



OHIO ETHICS COMMISSION

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September 25, 1998

Informal Opinion 1998-INF-0925

The Honorable Paul J. Gains
Mahoning County Prosecuting Attorney

Dear Prosecutor Gains:

You have asked if the Ohio Ethics Law and related statutes prohibit you, after having become the Mahoning County Prosecuting Attorney, from submitting a bill to the city of Youngstown for work you completed for the city prior to taking your public position.

By way of history, you have explained that you were elected to the position of Mahoning County Prosecuting Attorney in November, 1996, and that your present term of office commenced on January 6, 1997. You have stated that, prior to taking office, you were engaged by the city of Youngstown to represent a former Youngstown police officer, who was one of the defendants in a lawsuit filed against the city. You have stated that you completed over 90 hours of work on the lawsuit between May, 1995 and November, 1996. You have stated that, as had been your practice when engaged by the city in other matters, you do not plan to submit a bill for your work to the city until after the final disposition of the case. You have explained that the case is ongoing, and that you worked on the case in 1997 and 1998, but that you do not intend to bill the city for the time you spent on the case after you assumed your position as county prosecuting attorney.

As explained more fully below, R.C. 102.03(D) and (E) do not prohibit you from accepting or soliciting payment, from the city, for legal work that you performed prior to taking office as county prosecutor, where you were legally entitled to the payment prior to taking the office, because the payment would not be of such a character as to have a substantial and improper influence upon you with respect to the performance of your duties as county prosecutor. However, R.C. 102.03(D) and (E), as you are aware, would prohibit you from using your position as county prosecutor, in any way, to improperly secure payment of your legal fees by the city.

Conflict of Interest—R.C. 102.03(D) and (E)

The Ethics Commission has stated on numerous occasions that there is nothing in the Ethics Law that absolutely prohibits a public official or employee from holding outside employment or receiving compensation for services performed in a private capacity, so long as no actual conflict of interest exists between his public position and his outside employment. Ohio Ethics Commission Advisory Opinions No. 90-002 and 96-004. However, a public official or employee is bound by the provisions of R.C. 102.03(D) and (E), which may limit the ability of a public official or employee to hold outside employment or accept outside compensation. Divisions (D) and (E) of R.C. 102.03 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.

R.C. 102.01(B) and (C) define the term "public official or employee" to include any person who is elected or appointed to an office of a county. You, as an elected county prosecuting attorney, are a "public official or employee" for purposes of R.C. 102.03. Adv. Op. No. 90-007. The term "anything of value" is defined for purposes of R.C. 102.03 to include money, promissory notes, warrants, or checks, and every other thing of value. R.C. 102.01(G) and 1.03. Compensation or client fees are considered to fall within the definition of "anything of value" for purposes of R.C. 102.03. Adv. Ops. No. 86-004, 89-015, 89-016, and 90-008.

A public official or employee is prohibited by R.C. 102.03(D) and (E) from accepting, soliciting, or using his position to secure anything of value, including client fees, that would directly benefit his personal or private pecuniary interests, where the compensation could impair his objectivity and independence of judgment with regard to his official decisions and responsibilities. Adv. Ops. No. 87-006, 88-002, 89-006, and 90-002. The Ethics Commission has also held that Divisions (D) and (E) of R.C. 102.03 prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his office to secure payments for outside employment from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the agency with which he serves. Adv. Ops. No. 89-010 and 90-002.

The Ethics Commission has also held that R.C. 102.03 prohibits a county prosecutor from using his position to secure legal work, from parties he is statutorily required to represent, for his partner in private practice, and from receiving any portion of the compensation his partner is paid to perform the legal work. Adv. Op. No. 90-007. The Commission has also held that a public official who is an attorney is prohibited from representing clients in legal matters against his public agency, and from receiving money for conducting the legal services. Adv. Ops. No. 89-015 and 90-008.

Facts

You have indicated that you represented a former city employee, for the city, in an action brought against the city and the employee. It is assumed that the county is not a defendant or other party to that action. It is likely that the city of Youngstown may be doing or seeking to do business with, interested in matters before, or regulated by, the county. For example, there may be contracts or other agreements between the city and county for each to provide services to the other, or the city and county may work together to construct public buildings or facilities, or may jointly own or operate such facilities. In these situations, the county prosecutor may be expected to provide legal advice to the county. The city could be doing business with the county, or a party interested in the exercise of the county prosecutor's authority. The city would, therefore, be a prohibited source of

anything of value, including client fees, if you sought to perform legal services for the city now that you are the county prosecutor. Adv. Op. No. 90-007.

Your situation, however, is different. You have stated that you wish to receive payment only for the services contracted for and rendered prior to the time you took your public position, understanding that a conflict of interest may otherwise arise. You have stated that you do not wish to charge the city for any of the legal work you have completed, in order to bring the case to a conclusion, since you became county prosecutor. In a telephone conversation with Commission staff, you stated that the hourly rate you will charge for your services (\$100/hour) is lower than the rate the city will pay the other attorneys representing it in the same action (\$135/hour).

Given the facts that you have presented, payment from the city for legal work, where you performed the work prior to taking office as county prosecutor and where you were legally entitled to the payment prior to taking the office, would not be of such a character as to have a substantial and improper influence upon you with respect to the performance of your duties. Consequently, R.C. 102.03(D) and (E) would not prohibit you from submitting a bill to the city for the legal work you completed prior to assuming the county prosecutor position. R.C. 102.03(D) and (E) would, however, prohibit you from using your position as county prosecutor, in any way, to improperly secure the payment of your legal fees from the city.

Summary

As explained more fully above, R.C. 102.03(D) and (E) do not prohibit you from accepting or soliciting payment, from the city, for legal work that you performed prior to taking office as county prosecutor, where you were legally entitled to the payment prior to taking the office, because the payment would not be of such a character as to have a substantial and improper influence upon you with respect to the performance of your duties as county prosecutor. However, R.C. 102.03(D) and (E), as you are aware, would prohibit you from using your position as county prosecutor, in any way, to improperly secure payment of your legal fees by the city.

This informal advisory opinion was approved by the Ethics Commission at its meeting on September 25, 1998. 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.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney