



OHIO ETHICS COMMISSION

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COLUMBUS 43215

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Advisory Opinion

No. 75-016

August 19, 1975

Syllabus by the Ohio Ethics Commission:

Special counsel, appointed by the Attorney General of Ohio pursuant to Section 109.08 of the Revised Code, are independent contractors and therefore are not prohibited by Section 102.04 (A) of the Revised Code from receiving or agreeing to receive, directly or indirectly, compensation for services rendered or to be rendered by them 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.

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Your request for an advisory opinion asks whether an attorney appointed by the Attorney General of Ohio as special counsel, pursuant to Section 109.08 of the Revised Code, falls within the purview of Section 102.04 (A) of the Revised Code. You state you are an attorney actively engaged in the private practice of law and as such personally represent clients, for compensation, in matters before various agencies, departments, boards, bureaus and commissions of the State of Ohio. You further state, the attorney general has appointed you special counsel to collect claims certified to the attorney general as owed to various state departments and agencies. Section 102.04 (A) of the Revised Code states:

"No person elected or appointed to an office 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 to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be 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."

Special counsel are not within the purview of Section 102.04 of the Revised Code by virtue of being "elected to an office" nor do they seem to be "appointed to an office" of an instrumentality of the state.

To be "appointed to an office" the position to which the appointment is made must be a constitutionally or statutorily created office. Section 109.08 of the Revised Code states:

"The attorney general may appoint special counsel to represent the state in connection with all claims of whatsoever nature which are certified to the attorney general for collection under any law or which the attorney general is authorized to collect.

Such special counsel shall be paid for their services from funds collected by them in an amount approved by the attorney general."

Thus, the attorney general may through appointment, engage special counsel, under the provisions of Section 109.08 of the Revised Code, to collect those claims certified to the attorney general from other agencies of the state for collection or such other claims as the attorney general is authorized to collect.

Special counsel of the attorney general, thus, are not appointed to an office of an instrumentality of the state for purposes of Section 102.04 (A) of the Revised Code but are rather engaged as an agent of an elected officer of the state.

The issue of whether special counsel fall within the purview of Section 102.04(A) of the Revised Code, thus, turns upon whether they are "persons . . . employed by . . . any . . . instrumentality . . . of the state" as that phrase is used in Section 102.04 (A) of the Revised Code. The Ohio Ethics Commission has determined that independent contractors of public agencies are not included in that class of persons described by the phrase "employed by" as used in Section 102.04 of the Revised Code.

The Ohio Ethics Commission in Advisory Opinion No. 75-012 applied the following tests to distinguish employees from independent contractors:

- " (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in that locality the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work;

- (f) length of time for which the person is employed;
- (g) the method of payment, whether by time or by job;
- (h) whether or not the work is a part of the regular business of the employer; and,
- (i) whether or not the parties believe they are creating a relationship of master-servant."

The Ohio Ethics Commission went on in that Advisory Opinion to establish, for purposes of the ethics law, as the primary test, (b), whether the one employed is engaged in a distinct occupation or business. The Commission cautioned, however, that seldom does this test, standing alone, control, and the other tests must also be examined.

It is necessary, therefore, to apply all of the tests listed above to the relationship of the attorney general and special counsel as that relationship is established by Special Counsel Outline of Procedures (Revised January 1971) published by the Claims Section, Office of the Attorney General, Section 109.08 of the Revised Code; and the specific situation of the individual appointed special counsel.

(a) Extent of Control

Special counsel are authorized to act on those specific matters referred to them by the attorney general, in the manner prescribed by statute, and as directed in the Outline of Procedures. However, no control is exercised by the attorney general over the manner in which special counsel collect claims other than those statutorily imposed limits placed on any individual or entity responsible for the collection of claims.

(b) Distinct occupation or business

You state you are an attorney actively engaged in the private practice of law. Therefore, you have an occupation, that of the private practice of law, distinct from the attorney general's occupation, that of chief law officer of the state.

(c) Kind of occupation; with reference to supervision

The initial collection of claims owed the state is usually done by special counsel rather than employees. Engaging special counsel rather than full-time salaried employees to collect claims on a contingency basis allows the attorney general to more economically and efficiently collect claims. Thus, the initial collection of claims is work usually done for the attorney general by special counsel without supervision rather than an employee.

(d) Skill required

Since special counsel are hired for their legal expertise, it would be reasonable to conclude they have particular skills required for the collection of claims.

(e) Supplies, instrumentalities, tools and place of employment

The attorney general does not provide special counsel with office space, resource material, clerical services, or any other office supplies. The Special Counsel Outline of Procedures particularly stated special counsel may not use attorney general's office stationery but must provide their own. Thus, special counsel provide their own instrumentalities, tools, and places of employment.

(f) Length of time for which the person is employed

Neither, Special Counsel Outline of Procedure, Section 109.08 of the Revised Code nor the letter of appointment which you enclosed with your request specifies the exact length of time of the appointment. The letter of appointment, however, states special counsel shall represent the attorney general in such matters as may be referred to special counsel "from time to time" by the attorney general. This suggests special counsel are hired on a project-by-project basis rather than as full-time or part-time employees.

(g) Method of payment

Section 109.08 of the Revised Code provides, that, special counsel appointed under this section are paid for their services from funds collected by them in an amount approved by the attorney general. The Special Counsel Outline of Procedure describes the method of payment or non-payment and provides that no expenses incurred in the collection of claims will be paid by the attorney general; that fee checks will be sent monthly after the collections are remitted in full to the attorney general; and that the fees are paid at the attorney general's discretion; as provided in Section 109.08 of the Revised Code.

(h) Whether the work is part of the regular business of the employer

The collection of claims certified to the attorney general or claims which the attorney general is otherwise authorized to collect is, by statute, a part of the regular business of the attorney general.

(i) Whether the parties believe they are creating the relationship of master-servant

Your request for an advisory opinion indicates you believe that the relationship is that of an independent contractor. You state that, "I receive no compensation from the attorney general for my services other than a percentage of funds actually collected by me on a contingency basis. My compensation is not subject to withholding for

federal or state income tax and I am not eligible for Public Employees Retirement System membership or state hospitalization and other employee benefits. I am not subject to supervision of the attorney general in the collection of claims, other than the establishment of broad policy guidelines applicable to all claims certified to him, and I may refuse to accept any claim which may be referred to me." In addition, the attorney general has traditionally distinguished special counsel from regular employees of the attorney general in method of payment, hours worked, and responsibilities.

In review, the primary test of distinct occupation is determinative in that special counsel have a distinct occupation, that of an attorney engaged in the private practice of law, and as such seem to be independent contractors. In balancing this determination with the other test conclusions, additional support is found for the determination that special counsel are independent contractors.

The following test conclusions are supportive of the determination:

- (a) No control is exercised by the attorney general as to the manner in which the special counsel goes about collecting claims, those limits which are imposed on special counsel are those imposed upon any individual or entity responsible for the collection of claims owed to the State.
- (c) Special counsel are hired to do work usually done by a specialist without supervision rather than an employee.
- (d) Special counsel are hired because of a particular skill, their legal expertise.
- (e) Special counsel provide their own instrumentalities, tools and place of work.
- (f) They are employed on a project-by-project basis.
- (g) They are paid a percentage of the claims they collect rather than a regular salary.
- (i) Both the attorney general and special counsel believed they were creating a relationship of employer-independent contractor.

Thus, in balancing the tests, the Ohio Ethics Commission concludes that special counsel, appointed by virtue of Section 109.08 of the Revised Code, are independent contractors. This opinion does not necessarily apply to special counsel appointed, by virtue of Section 109.07 of the Revised Code or any other Section of the Revised Code, to represent the state in court actions, criminal prosecutions, or other proceedings.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that special counsel appointed by the Attorney General of Ohio

Advisory Opinion No. 75-016
page six

pursuant to Section 109.08 of the Revised Code are independent contractors and therefore are not prohibited by Section 102.04 (A) of the Revised Code from receiving or agreeing to receive directly or indirectly compensation for services rendered or to be rendered by them 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.


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(Mrs) Barbara H. Rawson, Chairman