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May 4, 2011

Informal Opinion 2011-INF-0504-1

David B. Wadsworth

Dear Mr. Wadsworth:

On February 16, 2011, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you stated that:

- You have been appointed to the position of Medina County Clerk of Courts for the remaining part of the retiring incumbent's four-year term; and
- You are also a licensed realtor, listing and selling property in Northeast Ohio, primarily in Cuyahoga and Medina Counties.

### **Question and Brief Answer**

**Question:** Can you, while serving as Clerk of Courts, work part-time as a realtor or real estate agent?

**Answer:** Yes, you can work part-time as a realtor or real estate agent while serving as Clerk of Courts, provided that you comply with the limits discussed in this opinion and the attached opinions.

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

As a county clerk of court, you are a "public official" and are subject to the prohibitions of R.C. 102.03(D) and (E), which read:

- (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.

A person who holds an elective county office is a "public official" subject to R.C. 102.03.<sup>1</sup>

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. The earnings a person would earn from employment, and the opportunity or ability to sell property for a commission, is a thing of value for purposes of R.C. 102.03(D) and (E).<sup>2</sup>

R.C. 102.03(D) prohibits a public official from, through the use of his authority or influence of office, securing a thing of value if the thing of value would have an improper influence upon him with respect to his duties by impairing his objectivity and independence of judgment.<sup>3</sup> The restriction in R.C. 102.03(D) applies whether the official is securing a thing of value for himself or for any other party with whom he has a close family, economic, business, or fiduciary relationship.<sup>4</sup> The Commission has explained that, if a matter before the public official will result in a definite and direct benefit to any of these closely related parties, the thing of value the party would receive would have a substantial and improper influence on the official. In your situation, these closely related parties would include Russell Real Estate Services, your employer, and your real estate clients.

R.C. 102.03(E) prohibits a public official from soliciting or accepting anything of value from any source if the thing of value would have an improper influence upon him with respect to his duties. Unlike R.C. 102.03(D), which prohibits a public official from using his public position to secure a thing of value, R.C. 102.03(E) prohibits a public official from merely soliciting or accepting a thing of value even where he takes no action to secure it.<sup>5</sup> R.C. 102.03(E) would prohibit you from soliciting any definite and direct benefits for yourself or for any of the closely related parties described above.

### **General Restrictions upon Outside Private Business Activity**

In 1996, the Ethics Commission issued a comprehensive opinion holding that the Ohio Ethics Law and related statutes do not prohibit a public official from engaging in private business activity provided that there is no irremediable conflict of interest between the official's or employee's public and private positions.<sup>6</sup> However, any public official who engages in private business activity must comply with all of the restrictions within the Ethics Law related to that activity.

The conclusions in Advisory Opinion No. 96-004 are included in this opinion as if restated here; a copy of the opinion is attached for your use. While you operate your real estate business, you are required to comply with the restrictions discussed in the opinion. For example, you are prohibited from using public time, equipment, personnel, or other resources to operate your private business and your public title or position in any way to promote your private business. Practically, these restrictions prohibit you from:

- Using your Clerk of Courts title on your letterhead, business cards, Web site, brochures, or other promotional materials that you distribute to solicit or promote your business;
- Using your official title on documents prepared in connection with your real estate business;
- Using your official title in the yellow pages or other published advertisements or articles about your business; or
- Distributing any business cards, brochures, or other promotional materials related to your business in the Clerk of Courts office.

This opinion will more fully discuss the aspects of Advisory Opinion No. 96-004 that are most relevant to your question.

### **Accepting Compensation from Vendors, Interested Parties, or Regulated Parties**

A public official who engages in a private outside business is prohibited from accepting, soliciting, or using his authority or influence to secure commissions, fees, or other payments from a party that is doing or seeking to do business with, regulated by, or interested in matters before his public agency. The Commission explained that payments from these parties are of such a character as to improperly influence the official with respect to the performance of his duties because they could impair the official's objectivity and independence of judgment regarding the source of payments.

For example, the Commission has explained that municipal and county engineers are prohibited from receiving compensation for private work from engineering firms that are doing business with or regulated by their offices.<sup>7</sup> Other examples include employees of the Board of Cosmetology, who are prohibited from selling goods to regulated salons, and municipal tax administrators who are prohibited from receiving client fees from clients who file income tax forms with the municipality.<sup>8</sup>

Therefore, a county clerk of courts who is also a real estate agent is prohibited from accepting compensation for the performance of any private employment activities from any person who is doing or seeking to do business with, regulated by, or interested in matters before his public agency.

### **Application to County Clerk of Courts**

Central to the application of the Ethics Law to your question is a review of the general duties and authority of a county clerk of courts to determine whether receiving compensation from your clients as a private realtor would create the possibility of impaired objectivity and independence of judgment for you regarding those clients.

The office of clerk of the court of common pleas is a statutorily created public office.<sup>9</sup> The clerk of the common pleas court also acts as the clerk of the court of appeals in the county.<sup>10</sup> A clerk of court exercises statutorily mandated powers and duties under the direction of the court.<sup>11</sup> The clerk of court's duties pertain generally to receiving, filing, organizing, keeping, and preserving specified papers, records, and dockets.<sup>12</sup>

In Ohio Attorney General Advisory Opinion No. 2006-011, the Attorney General examined the duties and authority of the clerk of the common pleas court, and concluded that the duties of the clerk have been characterized as "ministerial and non-judicial," and that the clerk shall comply with the direction of the court.<sup>13</sup> The clerk of the court of common pleas serves as an arm of the court, without exercising discretion.<sup>14</sup>

All property owners within a county are regulated by and interested in matters that could be the subject of discretionary decision-making authority of county officials.<sup>15</sup> However, the county clerk of courts, due to the ministerial nature of his official duties, does not have discretionary, decision-making authority over matters concerning the financial interests of individuals who either are, or can become, private business clients. Even if a matter affecting one of your clients would come before the Common Pleas Court of Medina County or the Ninth District Court of Appeals, you would not be in a position, as clerk of the courts, to exercise any discretion or decision-making regarding those matters.

Therefore, if you were to serve as a real estate agent for property sales in Medina County, the compensation that you would receive from your private real estate clients would not be a thing of value of such a character as to impair your objectivity and independence of judgment in the performance of your statutorily mandated duties as county clerk of courts. For that reason, R.C. 102.03(E) does not prohibit you from accepting client fees from any client, inside or outside of Medina County, who is also a person subject to the authority of the courts you serve.

### **Conclusion**

As explained above, you can work part-time as a realtor or real estate agent while serving as Clerk of Courts, provided that you comply with the limits discussed in this opinion and the attached opinions.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 28, 2011. The opinion is based on the facts presented. It 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 or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin  
Chief Advisory Attorney

Enclosure: Advisory Opinion No. 96-004

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's Web site: [www.ethics.ohio.gov](http://www.ethics.ohio.gov)

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<sup>1</sup> R.C. 102.01(B) and (C) ("public official" includes any person who is appointed to an office of a county).

<sup>2</sup> Ohio Ethics Commission Advisory Opinion No. 88-004.

<sup>3</sup> Adv. Op. No. 2008-02.

<sup>4</sup> Adv. Op. No. 2009-06.

<sup>5</sup> Adv. Op. No. 90-004.

<sup>6</sup> Adv. Op. No. 96-004.

<sup>7</sup> See, e.g., Adv. Op. No. 83-001.

<sup>8</sup> Adv. Ops. No. 83-007 and 93-015. See also *In the Matter of Carr* (Apr. 2, 1982), Muskingum App. No. CA-81-22, (affirming a city civil service commission's decision, based upon the prohibition of R.C. 102.03(D), to terminate a city code enforcement officer, who was a real estate broker, for attempting to sell a property that he had inspected in his official capacity).

<sup>9</sup> R.C. 2303.01.

<sup>10</sup> R.C. 2303.03.

<sup>11</sup> R.C. 2303.26.

<sup>12</sup> See R.C. 2303.08, 2303.09, 2303.12, and 2303.14.

<sup>13</sup> See *State ex rel. Glass v Chapman* (1902), 67 Ohio St. 1, 4.

<sup>14</sup> *State ex rel McKean v. Graves* (1914), 91 Ohio St. 23, 24.

<sup>15</sup> Adv. Op. 95-006.