



OHIO ETHICS COMMISSION

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Advisory Opinion No. 77-001

February 18, 1977

Syllabus by the Ohio Ethics Commission:

1) A member of the Rehabilitation Services Commission is a "public official or employee" as that term is defined in Section 102.01(B) and used in Section 102.03 of the Revised Code, and "a person. . . appointed to an office" for purposes of Section 102.04 of the Revised Code.

2) Section 102.03(A) of the Revised Code prohibits a member of the Rehabilitation Services Commission, who is a physician, from representing a patient who is a client of the Rehabilitation Services Commission on any matter before the Commission.

3) Section 102.04(A) of the Revised Code prohibits a member of the Rehabilitation Services Commission, who is a physician, from receiving compensation for services provided to a patient who is a client of the Rehabilitation Services Commission, insofar as the services provided by the physician are related to the client's "case, proceeding, application, or other matter" before the Commission.

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In your request for an Ohio Ethics Commission Advisory Opinion, you asked whether a member of the Rehabilitation Services Commission, who is a physician, is prohibited by the Ohio Ethics Law from providing professional services, for compensation, to clients of the Rehabilitation Services Commission.

You state, by way of history, that you are a physician and a member of the Rehabilitation Services Commission, and that you "see the Commission's clients on a fee-for-service basis." In addition, you note that you are in partnership with another physician who treats clients of the Rehabilitation Services Commission and shares the partnership profits with you. Sections 102.03 and 102.04 of the Revised Code prohibit certain conflicts of interest in the conduct of any "public official or employee" or any "person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts," respectively. The prohibitions of Section 102.03 of the Revised Code apply specifically to public officials and employees as defined in Section 102.01(B) of the Revised Code, which provides, in pertinent part:

"Public official or employee' means any person who is elected or appointed to an office or is an employee of any public agency." (emphasis added)

Therefore, to determine whether Sections 102.03 and 102.04 of the Revised Code apply to a member of the Rehabilitation Services Commission, it is necessary to determine whether he

is a "person. . . appointed to an office." Section 3304.12 of the Revised Code establishes the Rehabilitation Services Commission, and Division (A) of that Section provides, in part, that "the governor, with the advice and consent of the senate, shall appoint a rehabilitation services commission. . ." The Ohio Ethics Commission has formally recognized the Rehabilitation Services Commission as an agency that exercises sovereign power and that is therefore subject to Sections 102.03 and 102.04 of the Revised Code, based on an examination of Chapter 3304. of the Revised Code, case law, and other pertinent information. Thus, the position of member of the Rehabilitation Services Commission is an "office" for purposes of Section 102.01(B) of the Revised Code. We conclude therefore, that a member of the Rehabilitation Services Commission is "appointed to an office," and is therefore, a "public official" for purposes of the Ohio Ethics Law.

Section 102.03(A) of the Revised Code provides:

"No public official or employee shall represent a client or act in a representative capacity for any person before the public agency by which he is or within the preceding twelve months was employed or on which he serves or within the preceding twelve months had served on any matter with which the person is or was directly concerned and in which he personally participated during his employment or service by a substantial and material exercise of administrative discretion. As-used in this division, "matter" does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments. Nothing contained in this division shall prohibit, during such period, a former public official or employee, from being retained or employed to represent, assist, or, act in a representative capacity for the public agency by which he was employed or on which he served." (emphasis added)

The issue with respect to Section 102.03(A) of the Revised Code is whether a physician member of the Rehabilitation Services Commission who acts on behalf of his patients who are clients of the Rehabilitation Services Commission is representing a client or acting in a representative capacity before the public agency . . . on which he serves," in violation of Section 102.03(A) of the Revised Code. The answer depends largely upon the meaning of "represent" and "act in a representative capacity."

"In a broad sense, the term 'represent' is defined as meaning to stand in the place of, or as a substitute for; to be the equivalent of; to appear in the character of; to supply the place or perform the duties of. In a more restricted sense, it is defined as meaning to stand in the place of or act for the one represented; to speak or act with authority on behalf of another; to exercise power derived from another. . . to describe or portray in words. . . to exhibit to another mind in language." 77 C.J.S. 260 (emphasis added)

This definition could be interpreted narrowly to restrict the meaning of "represent" to representation of a patient or client only by actually appearing before the Rehabilitation Services Commission. However, in enacting Am. H.B. 1040 of the 111th General Assembly, the legislature amended Section 102.03(A) of the Revised Code to provide that "no public official shall represent a client or act in a representative capacity for any person before the public agency by which he is or within the preceding twelve months was employed or on which he serves. ' .'," adding the language it or act in a representative capacity" with the apparent intention of

broadening the definition of "represent." So defined, the term "represent" could include varied acts on behalf of a patient or client, such as the preparation of medical report - s, files, x-rays, letters or other documentary evidence. We conclude, therefore, that a physician who is a member-of the Rehabilitation Services Commission is prohibited under Section 102.03(A) of the Revised Code from representing or acting in a representative capacity for a patient who is a client of the Rehabilitation Services Commission on any matter before the Commission. On the other hand, the physician would not be prohibited from providing professional services that are not related to the patient or client's case before the Commission.

Section 102.03(D) of the Revised Code provides:

"No public official or employee shall use or attempt to use 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."

The issue with respect to this provision is whether a member of the Rehabilitation Services Commission, who is a physician and who sees patients who are clients of the Commission, is using or attempting to use his official position to secure "anything of value" for himself, in violation of Section 102.03(D) of the Revised Code. The issue is a question of fact to be determined on the basis of the facts and circumstances of the particular case. Some of the considerations in making such a determination might include: (1) whether the physician had examined or treated the patients prior to his appointment to the Commission; (2) for those that had become patients subsequent to the physician's appointment to the Commission, whether the fact that the physician was a member of the Commission was a significant factor in their choice of a physician, and (3) whether the physician prepared reports or other documentary material on behalf of the client for use in the case before the Commission. Your request for an advisory opinion did not include sufficient facts for us to make such a determination. Section 102.04(A) of the Revised Code, provides in pertinent part, that:

"No person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall receive or agree or agree to receive directly or indirectly compensation other than -from the agency with which he serves for any service rendered by him personally in any case, proceeding, application, or other matter which is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts." (emphasis added)

The issue with respect to this provision is whether a member of the Rehabilitation Services Commission, who is a physician, is prohibited by Section 102.04(A) of the Revised Code from receiving compensation for rendering personal services to patients who are clients of the Rehabilitation Services Commission. The Rehabilitation Services Commission is a "commission. . . of the state," and members are "appointed to an office" thereof. As a physician "seeing patients on a fee-for-service basis," a member of the Rehabilitation Services Commission "receives or agrees to receive directly or indirectly compensation" for services rendered personally by him, which is compensation from a source other than the agency with which he serves. If the physician provides services to patients as parties to a "case, proceeding,

application, or other matter" before the Rehabilitation Services Commission, then the physician is providing a service that is related to a matter before the Commission. Therefore, a member of the Rehabilitation Services Commission, who is a physician, and who receives compensation from his patients who are clients of the Commission for services rendered by him personally, is in violation of Section 102.04(A) of the Revised Code, insofar as the services provided by him are related to a "case, proceeding, application, or other matter" before the Commission.

Finally, you asked whether a member of the Rehabilitation Services Commission is prohibited by Section 102.04(A) of the Revised Code from receiving a share of partnership profits or a distributive share of fees for services rendered by a partner for patients who are clients of the Rehabilitation Services Commission. Section 102.04(A) of the Revised Code prohibits compensation for "any service rendered or to be rendered by him personally." The term "personal services" was defined in Ohio Ethics Commission Advisory Opinion No. 74-009, page 3, as it. . something done 'in person or by one's self without use of another person or outside agency.'" That opinion interpreted the word "personally," as used in Section 102.04(B) of the Revised Code and concluded in part:

"Thus the person in question may receive through partnership distribution, compensation for services not rendered by him personally but rather rendered by a partner personally, without violating the section, which prohibits the receipt of compensation for services personally rendered." (emphasis in original)

Although Advisory Opinion No. 74-009 applied to a lawyer who was a member of a municipal planning commission and who shared in the partnership profits of a law firm that had cases before the commission, the conclusion would also apply to physician partnerships, as long as the commission member rendered no personal services.

The Ohio Ethics Commission cautions that its Advisory Opinions may be relied upon only with respect to violations of Chapter 102. of the Revised Code, and do not address possible violations of other laws or rules.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that a member of the Rehabilitation Services Commission, who is a physician: (1) is prohibited by Section 102.03(A) of the Revised Code from representing a patient who is a client of the Rehabilitation Services Commission on any matter before the Commission; (2) is prohibited by Section 102.04(A) of the Revised Code from receiving compensation for rendering personal services to patients who are clients of the Rehabilitation Services Commission, insofar as the services provided are related to the client's case before the Commission; and (3) is not prohibited by Section 102.04(A) of the Revised Code from receiving partnership profits derived from services rendered by a partner for a patient who is a client of the Rehabilitation Services Commission.


OHIO ETHICS COMMISSION
Lindsey Cowen - Chairman