



OHIO ETHICS COMMISSION

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March 14, 1997

Informal Opinion 1997-INF-0314-1

Robert L. Konstam
Law Director
City of Mansfield

Dear Mr. Konstam:

In your request for an advisory opinion, you ask whether the Ohio Ethics Laws and related statutes prohibit an employee of the City of Mansfield (City) from engaging in outside private employment as an independent forensic science consultant.

As explained below, the Ohio Ethics Law and related statutes do not prohibit the city employee from testifying as a defense expert witness in a criminal case in a neighboring county in which the City or the task force is not, and is unlikely to become, an adverse party. However, the city employee must observe significant and numerous restrictions imposed by the Ohio Ethics Law and related statutes while he engages in private outside employment.

Facts

You state that the City employee is the head of the police department's crime laboratory. He is responsible for running the laboratory, supervising staff, conducting tests, and collecting evidence of crimes. He is responsible for the custody and safekeeping of evidence. He testifies in court as to the results of the tests conducted in his laboratory. You also state that he is the forensic scientist for a multi-county drug task force and that he performs similar duties for the task force. You state that most of his forensic work involves drug cases. He has a Bachelor's Degree in Criminalistics and has attended continuing education classes, some of which have been paid for by public agencies that utilize his services, such as the County Prosecutor's Office and the City police department.

You state that the employee has maintained a private, independent forensic science consulting practice for the past five years. You state that the employee has done his private work strictly on his own time and with his own equipment. You stress that the employee does not perform private work, on either criminal or civil matters, in which the City or the task force is an adverse party. The issue is whether the Ohio Ethics Laws and related statutes prohibit him from testifying as an expert witness, for the defense, in a criminal case in a neighboring county.

Prohibitions Imposed by R.C. 102.03 (D) and (E)

Your attention is directed to Divisions (D) and (E) of Section 102.03 of the Revised Code, which read as follows:

- (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.
- (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.

The term "public official or employee" for purposes of R.C. 102.03 as "any person who is an employee of any public agency." R.C. 102.01 (C) defines a "public agency" to include "any department, division, institution, board, commission, authority, bureau or other instrumentality" of a city. Accordingly, the city employee is subject to R.C. 102.03 (D) and (E).

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money, the promise of future employment, and every other thing of value. R.C. 1.03, 102.01 (G); Advisory Ops. No. 82-002, 87-008, and 89-003. The compensation that the city employee receives from his private forensics practice is a thing of value for purposes of R.C. 102.03 (D) and (E).

R.C. 102.03 (D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his official position to secure anything of value if the thing of value could manifest a substantial and improper influence upon him with respect to his duties. Advisory Op. No. 90-003. The Ethics Commission has held that in order to be prohibited for purposes of R.C. Section 102.03, the thing of value must be of a substantial and improper character. Advisory Ops. No. 80-007, 85-006, and 89-014. The compensation received from private outside employment or business activity is not incidental or minimal in amount, and thus, would be of a substantial nature. Generally, R.C. 102.03 (D) and (E) do not prohibit a public official or employee from engaging in private business activity so long as no conflict of interest exists between the public official's or employee's public position and private financial interests. Advisory Ops. No. 84-009, 84-012, and 92-009.

Prohibition Imposed by R.C. 102.03 (E)

Division (E) of Section 102.03 of the Revised Code was enacted as part of Am. Sub. H.B. 300, 116th Gen. A. (1986) (eff. September 17, 1986) to supplement the prohibitions imposed by R.C. 102.03 (D). Prior to the enactment of Am. H.B. 300, Division (D) of Section 102.03 prohibited a public official or employee from using the authority or influence of his office or employment to secure a thing of value for himself that would not ordinarily accrue to him in the

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performance of his duties if the thing of value was of such a character as to manifest a substantial and improper influence upon him with respect to his duties. In its application of Division (D), before the enactment Division (E), the Ethics Commission held that a public official or employee was prohibited from using the authority or influence of his public position to solicit or receive consulting fees from a party interested in matters before, regulated by, or doing or seeking to do business with his public agency. Advisory Ops. No. 79-002, 84-014, and 86-008.

R.C. 102.03 (E) does not require that the public official or employee use the authority or influence of his office or employment to secure an improper thing of value, rather it prohibits a public official or employee from merely soliciting or accepting an improper thing of value. Advisory Op. No. 90-004. The Ethics Commission has held that the relationship between the public official or employee and the source of the thing of value determines whether the source is an improper source for purposes of R.C. 102.03 (E). Advisory Ops. No. 86-011 and 92-015. The Commission has held that a public official's or employee's objectivity and independence of judgment with regard to his official actions could be impaired if he were to solicit or accept a thing of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with his own public agency. Advisory Ops. No. 87-006, 87-009, and 89-006. See also Advisory Ops. No. 87-008 and 90-004.

The Ethics Commission has held that in certain situations, a public official or employee who engages in private outside business activity may withdraw from consideration of matters that would create an impairment of his objectivity and independence of judgment. Advisory Ops. No. 89-006, 90-002, and 90-009. However, a public official's or employee's withdrawal from consideration of issues concerning parties who are interested in matters before, regulated by, or doing or seeking to do business with his own public agency may be accomplished only when such a withdrawal: (1) does not interfere with the official's or employee's performance of his assigned duties; **and** (2) is approved by the appropriate officials at his employing agency. Advisory Ops. No. 89-006, 89-010, and 90-002. See also Advisory Op. No. 90-010.

The application of R.C. 102.03 (E) is dependent upon the facts and circumstances of each individual situation. Advisory Ops. No. 90-004 and 91-002. In some situations a public official or employee may not have any official duties that bring him into contact as a public official or employee with the party with which he desires to conduct private business. In such a situation, it is obvious that an initial withdrawal affecting the interested party is unnecessary. But it is necessary that the appropriate officials at the affected official's or employee's agency approve the official's or employee's proposed activity since the existence of a private business relationship will affect his employing public agency's ability to assign new duties that could bring him into contact with the interested party in the future.

Exception in the Application of R.C. 102.03 (E)

Therefore, R.C. 102.03 (E) prohibits a public official or employee from engaging in private outside employment or business activity with parties that are interested in matters before, regulated by, or seeking to do business with his own agency, unless he is able to withdraw from consideration

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of matters which would pose a conflict of interest, **or** if he does not have any official duties that bring him into contact, as a public official or employee, with the party with which he desires to conduct private business.

In the instant situation, the issue is whether the Ohio Ethics Laws and related statutes prohibit the city employee from receiving compensation for testifying as an expert witness in a criminal case in a neighboring county.

In Advisory Opinion No. 84-012, the Ethics Commission held that a service forester employed by the Division of Forestry of the Department of Natural Resources was prohibited from soliciting or receiving fees for services rendered on a project on which he provides, or is required to provide, technical assistance or advice in his official capacity. But in that opinion, the Ethics Commission also held that:

Division (D) of Section 102.03 of the Revised Code does not, per se, prohibit the service forester from operating a private tree service outside his district, and there may be projects within his district that are not within his jurisdiction. However, Division (D) of Section 102.03 of the Revised Code conditions or restricts his activities, as described above. In addition, the service forester may be subject to Departmental administrative policies or procedures with respect to such an arrangement. (Emphasis in original).

In Advisory Op. No. 90-002, the Commission held that a Department of Agriculture meat inspector was not prohibited by R.C. 102.03 (D) and (E) from owning and operating a meat processing plant that was located in an inspection district other than his own despite the fact that his employing state agency would regulate his plant.

In the instant situation, the city employee's official duties consist of performing forensic services for the City and a multi-county drug task force. The city employee does not perform private work, on either criminal or civil matters, in which the City or the task force is an adverse party. In the instant situation, the employment with the City would be akin to the situations addressed in Advisory Opinions No. 84-012 and 90-002 in which a public employee is charged with performing an official duty within a specified geographical area.

Therefore, R.C. 102.03 (E) would not prohibit the city employee from receiving compensation for testifying as an expert witness in a criminal case in a neighboring county provided that the party that is the source of the compensation is not interested in matters before, regulated by, or seeking to do business with the city police department or the multi-county drug task force. The city employee must, however, take extreme care to determine that a private client who is a defendant in a criminal case in a neighboring county is not interested in any matters pending before the city and the multi-county task force and, based on the facts of the case, that matters between his private client and the city and the multi-county task force are unlikely to arise.

R.C. 102.03 (D) - Restrictions on Private Outside Employment

As explained above, Division (D) of Section 102.03 of the Revised Code prohibits a public official or employee from using the authority or influence of his position to secure anything of value for himself, family members, business associates, or others where there is a conflict of interest. Advisory Ops. No. 79-006, 87-009, and 89-006. R.C. 102.03 (D) requires that some action or inaction by a public official or employee results in the securing of the thing of value.

Generally, the Ethics Commission has held that the compensation that a public official or employee secures from engaging in private outside employment or business activity is of such character as to manifest a substantial and improper influence upon him with respect to his duties when the fees result from the direct use of his official authority or influence, impair his performance, or burden the public resources entrusted to him at the expense of his own personal financial interests.

Accordingly, in Advisory Opinion No. 96-004, the Ethics Commission identified general restrictions that apply to all public officials and employees who engage in private outside employment. The Commission held in Advisory Opinion No. 96-004 that R.C. 102.03 (D) prohibits a public official or employee who engages in private outside employment or business activity from:

- (1) using public time, facilities, personnel, or resources in conducting a private business or while engaging in private outside employment including conducting demonstrations for clients using public equipment;
- (2) using his official title or identification on private business cards or other written materials or appearing in uniform while soliciting business or conducting demonstrations for clients;
- (3) using his relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding his private interests;
- (4) discussing, deliberating, or voting on any matter involving his private business, including recommending his outside employer's or business's services to his own public agency;
- (5) receiving fees for providing services rendered on projects that he has recommended in his official capacity;
- (6) participating in decisions or recommendations regarding his competitors;
and,
- (7) using his public position or authority in any other way to secure a benefit for his outside employer or private business.

The Commission has established these general limitations on the conduct of a public official or employee who wishes to engage in a private business, however, the application of these limitations are dependent on the facts and circumstances of each individual situation. See generally Advisory Ops. No. 77-003, 86-007, and 92-009.

Application of R.C. 102.03 (D) Prohibitions

In light of the above enumerated restrictions, the compensation that the city employee would receive from a criminal defendant in a neighboring county would be unrelated to the services that he is required to provide as an public official or employee. It must be reiterated that the city employee is required to do his private outside work on his own time, using his own equipment. Also, he is prohibited from using his official title or identification on private business cards or advertising. While serving as an expert witness, he is limited to identifying the city and the multi-county drug task force as his employer and describing the duties that he performs. Whenever he performs private services on matters outside the city and the multi-county task force, he may not use his relationship with other public officials and employees to intervene in decisions that would affect his private consulting practice.

Restrictions Imposed by R.C. 102.03 (A)

Section 102.03 (A) of the Revised Code provides in pertinent part:

- (1) No present or former public official or employee shall, during his 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.
- ...
- (5) As used in divisions (A)(1), (2), and (3) of this section, "matter" includes any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments . . .

The fundamental elements of Section 102.03 (A) are: (1) a present or former public official or employee; (2) is prohibited from representing or acting in a representative capacity for any person (defined in R.C. Section 1.59 to include an individual, corporation, partnership, association, or other similar entity); (3) before any public agency; (4) on any matter in which he personally participated as a public official or employee; (5) during government service and for one year thereafter. Advisory Ops. No. 86-001, 87-004, and 92-005.

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Under R.C. 102.03 (A), the term “represent” includes “any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person.” Under R.C. 1.59, the term “person” includes “an individual, corporation, business trust, estate, trust, partnership, and association.” The Ethics Commission, in explaining the types of activities that would encompass the term “represent,” stated:

[T]his would include activities ranging from an appearance on behalf of a private client in a formal proceeding or meeting to informal “lobbying” of agency personnel by telephone or in person. It also includes written communications ranging from formal documents and filings to informal letters and notes. Even if the attorney or consultant does not sign the documents, letters, or notes, the prohibition would apply if she prepared the communication. If she merely consulted with the attorneys or other personnel who prepared the documents, letters, or notes, the prohibition would not apply. Advisory Op. No. 86-001. See also Advisory Ops. No. 89-003, 91-003, 91-009, and 92-005.

It is important to note that R.C. 102.03 (A) prohibits a former public official or employee from representing a client, new employer, or any other party before any public agency on a matter in which he personally participated, not just the agency with which he was previously employed. Advisory Ops. No. 86-001 and 87-001. R.C. 102.01 (C) defines “public agency” to include “the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, township, and the five state retirement systems, or any other governmental entity.”

The term “matter” is defined by R.C. 102.03 (A) to include “any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments.” (Emphasis added.) R.C. 102.03 (A) defines “personal participation” to include the “decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.” The Ethics Commission has found that “personal participation” in a matter includes the exercise of supervision or general oversight by a public official or employee over other personnel in their work on that matter. Advisory Ops. No. 86-001, 91-009, and 92-005.

R.C. 102.03 (A) prohibits the city employee, while he is employed by the city and the multi-county drug task force, from representing a private client or any other party, before any public agency on any matter in which he personally participated during his employment with the city and multi-county task force, regardless of when such personal participation occurred. Advisory Ops. No. 89-003, 91-009, and 92-005. This restriction continues for one year should he leave his public employment. Id. R.C. 102.03 (A) does not prohibit the city employee from representing clients before a public agency on new matters, legislative matters, or matters in which he did not personally participate as a public employee.

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Restrictions Imposed by R.C. 102.03 (B)

R.C. 102.03 (B) provides that:

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 when 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.

R.C. 102.03 (B) prohibits the city employee from using or disclosing confidential information that he acquired in his positions with the city and the multi-county drug task force without appropriate authorization. Advisory Ops. No. 93-011 and 92-005. This prohibition, unlike Section 102.03 (A), has no time limit, and is applicable during an individual's public service and thereafter, for as long as the information remains confidential.

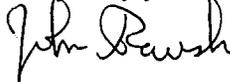
Conclusion

As explained above, the Ohio Ethics Law and related statutes do not prohibit the city employee from testifying as an expert witness in a criminal case in a neighboring county in which the City or the task force is an adverse party. However, the city employee must observe the restrictions imposed by the Ohio Ethics Law and related statutes while he engages in private outside employment.

The city employee should inquire whether there are departmental policies, charter provisions, local ordinances, collective bargaining provisions, or other restrictions that may further restrict his ability to engage in private outside business activity. The Ethics Commission is statutorily authorized to address only issues arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code and cannot address the application of restrictions imposed by provisions of law outside its jurisdiction.

This informal advisory opinion was approved by the Ethics Commission at its meeting on March 14, 1997. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. If you have any further questions, please feel free to contact this Office again.

Very truly yours,



John Rawski
Staff Attorney