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November 3, 2011 Informal Opinion 2011-INF-1103-2

Peter R. Silverman
Shumaker, Loop & Kendrick, LLP
[REDACTED]

Dear Mr. Silverman:

On September 16, 2011, the Ohio Ethics Commission received your request for an advisory opinion. In your request, you explained that you are a Casino Control Commission member and a partner in a private law firm. You asked two questions about the Ethics Law. This advisory opinion answers your second question. The other question will be answered in a separate opinion.

Question and Brief Answer

Question: Can your law firm assist, at the request of a local attorney, in providing counsel on selected, specialized issues that arise in the Toledo casino? If yes, what steps should you take to insulate yourself from potential conflicts of interest?

No. The Ethics Law prohibits any member of the Casino Control Commission from directly or indirectly having an interest in a contractual or service relationship with the following: (1) a casino facility; (2) casino operator; (3) management company; (4) holding company; or (5) gaming-related vendor.¹ As a partner in the law firm, you would have both a direct interest and an indirect interest in the contracts and services provided by the law firm. For that reason, the firm cannot provide legal services to any of these parties.

Law Firm Providing Services on Casino Matters

Your question is that a local attorney has asked your law firm to assist in providing counsel on selected, specialized issues that arise in the Toledo casino. This question could involve one of two possibilities: (1) the law firm is representing, as counsel or co-counsel, a

party that is subject to the jurisdiction of the Casino Control Commission or a party that is not subject to the Casino Control Commission on specialized issues that arise in the Toledo casino; or (2) the law firm is advising or providing other legal services to an attorney on specialized issues that arise in the Toledo casino. In the second situation, in order to apply the law, the law firm must know the identity of the attorney's client. Whether the law firm's connection to the client is direct or indirect, the restrictions in the Ethics Law will apply to you and the law firm.

There are specific conflict of interest provisions that apply to a public official or employee with a casino gaming regulatory function, including members of the Ohio Casino Control Commission. R.C. 102.03(L) provides:

No present public official or employee with a casino gaming regulatory function shall directly or indirectly have a financial interest in, have an ownership interest in, be the creditor or hold a debt instrument issued by, or have an interest in a contractual or service relationship with a casino operator, management company, holding company, casino facility, or gaming-related vendor. This section does not prohibit or limit permitted passive investing by the public official or employee.

As a Casino Control Commission member, you perform a casino gaming regulatory function and are subject to R.C. 102.03(L). R.C. 102.03(L) prohibits any direct or indirect "interest in a contractual or service relationship." There is no limitation on the nature of the interest prohibited by this phrase. The provision of legal services is a contractual or service relationship comprehended within the phrase. The Commission has previously concluded that the term "interest," used in R.C. 2921.42, includes both financial and fiduciary interests.² An "interest" prohibited by R.C. 102.03(L) can also be financial or fiduciary.

R.C. 102.03(L) prohibits you from, directly or indirectly, having any of the following connections:

- Financial interest;
- Ownership interest;
- Creditor or holder of a debt instrument issued; or
- Interest in a contractual or service relationship;

with any of these entities:

- A casino facility in Ohio;³
- A casino operator of a casino facility in Ohio;⁴
- A management company working with a casino facility in Ohio;⁵
- A gaming-related vendor working with a casino operator or management company for a casino facility in Ohio;⁶ or
- A holding company of an applicant, casino operator, management company, or gaming-related vendor of a casino facility in Ohio.⁷

Application to Your Question

As a partner in a law firm, you have a direct financial interest in the contracts of and services provided by the law firm. Even if you were to waive partnership profits attributable to any particular contract of or service provided by the law firm, you would have an indirect interest in the firm's contracts or services because of your fiduciary connection to the firm.⁸

If your firm provides counsel or services to a casino facility, casino operator, management company, gaming-related vendor, or holding company, you would have a prohibited direct or indirect interest in the law firm's contractual or service relationship with that entity. When interpreting R.C. 102.03(L), the Commission is bound by the definitions of "casino operator," "management company," "holding company," "casino facility," and "gaming-related vendor" that are included within the amendment to the Ohio Constitution approved by voters or the statutes governing the Casino Control Commission enacted by the General Assembly.

The Toledo casino is one of the casino facilities included in the Ohio constitutional amendment. Therefore, you would have a prohibited direct or indirect interest in a contractual or service relationship if the firm were to provide legal services on a matter related to the Toledo casino to:

- A casino operator of the Toledo casino;
- A management company working with the Toledo casino;
- A gaming-related vendor working with an operator or management company at the Toledo casino; or
- A holding company of an applicant, casino operator, management company, or gaming-related vendor of the Toledo casino.

The law firm is prohibited from providing services directly to these parties or to another attorney whose clients are these parties.

The restriction in R.C. 102.03(L) would not apply, however, if your firm provides services on specialized issues that arise in the Toledo casino to a party other than those under the jurisdiction of the Casino Control Commission. Therefore, R.C. 102.03(L) does not prohibit your firm from providing legal services on specialized issues that arise in the Toledo casino to a party that is not under the jurisdiction of the Casino Control Commission. However, in that situation, R.C. 102.03(M)(1) and the general conflict of interest provisions in R.C. 102.03(D) and (E) would apply to you. These restrictions may still prohibit the activity you have described.

Conflicts of Interest—R.C. 102.03(M)(1) and R.C. 102.03(D) and (E)

R.C. 102.03(M)(1) states that a Casino Control Commission member shall not:

Accept anything of value, including but not limited to a gift, gratuity, emolument, or employment from a casino operator, management company, or other person subject to the jurisdiction of the commission, or from an officer, attorney, agent, or employee of a casino operator, management company, or other person subject to the jurisdiction of the commission.

Payment for legal services is within the definition of anything of value.⁹ R.C. 102.03(M)(1) is a complete bar on the members of the Ohio Casino Control Commission, prohibiting them from accepting anything of value, regardless of its amount or the purpose for which it is given, from the prohibited sources discussed in that section.

The range of prohibited sources in R.C. 102.03(M)(1) is broader than those described in R.C. 102.03(L) because it includes any "person subject to the jurisdiction of the" Casino Control Commission and any "officer, attorney, agent, or employee" of any "other person subject to the jurisdiction of the commission." Therefore, if a local attorney who is working for "any other person" subject to the Commission's jurisdiction were to pay your law firm to provide legal services, you would be prohibited from accepting any portion of the fees paid by that party to the law firm. Again, the law firm must know the identity of the attorney's client in order to determine to what extent the restriction in R.C. 102.03(M)(1) applies.

This prohibition applies regardless of the subject matter of the services provided by the firm. Even if the firm provides legal services to the individuals described in R.C. 102.03(M)(1) on a matter that is unrelated to the Toledo casino or any other subject before the Casino Control Commission, R.C. 102.03(M)(1) would prohibit you from accepting any portion of the fees paid to the firm.

If the local attorney wants to engage your law firm, and he is working for any person subject to the jurisdiction of the Casino Control Commission, the prohibition in R.C. 102.03(M)(1) would apply. In that case, R.C. 102.03(M)(1) would prohibit you from accepting any portion of the fee paid to your law firm.

If you were to violate R.C. 102.03(M)(1), in addition to the penalties set forth in R.C. 102.99, you would forfeit your position as a member of the Commission.¹⁰

In addition to R.C. 102.03(L) and (M)(1), you are also within the class of individuals¹¹ subject to R.C. 102.03(D) and (E), which are the general conflict of interest restrictions contained in the law before R.C. 102.03(L) and (M)(1) were enacted. R.C. 102.03(D) and (E) provide:

- (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.

"Anything of value" is defined to include money, goods, chattels, and other things of value.¹² As noted above, payment for legal services is within the definition of anything of value. A definite and direct financial benefit or detriment is also considered to be a thing of value under R.C. 102.03(D) and (E). Any regulatory or other decision of the Casino Control Commission concerning the operation of casinos in Ohio is a thing of value for casino owners and operators and for casino-related industries.

R.C. 102.03 (D) prohibits a public official from using the authority or influence of his office to secure anything of value for himself, or for another person or entity if the relationship between the official and that person or entity could impair the official's objectivity and independence of judgment with regard to matters that affect that person or entity.¹³ In Advisory Opinion No. 90-008, the Commission explained that R.C. 102.03(D) prohibits a city council member who is employed by a private law firm from voting, discussing, or otherwise using the authority or influence of his official position, formally or informally, with regard to a matter pending before city council if an employee or partner of his employing law firm either: (1) is representing a client on the specific matter pending before city council; or (2) has provided consultation and advice on the matter before city council to any person.

R.C. 102.03(E) prohibits a public official from engaging in private employment or business activity with a party that is interested in matters before, regulated by, or doing or seeking to do business with his own public agency. If a public official operates a private business, then he is prohibited from accepting, soliciting, or using his authority or influence to secure fees or other payments from a customer who is interested in matters before, regulated by, or doing or seeking to do business with, the official's or employee's public agency. The payments received from these parties are of such a character as to improperly influence the official or employee with respect to the performance of his official duties regarding the source of the payments.¹⁴

Therefore, assuming that your law firm is able to provide legal services on specialized issues that arise in the Toledo casino without violating R.C. 102.03(L) or (M)(1), R.C. 102.03(D) and (E) would prohibit you from:

- (1) Participating, in any way, on any matter before the Casino Control Commission on which your firm has provided consultation or advice (R.C. 102.03(D)); and
- (2) Accepting any portion of the fees paid to your law firm by any party that is subject to the jurisdiction of the Ohio Casino Control Commission, or by any officer, attorney, agent, or employee of such party (R.C. 102.03(E)).

Other Considerations

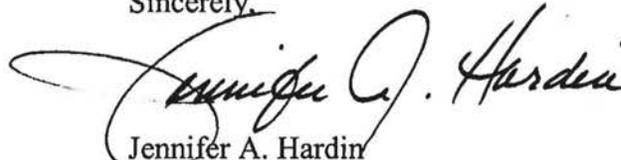
Although you did not ask whether you can personally provide advice or counsel to the parties you described in your letter, you should be aware that you are also subject to the Revolving Door restrictions in R.C. 102.03(A)(8). During and for two years after leaving the Casino Control Commission, you are prohibited from: (1) representing a client before any public agency on any matter before or concerning the Casino Control Commission;¹⁵ (2) being employed or compensated by a person regulated by the Casino Control Commission on any matter before or concerning the Casino Control Commission; and (3) acting in a representative capacity for any person on any matter before or concerning the Casino Control Commission.

You are also prohibited from disclosing or using, without appropriate authorization, any confidential information that you acquire in the course of your official duties. There is no time limitation on this prohibition.¹⁶

Finally, as a lawyer, you are subject to the Rules of Professional Conduct, which includes rules that apply to lawyers who are or have been public officials and public employees. For example, Rule No. 1.11 sets forth special conflict of interest rules for lawyers who serve in public roles.¹⁷ These rules may restrict your actions, or the actions of the firm, more broadly than the Ethics Law. For guidance on the application of the Rules of Professional Conduct to your situation, you should contact the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on November 3, 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 need additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

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

¹ These terms are defined in R.C. 3772.01.

² Ohio Ethics Commission Advisory Opinion No. 2009-06.

³ Ohio Const. Art. XV, Sec. 6(C)(9). The Constitution allows for four casino facilities to be operated in Ohio. Ohio Const. Art. XV, Sec. 6(C)(1).

⁴ Defined in R.C. 3772.01(F).

⁵ Defined in R.C. 3772.01(Q).

⁶ Defined in R.C. 3772.01(J).

⁷ Defined in R.C. 3772.01(K).

⁸ The Commission has explained that, if a partner in a law firm waives his or her share of partnership profits attributable to services performed under a public contract, he or she does not have a direct interest in the contract. Adv. Op. No. 90-007.

⁹ Adv. Op. No. 90-008.

¹⁰ R.C. 102.03(M)(1) is a misdemeanor of the first degree, with a maximum penalty of six months in prison and a \$1000 fine. The additional forfeiture penalty is set forth in R.C. 102.03(M)(3).

¹¹ R.C. 102.01(B) and (C).

¹² R.C. 102.03(G), 1.03.

¹³ See Adv. Op. No. 90-008.

¹⁴ See, e.g., Adv. Ops. No. 83-007 (an employee of the Board of Cosmetology is prohibited from selling products to regulated salons) and 93-014 (a member of a board of education is prohibited from selling annuities to school district employees).

¹⁵ See also R.C. 102.04(A), prohibits a member of a state board from receiving compensation for services he seeks to perform personally on matters *before the board he serves*. (An exception in R.C. 102.04(D) allows a board member to be paid to perform services personally on a matter *before an agency other than the board he serves*, as long as all of the requirements of the exception can be met. However, as a Casino Control Commission member, the added restrictions in R.C. 102.03(A)(8), (M), and (L) will also apply.) R.C. 102.04(A) is explained more fully in Adv. Op. No. 2007-03.

¹⁶ Adv. Op. No. 88-009.

¹⁷ Other potentially applicable Rules include Rules No. 1.6, 1.7, 1.8, and 1.12.