



OHIO ETHICS COMMISSION
THE ATLAS BUILDING
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March 6, 1992

Informal Opinion 1992-INF-0306-1

Anthony Capizzi
Dayton City Commission

Dear Mr. Capizzi:

You have asked if the Ohio Ethics Law and related statutes prohibit you, as a city commission member, from voting on a matter pending before the city commission.

By way of history, you have explained that you are a member of the Dayton city commission. You were elected to that position in 1986. You have also stated that you are, and have been, an attorney since 1979. You have stated that you became a member of a group of independent law practitioners in September, 1988. The group of independent practitioners shared certain office expenses and overhead, such as rent, utility bills, telephone service and telephone equipment lease payments, the services of one receptionist, and bookkeeping services to track collective office expenditures. The group of practitioners did not share in fees, profits, or losses, and each practitioner was responsible for his own secretary and his own bookkeeping. The practitioners group was not a corporation or partnership, and did not file a joint tax return. You have explained that, in September of 1991, the practitioners decided to terminate the expense-sharing agreement. However, you have further explained that the practitioners do, in fact, still share a physical location and certain expenses, including the lease payments, utilities, the telephone equipment lease, and the salary for the receptionist, and will continue to share the location and expenses until August 31, 1993.

You have further explained that one of the attorneys in this group represents a corporation which applied to the city plan board for a zoning change in order to operate a landfill. That rezoning request was filed in May of 1990. The city plan board denied the request in November of 1990. You have explained that, following the denial by the plan board, the applicant appealed the decision of the plan board to the city commission. The city commission held public hearings on the appeal in January and February of 1991. The city law director has stated that the city commission did not vote on the appeal. You have explained that you abstained from the proceedings of the city commission.

You have also explained that, subsequent to the city plan board decision and the city commission's hearings, the party

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requesting the rezoning filed suit in the Federal District Court, on February 22, 1991, in which the city, the city commission, and the city plan board are defendants. The District Court judge ordered the parties in the lawsuit to enter into settlement negotiations on the matter. You explained that you participated in these negotiations on the specific order of the District Court judge. The parties have apparently reached a tentative settlement, which you have explained may come before the city commission for a vote. Additionally, the city commission may be required to vote regarding the rezoning matter itself. Therefore, the matters before the city commission affect not only the interests of the corporation, but the interests of the city itself, since the city and its officers are defendants in the litigation.

You have explained that you are not an attorney in the litigation or case pending before the city commission and you are not receiving any client fees from the corporation represented by the attorney with whom you share office space. You have explained that the expense-sharing relationship is being terminated because of the future growth and direction of the firm and not because of the matter now pending before the city commission. You have stated that, regardless of any vote taken by the city commission, the association will be dissolved.

You have asked if you are prohibited from voting with regard to the settlement agreement and the rezoning appeal which may come before the city commission if a party to the settlement and rezoning appeal is represented by an attorney who shares office space and expenses with you. Division (D) of R.C. 102.03 provides as follows:

No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his duties.

The term "public official or employee" is defined to include any person who is elected or appointed to an office of a city. See R.C. 102.01 (B) and (C). A member of the Dayton city commission is a "public official or employee" for purposes of R.C. 102.03. See generally Ohio Ethics Commission Advisory Opinions No. 88-005 and 89-008. The term "anything of value" has been defined for purposes of R.C. 102.03 to include money and every other thing of value. See R.C. 102.01 (G) and 1.03. Therefore, client fees earned by the attorney representing the corporation fall within the meaning of "anything of value." See Advisory Opinions No. 86-004 and 90-008. Also, any financial benefit accruing to you as an attorney in private practice would constitute anything of value for purposes of R.C. 102.03. See Advisory Opinion No. 92-003.

The Ethics Commission has consistently held that Division (D) of R.C. 102.03 prohibits a public official or employee from participating in a matter where the public official or employee would have an inherent conflict of interest such that his independence and objectivity of judgment could be impaired. See Advisory Opinions No. 84-009, 85-006, 88-009, and 90-008. R.C. 102.03 (D) prohibits a public official from participating in a matter which would affect his own private, pecuniary interest. See Advisory Opinions No. 88-004, 90-002, and 90-003. Furthermore, a public official is prohibited from participating in a matter affecting the interests of another party where the relationship between the public official and the other party is such that the public official's objectivity or independence of judgment could be impaired with regard to matters which affect the interests of that party. See Advisory Opinions No. 88-004 and 90-008.

The application of R.C. 102.03 (D) is dependent upon the facts and circumstances of each individual situation. See Advisory Opinions No. 88-004. All of the facts and circumstances in the issue you have presented to the Ethics Commission are important in determining whether you may vote on the matters pending before and affecting the city commission. The Ethics Commission, when rendering advisory opinions, interprets pertinent statutory provisions and sets forth the criteria which must be observed to avoid a violation of the law. The opinion function of the Ethics Commission is not a fact-finding process, and the Commission must rely upon the truth and completeness of facts set forth in request letters. See Advisory Opinion No. 92-003.

In Advisory Opinions No. 86-004 and 89-016, the Ethics Commission held that an attorney who is a partner, associate, or employee of a law partnership is prohibited from taking any official action concerning a matter pending before his agency where a partner, associate, or employee of his law firm is representing a client on that matter. In Advisory Opinion No. 89-016, the Ethics Commission stated:

[t]he relationship between [a public official] and his employing law firm and law partners or associates indicates that his objectivity or independence of judgment could be impaired in considering a matter in which his law firm and law partners or associates are interested, and that R.C. 102.03 (D) would prohibit [the public official] from participating in matters in which his law firm is involved even though he does not personally receive a share of the client fees.

In Advisory Opinion No. 90-008, the Ethics Commission was asked if a city council member could vote on a matter where the law firm by which he was employed was representing a client on that matter before council. In Advisory Opinion No. 90-008, the law firm involved was a partnership, and the city council member was an employee of the firm, receiving a salary and eligible to receive

"productivity" bonuses. Relying on Advisory Opinion No. 89-016, the Ethics Commission stated, in Advisory Opinion No. 90-008:

R.C. 102.03 (D) would, therefore, prohibit [a city council member] from voting, taking part in discussions or deliberations, or otherwise participating, formally or informally, in the consideration of matters pending before the council if a member of [the council member's] firm is representing a client on the specific matter before council, even though [the council member does] not personally receive a share of the client's fees.

The Ethics Commission further held that R.C. 102.03 (D) would prohibit the city council member from participating in a matter if the public official would be required to review and act upon matters in which members of his employing law firm had received client fees. See also Advisory Opinion No. 90-011.

In Advisory Opinion No. 92-003, the Ethics Commission was asked if a city law director could appoint attorneys with whom he shared rent and other expenses to the position of assistant law director, in order to assist the law director in the performance of his official duties. The Ethics Commission held as follows:

R.C. 102.03 (D) prohibits a public official from using his official position in any way to secure anything of value for his business associates, unless he can demonstrate that under the circumstances his independence of judgment could not be impaired by his business associates' interests. See Advisory Opinions No. 88-004, 88-005, and 90-008. It is [the law director's] responsibility . . . to appoint assistant law directors to aid . . . in the performance of [the law director's] duties. (Citation omitted.) Payments made, directly or indirectly, from the county commissioners to attorneys with whom [the law director] share[s] expenses are of such a character as to manifest a substantial and improper influence upon [the law director] in the performance of this responsibility, since such payments could aid the attorneys in the payment of their share of the expenses. (Citation omitted.) The relationship between [the law director] and the attorneys in [his] association is such that [the law director's] objectivity and independence of judgment . . . could be impaired where [the attorneys] would have a financial interest in the appointments.

As stated above, the application of R.C. 102.03 (D) is dependent upon the facts and circumstances of each individual situation. In Advisory Opinion No. 89-016 and 90-008, the Ethics Commission held that the relationship between a partner or employee of a partnership of attorneys and the partnership itself is such that the objectivity and independence of judgment of the partner or

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employee, in his role as a public official, could be impaired with regard to issues in which another attorney in the law firm is representing a client, or in which the law firm has participated. In Advisory Opinion No. 92-003, the Ethics Commission held that the relationship between attorneys involved in an expense-sharing arrangement similar to the one at issue in this question was such that the objectivity and independence of judgment of one of the attorneys, in his role as the city law director, could be impaired with regard to awarding employment contracts to the other attorneys in the expense-sharing arrangement, taking into consideration that the law director's own interests could be affected by payments to those with whom he shared expenses.

The situation you have described shares some of the elements present in Advisory Opinions No. 89-016 and 90-008, and 92-003, but it is not controlled by any of these opinions. As in Advisory Opinions No. 89-016 and 90-008, the issues pending before the city commission are ones on which an attorney with whom you have a business relationship is representing a client. However, in Advisory Opinions No. 89-016 and 90-008, the relationship between the public official and the law firm representing the client was either as a partner or as an employee. See Advisory Opinion No. 88-005 (a public official or employee is prohibited by R.C. 102.03 (D) from taking any official action in a matter in which his employer has an interest because the fact that an employer stands in a position of authority over an employee who also serves as a public official indicates that the public official's independence of judgment could be impaired with respect to his outside employer's interests). See also Advisory Opinion No. 91-004. The combination of circumstances in each Advisory Opinion No. 89-016 and Advisory Opinion No. 90-008 was enough to indicate that the objectivity of the official could be impaired in making his decision. In the situation you have described, you are not an employee of the attorney representing the client before the city commission. You are also not a partner in a law firm which is representing a client before the city commission. Rather, you have explained that the practitioners in your question have not formed a corporation or a partnership, and that each practitioner is responsible for his own tax documents. However, it is clear from your letter, and subsequent discussions with the Ethics Commission staff, that you do continue to share office space and expenses with the attorney who is representing the corporation that filed suit against the city and that is interested in the settlement and rezoning issue.

This relationship between you and the attorney with whom you share office space is similar to the relationship considered in Advisory Opinion No. 92-003. In both circumstances, the public official is a member of an affiliation of attorneys who share office expenses, although they maintain separate accounts and do not share profits. In your circumstance, however, you have stated that the affiliation between yourself and the other attorneys is limited to expense-sharing, that you do not share a telephone

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number, and that you do not use letterhead listing the names of all of the attorneys in the expense-sharing arrangement. Furthermore, the intent of the parties is to terminate the arrangement, and steps have been taken to begin the termination. In the situation described for purposes of Advisory Opinion No. 92-003, the public official, as city law director, asked if the Ethics Law prohibited him from appointing attorneys with whom he shared expenses to the position of assistant city law director. The attorneys with whom the city law director shared office space would have received a direct financial benefit from the law director's action to appoint them. It was the interest of the attorneys, and not the clients of the attorneys, which would have been directly affected by the law director's actions in Advisory Opinion No. 92-003. Additionally, the Ethics Commission determined that the law director himself could also potentially benefit from the appointment of the other attorneys, because the salary or other payments made to the other attorneys as assistant law directors could free the law director from the liability to pay the share of the expenses for which the other attorneys were responsible. It was the combination of these factors--the relationship between the public official and the other party, the direct financial benefit stemming from the action of the city law director, and the potential benefit to the law director himself--which led the Ethics Commission to determine that the law director's objectivity and impartiality of judgment could be impaired if he appointed the attorneys with whom he shared office space.

In sum, you and the other attorney are not partners and do not share fees. You have stated that you would not receive a share of the client fees paid in this situation. Furthermore, you are not an employee of the attorney representing the corporation, and the attorney does not otherwise stand in a position of authority or influence over you. While you and the attorney representing the client do have a relationship similar to that described in Advisory Opinion No. 92-003, the attorney's own interests are not pending before the city commission. You have stated that you are unaware of whether the client fees received by the attorney are dependent upon the decisions made by the city commission on the issues pending before it. The Ethics Commission assumes that there is no provision within the settlement agreement pending before the commission which provides for the payment of attorney's fees or other benefit by the city to the attorney. It is also assumed that the attorney will be paid by his client regardless of the outcome of the city commission's decision. Furthermore, the possibility that the attorney may be required to work a greater number of hours, and thus will receive more client fees, if the city commission reaches one decision instead of another, is too remote and speculative to require you to abstain. See generally Advisory Opinions No. 91-006.

Additionally, while it could be argued that you will benefit from any payment made to attorneys with whom you are in an expense-sharing arrangement insofar as their ability to pay their expenses

could free you of the necessity to pay the expenses, this benefit to you would not stem directly from the city commission's decision on the issues pending before the city commission, but would result, if at all, from the client fees which will be paid to the attorney by the corporation. Again, it is assumed that the settlement agreement does not provide for payment of fees by the city to the attorney, and that the attorney will be paid regardless of the outcome of the city commission's decisions. Again, the difference in the number of hours worked, and thus, the amount of client fees paid, that could exist depending on the decisions made by the city commission is too remote and speculative a factor to require you to abstain.

Therefore, although there is an expense-sharing relationship between you and the attorney who is representing a client in the matters pending before the city commission, the relationship, in and of itself, is not sufficient to conclude that your objectivity and impartiality of judgment could be impaired with regard to the matters pending before the city commission on the facts presented. If other facts exist which establish that the attorney in your expense-sharing arrangement would be paid under the settlement agreement or does, in fact, have some direct financial interest in the outcome of the city commission's vote, or if the attorney's financial interests would be substantially affected by, or dependent upon, the particular decision reached by the city commission, that direct financial interest, coupled with the relationship between you and the attorney, would indicate that your objectivity and impartiality of judgment could be impaired with regard to the matters pending before the city commission such that you would be required to abstain from participating in the issues. Such direct financial interest is not apparent from the facts submitted to the Ethics Commission. However, the conclusions of this opinion are based solely upon the facts presented to the Commission and if any facts exist which have not been provided to the Commission and which may suggest that the attorney has a direct financial interest in this matter then the conclusions of this opinion cannot be relied upon.

Further, it must be noted that if any relationship exists between you and the client involved in the matter, or if your financial interests would be directly and substantially affected by, or dependent upon, the outcome of the matters pending before the city commission, you would be prohibited from acting with regard to those matters. See Advisory Opinion No. 90-008. Once again, it is assumed that the relationship between you and the attorney representing the corporation before the city commission was not altered in order to affect your ability to participate.

You should also be aware of R.C. 102.03 (B), which states as follows:

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No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential which such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

Pursuant to this section, you are prohibited from disclosing confidential information which you acquired in your position as a city commission member to any other party, or using the information in any way, without appropriate authorization. See Advisory Opinion No. 90-008. This limitation is applicable during your public services, and after, and remains in effect as long as the information is confidential. Id.

As a final note, you should be aware that your question may also raise 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.

This informal advisory opinion was approved by the Ethics Commission at its meeting on March 6, 1992. 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, please feel free to contact this Office again.

Sincerely,



Melissa A. Warheit
Executive Director