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June 20, 2011

Charles R. Saxbe
Chester Willcox & Saxbe, LLP
[redacted]

Jerry Chabler
[redacted]

Dear Mr. Saxbe and Mr. Chabler:

On April 22, 2011, the Ohio Ethics Commission received Mr. Saxbe's letter requesting an advisory opinion. On May 4, 2011, the Ethics Commission received Mr. Chabler's e-mail asking for an advisory opinion on the same topic, with a copy of Mr. Saxbe's letter attached.

In your letter and e-mail, you stated that:

- In October 2010, then-Governor Strickland appointed you both to serve as members of the Ohio Casino Control Commission;
- As required by R.C. 3772.02, the Governor's appointments to the Casino Control Commission were forwarded to the Ohio Senate for its advice and consent;
- The appointed members of the Casino Control Commission met on two occasions in 2010;
- The Casino Control Commission had no staff or funding and took no official actions;
- The members of the Casino Control Commission have received no compensation or reimbursement for their service; and
- On December 21, 2010, the Ohio Senate voted not to confirm all the appointments that former Governor Strickland made to the Casino Control Commission. At that point, you were no longer members of the Casino Control Commission; you became former members.

Question and Brief Answer

Question: Are you subject to the revolving door restriction in R.C. 102.03(A)(8)?

Answer: Yes, you, and the other individuals appointed to the Casino Control Commission by the former Governor, were "casino control commission officials," and the revolving door restriction in R.C. 102.03(A)(8) applies to you.

Casino Control Commission

The Casino Control Commission was created on May 4, 2010, in an amendment to the Ohio Constitution.[1] The enabling statute for the Casino Control Commission is R.C. 3772.02, which provides that its seven members are appointed by the Governor with the advice and consent of the Senate. Former Governor Strickland appointed seven members to the Casino Control Commission in October 2010. On December 21, 2010, the Senate, in accordance with R.C. 3772.02, voted not to confirm the seven appointees.

Revolving Door Restriction—R.C. 102.03(A)(8)

You have asked about the revolving door restriction contained in the first paragraph of R.C. 102.03(A)(8),[2] which was enacted in H.B. 519, effective September 10, 2010, and provides:

> No present or former Ohio casino control commission official shall, during public service or for two years thereafter, represent a client, be employed or compensated by a person regulated by the commission, or act in a representative capacity for any person on any matter before or concerning the commission.

Some of the terms used in R.C. 102.03(A)(8), including "represent," "matter," and "person," are defined in the Ohio Revised Code and previous Ethics Commission advisory opinions.[3]

The general revolving door restriction, R.C. 102.03(A)(1), provides:

> No present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

R.C. 102.03(A)(8) differs from this general revolving door restriction in four ways. R.C. 102.03(A)(8):

1. Applies to a very narrow and distinct class of officials and former officials (current and former members of the Casino Control Commission) rather than to all present and former public officials and employees;
2. Contains a post-service restriction on these former officials for two years, rather than one;
3. Prohibits the former official from representing a client or acting in a representative capacity for any person, but also prohibits the former official from being "employed or compensated by a person regulated by the commission"; and

4. Prohibits a former member of the Casino Control Commission from engaging in the activities described above on "any matter before or concerning the commission," rather than only those matters on which he or she personally participated during public service.

Therefore, for two years after leaving the Casino Control Commission, a former member is prohibited from:

1. Representing a client before any public agency on any matter before or concerning the Casino Control Commission;
2. Being employed by or receiving compensation from a person regulated by the Casino Control Commission on any matter before or concerning the Casino Control Commission; and
3. Acting in a representative capacity for any person on any matter before or concerning the Casino Control Commission.

You have raised three key concerns about the restriction in R.C. 102.03(A)(8), which are discussed below.

1. Application of Section 102.03(A)(8) to New Casino Control Commission Appointees

You have argued that the individuals appointed by former Governor Strickland were never compensated, never made any binding decisions, and were "never positioned to engage in any quid pro quo conduct" before the Senate declined to confirm their appointments.

R.C. 102.03(A)(8) applies its revolving door prohibition to every "present or former Ohio casino control commission official" with no exceptions or exemptions. Nothing in the statute exempts members of the Casino Control Commission from its revolving door prohibition until they are compensated, until the Commission reaches a certain state of organization or maturity, or until the Commission performs certain official duties or regulatory actions. The prohibition applies to all persons who are lawfully appointed and sworn in as members of the commission from the moment they take their oaths.

R.C. 3772.02(D) provides that each "[C]ommission member shall hold office from the date of appointment until the end of the term for which the member was appointed." R.C. 3772.02(J) provides that each "[C]ommission member, before entering upon the discharge of the member's official duties, shall make an oath to uphold the Ohio Constitution and laws of the state of Ohio and shall give a bond, payable by the commission, to the treasurer of state . . . which bond shall be filed with the secretary of state."

The former members of the Casino Control Commission were lawfully appointed. They were sworn into office, and their bonds were properly posted.[4] The newly appointed Commission convened and held two meetings.

While R.C. 102.03(A)(8) did not require the former Casino Control Commission to take any official action before the revolving door prohibition applied to its members, it is clear that from the Commission's first meeting onward to the date when the Ohio Senate voted not to confirm its

members' appointments, the Commission and its members had the full power and authority to carry out all the duties and responsibilities set forth in R.C. 3773.03.

Mr. Saxbe, while Chairman of the Casino Control Commission, expressly acknowledged this authority and responsibility of the former Commission members when he stated at the Commission's second meeting: "This second meeting of the Casino Control Commission is a recognition by us all that we took an oath of office on October 25 to discharge our duties with respect to setting up this commission, fulfilling our charge as leaders of the commission and pursuing answers and offering some solutions with respect to working to get the casino gambling initiated in the State of Ohio, whether some people like it or not."[5] He later stated: "This is a job that has to be done . . . . The Casino Control Commission recognizes that it's important for us to make a contribution however long we retain these positions."[6]

The R.C. 102.03(A)(8) revolving door prohibition therefore applies to those former members of the Casino Control Commission who were appointed by Governor Strickland.

2. <u>Constitutionality</u>

You have argued that the restriction in R.C. 102.03(A)(8) is similar to the restriction in R.C. 102.03(A)(4). In *Brinkman v. Budish,* the United States District Court struck down R.C. 102.03(A)(4) and permanently enjoined its application and enforcement.[7]

No court has ruled on the constitutionality of R.C. 102.03(A)(8), the specific statute about which you have inquired. The statute struck down in *Brinkman*, R.C. 102.03(A)(4), was not within the Ohio Ethics Commission's jurisdiction as it applied exclusively to current and former members and employees of the General Assembly. Further, while striking down R.C. 102.03(A)(4), the Court favorably noted R.C. 102.03(A)(1), the general revolving door restriction that <u>is</u> within the Ethics Commission's jurisdiction, as an example of how a statute can be narrowly tailored to achieve a compelling state interest.[8]

The Ohio Ethics Commission is an administrative agency created by the General Assembly in the Ohio Revised Code. As such, it has the duty to follow existing court precedent interpreting the statutes under its jurisdiction. It has no jurisdiction to make an initial determination of the constitutional validity of R.C. 102.03(A)(8) or any other statute under its authority.[9]

3. <u>Jurisdiction</u>

You have argued that the Ohio Constitution specifically vests in the Ohio Supreme Court original jurisdiction in all matters relating to the practice of law. Mr. Saxbe notes that he and two other members of the Commission are lawyers. Mr. Chabler is not a lawyer.

The Supreme Court of Ohio Rules of Professional Conduct contain special conflict of interest rules for lawyers who have formerly served as public officers. The Rules specifically recognize that there are also laws that govern lawyers in this area. Rule 1.11 provides: "A lawyer who has formerly served as a public officer or employee of the government shall comply with . . . all applicable laws and Rule 1.9(c) regarding conflicts of interest." In comment 1 to the Rule, the

Supreme Court wrote: "A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Ohio Rules of Professional Conduct. . . and may be subject to criminal statutes and other government regulations regarding conflict of interest. See R.C. Chapters 102. and 2921." Whether the Supreme Court of Ohio would conclude that R.C. 102.03(A)(8) should not restrict the actions of attorneys is a question for the Court.

Conclusion

The Ohio Ethics Commission concludes that the former members of the Casino Control Commission are subject to the Revolving Door restrictiou in R.C. 102.03(A)(8) for two years from the date their terms ended because the Senate declined to confirm their appointments.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on June 17, 2011. This 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. It does not purport to interpret other laws or rules. If you have any questions or need additional information, please contact the Ethics Commission again.

Sincerely,

Ben Rose
Chair, Ohio Ethics Commission

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's Web site: www.ethics.ohio.gov.

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[1] Ohio Constitution Art. XV, Section 6(C)(4).
[2] The second paragraph in R.C. 102.03(A)(8) also contains a revolving door provision, which is applicable only to Casino Control Commission employees and will not be addressed in this advisory opinion.
[3] R.C. 102.03(A)(5), Adv. Op. No. 89-006 (represent); R.C. 102.03(A)(5), Adv. Ops. No. 99-001 and 2004-04 (matter); R.C. 1.59(C), Adv. Op. No. 2004-04 (person).
[4] Ohio Casino Control Commission, Minutes of Meeting of Commission Members, Meeting of 25 October, 2010.
[5] Kovac, M. (2010, November 9). State casino body meets, despite an uncertain future. *Record Publishing Company.* Retrieved from www.recordpub.com/news/article/4928868.
[6] Id.
[7] *Brinkman v. Budish*, 692 F.Supp.2d 855 (S.D. Ohio, 2010). (Brinkman involved a former state legislator who was volunteering his services as an uncompensated lobbyist before the General Assembly.)
[8] *Brinkman* at 13-14.
[9] *Herrick v. Kosydar* (1975), 44 Ohio St. 2d 128, 130. See also *State ex rel. Columbus Southern Power Co. v. Sheward* (1992), 63 Ohio St. 3d 78, 81.