, or other services to a client on a matter before the public agency, even if the partner or employee is not directly representing the client on the matter. Adv. Op. No. 90-008. R.C. 102.03(E) prohibits the official from accepting any share of

the fees earned by the law firm regardless of whether the official is personally representing the clients or has provided any services to the clients.[2]

Application to Prospective Appointee

As applied to the situation you have described, R.C. 102.03(D) and (E) would prohibit the prospective appointee from serving on the College Board while a partner in his law firm represents three unions of College employees unless he: (a) withdraws from any formal or informal participation, as a member of the College Board, in any matters before the Board on which the firm is representing a union or union employee or has provided any advice, guidance, or other services; and (b) declines any distributive share of the partnership's profits attributable to the firm's representation of the unions, employees, or other parties on matters before the College.

If he does serve on the College Board, R.C. 102.03(D) would prohibit the prospective appointee, while serving as a member of the College Board, from voting, discussing, deliberating, recommending, formally or informally lobbying other Board members, College officials, or employees of the College, directing College employees, and using his position in any other way to secure a particular outcome on any matter affecting a union or union member if the law firm is representing the union or union member on the matter. The prospective appointee would also be prohibited from participating in any matter where the law firm or any partner or employee of the law firm provided services to the union, a College employee, or other client.

Specific matters could include any grievances, disciplinary matters, or other job actions affecting a College employee if the employee or the union consulted with the trustee's law firm or partner on the matter. For example, if the law firm prepared any materials related to a grievance, and the materials will be submitted to the College, the prospective appointee would be barred from voting, discussing, deliberating, recommending, formally or informally lobbying other Board members, College officials, or employees of the College, directing College employees, and using his position in any other way to secure a particular outcome related to the grievance.

Regardless of whether he participates in the matter before the College, R.C. 102.03(E) prohibits the prospective appointee from accepting any distributive share of the firm's profits attributable to its representation of clients on matters before the College. Similarly, R.C. 102.03(E) prohibits the prospective appointee from accepting any share of the firm's profits from advice, guidance, consultation, or other services provided to clients on matters that will be before the College, even if the firm is not representing any person or entity before the College.

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[2] R.C. 102.04(A) would prohibit a member of a state community college board from receiving any compensation for performing any services for any person on a matter that is before the state community college. However, because there is no suggestion in your letter that the prospective appointee is providing any services to the employee unions or any other person on matters before the College, this opinion need not discuss the prohibition in R.C. 102.04(A).

Interest in a Public Contract

A member of a board of trustees of a state community college is also a "public official" subject to R.C. 2921.42(A)(4), which provides that no public official shall:

> 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 the public official is connected.

R.C. 2921.01(A).

A "public contract" is defined as:

> The purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either.

R.C. 2921.42(I)(1)(a). A collective bargaining agreement between a public agency and a union of its employees is a "public contract." Adv. Ops. 82-003 and No. 98-004.

A prohibited "interest" in a public contract is a definite and direct interest that can be of either a financial or fiduciary nature. Adv. Ops. No. 81-008 and 88-001. The union, and its officers and negotiators, have an interest in the collective bargaining agreement affecting its members. Adv. Op. No. 82-003.

In Advisory Opinion No. 86-002, the Commission stated that a lawyer does not generally have an interest in the contracts of his or her clients, saying "such professionals are not deemed to be interested in the business dealings of a client, merely because they receive fees for professional services." Where a lawyer is not providing professional services to the client in connection with the client's public contract, the lawyer does not have an interest in the contract. However, the Commission also explained that some professional services are provided or sold *in conjunction with* a particular public contract. Adv. Op. No. 86-002. The payments or profits an attorney would receive for performing services provided in conjunction with a public contract would be a "benefit" of the public contract. *Id.*

In this situation, the partner who represents the unions is paid to provide union members with various services related to the collective bargaining agreements. For example, the partner represents union members in grievance actions and job-related actions. These are services provided in conjunction with the collective bargaining agreements. Any payments the partner receives for performing services related to the contracts would be a definite and direct result of the contracts.

R.C. 2921.42(A)(4) prohibits a member of a college board of trustees from having an interest in any contract of the College. Any partner of the law firm who receives a share of the partnership's profits would have a financial interest in the contracts. As noted above, R.C. 102.03(E) prohibits the prospective appointee from receiving a distributive share of the partnership profits of the law firm for representing, or providing advice or services to, clients on matters before the College. This would include fees paid to the firm for performing services for the unions or union members on matters related to the collective bargaining agreements with the College. If the prospective appointee were to accept a distributive share of the profits, he would have an interest in the contracts prohibited by R.C. 2921.42(A)(4).[3] Provided that the prospective appointee does not accept any distributive share of these profits, he would not have a prohibited interest in the collective bargaining agreements.

If the prospective appointee waives any share in the partnership's profits related to the collective bargaining agreements, so that he can serve as a College Trustee, there are two other restrictions that apply to his actions as a Trustee.

Authorizing Contracts and Confidential Information—R.C. 2921.42(A)(1) and 102.03(B)

As a public official, a university trustee is also subject to R.C. 2921.42(A)(1) and R.C. 102.03(B). R.C. 2921.42(A)(1) provides that no public official shall knowingly:

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

The law firm and its partners are the prospective appointee's business associates. Adv. Op. No. 95-004. As noted above, an attorney providing services to a union and its members on grievances and other matters in conjunction with a collective bargaining agreement has an interest in the collective bargaining agreement. If the lawyer is a partner in the law firm, the firm also has an interest in the collective bargaining agreements.

Therefore, even if the prospective appointee does not represent the union or receive any portion of the partnership profits attributable to the three collective bargaining agreements on which his partner represents a union, R.C. 2921.42(A)(1) will prohibit him, if he were to serve as a Trustee, from authorizing or employing the authority or influence of his office to secure authorization of any of the collective bargaining agreements.

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[3] There is an exception to R.C. 2921.42(A)(4). However, the exception does not apply to R.C. 102.03(E), which would prohibit the prospective appointee from serving on the Board of Trustees if he were to accept a portion of the partnership's profits related to representing clients before the College. Therefore, it is unnecessary for the Commission to consider the application of the exception.

"Authorizing" a contract includes voting on, signing, or taking any other action to award the contract. Adv. Op. No. 2001-02. Employing the "authority or influence" of one's position to "secure authorization of" a contract includes a much broader range of activities, such as recommending, deliberating or discussing, and formally or informally lobbying any public official or employee about the contract. Id.

Therefore, while he is serving on the College Board, the prospective appointee is prohibited from voting, deliberating about, participating in the negotiation of, or taking any other action regarding any of the collective bargaining agreements. The prospective appointee would also be prohibited from taking any more informal action, such as discussing the agreements with his fellow Board members or any College officials or employees, and from recommending or lobbying for or against passage of the agreements.

Finally, R.C. 102.03(B) prohibits a public official from disclosing or using confidential information acquired in the performance of his public duties. The prospective appointee would be prohibited from disclosing or using any confidential information he acquired through his service on the Board. There is no time limit for this restriction. Adv. Op. No. 89-009.

In Advisory Opinion No. 2008-02, the Commission explained that, because of the restriction on disclosure of confidential information, a member of a governing board whose business associate has an interest in matters before the board should refrain from attending some executive sessions of the agency. The Commission held that the official should not attend any portion of an executive session of the board during which: (1) the governing board will be discussing matters in which his business associate or employer has a definite and direct interest; or (2) any attorney representing the agency will be giving legal advice or sharing privileged information with the governing board regarding matters in which his law firm or business associate has a definite and direct interest.

The Commission suggested that, while the law does not require it, the best practice may be for staff of the agency to isolate, from among the items to be discussed in the executive session, the items in which the official's business associate has an interest and to designate a separate executive session for discussion of those matters. The distinct separation of matters in which the official's business associate has an interest will facilitate the official's removal from the executive session.

In the situation you have set forth, the prospective appointee should not attend any executive session where matters on which his law firm is representing a party are to be discussed. The prospective appointee is also prohibited from sitting in on any executive session where the legal counsel for the College is providing legal advice or guidance to the Board on a matter where his law firm represents or is providing legal services to a party.

Rules of Professional Conduct

In addition to the Ohio Ethics Law and related statutes, the prospective appointee is bound by the Ohio Rules of Professional Conduct. Some of the provisions of the Rules apply to attorneys who also serve in public positions. *See e.g.* Rule 1.11, Rules of Professional Conduct. For guidance about the application of the Rules of Professional Conduct, the prospective appointee should consult Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.

Conclusion

As explained more fully above, R.C. 102.03(D) and (E) prohibits the prospective appointee from serving on the College Board while a partner in his law firm represents three unions of College employees unless he: (a) withdraws from any formal or informal participation, as a member of the College Board, in any matters before the Board on which the firm is representing a union or union employee or has provided any advice, guidance, or other services; and (b) declines any distributive share of the partnership's profits attributable to the firm's representation of the unions, employees, or other parties on matters before the College. The prospective appointee would also be required to waive any share of the partnership's profits attributable to legal services on matters related to the collective bargaining agreements in order to avoid a prohibited interest in the collective bargaining agreements between the College and the unions.

If the prospective appointee is able to meet these requirements, neither R.C. 102.03(D) and (E) nor R.C. 2921.42(A)(4) would prohibit him from serving on the Board. However, the prospective appointee is also prohibited from: (a) authorizing or participating in the authorization of any public contract in which the law firm or its other partners or employees have an interest; and (b) using or disclosing confidential information acquired during the course of his public service.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on March 3, 2008. The 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. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,

Jennifer A. Hardin
Chief Advisory Attorney