



OHIO ETHICS COMMISSION

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Advisory Opinion Number 92-003
January 31, 1992

Syllabus by the Commission:

(1) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a city law director from authorizing, or using his authority or influence with respect to the city and county he serves as law director and prosecutor in the municipal court to secure authorization of, the employment of his business associates as assistant law directors and the payment of compensation from the city or the board of county commissioners for his business associates for serving as assistant law directors;

(2) For purposes of Division (A)(1) of Section 2921.42 of the Revised Code, attorneys who are affiliated in an association where only expenses, and not fees, are shared are "business associates";

(3) Division (D) of Section 102.03 of the Revised Code prohibits a city law director from employing, as assistant law directors, attorneys with whom he is affiliated in a legal association where expenses are shared, and from otherwise using his authority or influence to secure compensation, from the city or the county he serves as law director or prosecutor in the municipal court, for attorneys with whom he is affiliated in a legal association.

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You have asked if the Ohio Ethics Law and related statutes prohibit you, as a city law director, from hiring as assistant city law directors attorneys who are in your association of sole practitioners.

By way of history, you have stated that you are the appointed law director for a city in Ohio. In that position, you are responsible for the prosecution of criminal cases arising in the unincorporated areas served by the municipal court which is located in your city. See R.C. 1901.34. You have explained that the court's current schedule requires your presence in court three or four days each week. You have also explained that you are a sole practitioner, and that you are a member of an association of sole practitioners. You and the other members of the office share in the payment of a monthly rent for the office space. You have also explained that each member of the association maintains individual records and accounts, and that you do not share profits.

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. It cannot, however, determine whether those criteria have been met in a particular situation in the

context of rendering an opinion. The opinion function of the Ethics Commission is not a fact-finding process, and the staff must rely upon the truth and completeness of facts set forth in request letters. See Ohio Ethics Commission Advisory Opinion No. 75-037. In addition, the Ethics Commission cannot render an opinion with regard to facts which have already transpired. Id. If a question is raised with regard to activity which has already occurred, the Commission could only act through its confidential investigative function to determine whether there are facts indicating that the Ethics Law may have been violated and to refer those matters required for prosecution.

You have asked if the Ohio Ethics Law and related statutes prohibit you, as the law director, from hiring the attorneys in the association to serve as assistant law directors on days when your schedule does not permit your own appearance in the municipal court. You have explained that you are compensated by the county for prosecuting cases in the municipal court and that you will compensate the two attorneys directly, from your own funds, for their assistance, based on the time they have spent prosecuting cases in the municipal court. You have further explained that, because of court requirements, you will name the two attorneys assistant city law directors for the purpose of prosecuting these cases that arise in the unincorporated territory served by the municipal court, but you assert that they will receive no salary from the city or county for their activities, and will be compensated solely from your own funds.

Your question involves the process established in Revised Code Section 1901.34 for the prosecution of criminal cases in municipal court. This section states that the municipal law director is responsible for prosecution of all cases brought before the municipal court for criminal offenses that occur within the municipality he serves. R.C. 1901.34 (A) further provides, in pertinent part:

[T]he village solicitor, city director or law, or similar chief legal officer for the municipal corporation in which a municipal court is located shall prosecute all cases brought before the court arising in the unincorporated areas within the territory of the municipal court.

Further, pursuant to R.C. 1901.34 (C), the county commissioners may provide additional compensation to the law director, and any assistants he may appoint, for the prosecution of criminal cases brought before the municipal court. See 1952 Ohio Op. Att'y Gen. No. 2183, p. 785. See also R.C. 1901.20 (setting forth criminal jurisdiction of municipal courts). Such compensation is paid from the county treasury as the board of county commissioners prescribes. See 1952 Ohio Op. Att'y Gen. No. 2183 (the board of county commissioners has discretion in establishing the amount of compensation paid to the law director and his assistants, depending on the level of additional duties involved, and may withhold such additional compensation entirely). The board of county commissioners has the discretion in determining the manner in which to compensate the law director and his assistants. For example, in Ohio Attorney General Opinion No. 85-086, the Attorney General stated that the county commissioners may pay the law director or his assistants directly, or may enter into a contract with the city with which the law director is connected whereby the county pays the city for the law director's and his assistants' services, and the city disburses the money to the attorneys. Regardless of the manner in which payment to the city law director and his assistants is made, however, it is clear that the source of such compensation is the county, and that the compensation is paid to the law director and his assistants for performing services and responsibilities and exercising authority on behalf of the

county in which the municipal court is located. See Ohio Op. Att'y Gen. No. 85-086 (contracting with the city to make payments to the city law director and his assistants, as set forth in R.C. 1901.34, does not free the county from any liability which may be attendant to the actions of the city law director); 1952 Ohio Op. Att'y Gen. No. 2183 (compensation that may be paid by the board of county commissioners to a law director and his assistants under what is now R.C. 1901.34 is for the prosecution, in the municipal court, of criminal offenses under state statutes arising within the territory of the municipal court, including those arising in the unincorporated areas of the territory). Cf. Kime v. Wise, 634 F. Supp. 514, 518-19 (N.D. Ohio 1985) (holding that a county is not liable in a 42 U.S.C. § 1983 action for all of the acts of the city law director in the prosecution of a case, in the municipal court, involving a state law violation that occurred within the city where there is no showing that the alleged acts of the law director were committed pursuant to official policy or custom connected with the county, because the county does not have "full control" over the actions of the law director; however, the District Court did recognize that there is "overlap" between the responsibilities of a municipal law director, and a county prosecutor, in the prosecution of cases in the municipal court involving violations of state law). You, as city law director are, in prosecuting criminal cases brought before the municipal court, performing services for both the city with which you serve and the county in which the municipal court is located. See generally Advisory Opinion No. 89-004.

Division (A)(1) of Section 2921.42 of the Revised Code states as follows:

(A) No public official shall knowingly:

(1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

The term "public official" is defined in R.C. 2921.01 (A), for purposes of R.C. 2921.42, to include any elected or appointed officer of any political subdivision of the state. You, as a city law director, are a "public official," and subject to the prohibitions of R.C. 2921.42. See Advisory Opinions No. 85-011 and 89-015.

Division (E) of Section 2921.42 defines a "public contract" for purposes of that section to include "the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of" a political subdivision. An employment relationship between a political subdivision and an employee is a "public contract" as that term is defined in R.C. 2921.42 (E), since it is the purchase or acquisition of services by and for the use of the political subdivision. See Advisory Opinions No. 85-003, 85-015, and 90-010. Additionally, the Commission has stated that the provision of legal services, or a contract to provide legal services, for a political subdivision, including a municipality or a county, is a public contract for purposes of R.C. 2921.42. See Advisory Opinions No. 78-001, 83-002, and 90-007.

The determination of whether a public official or employee has an "interest" in a public contract entered into by a governmental entity depends upon the facts and circumstances of each particular situation. See Advisory Opinions No. 84-009, 89-006, and 90-003. An "interest" which is prohibited under Section 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. See Advisory Opinions No. 81-008 and 89-004. An individual has a direct

and definite pecuniary interest in a public contract if he receives payment for services he provides pursuant to the public contract. See generally Advisory Opinions No. 86-009 and 88-001. Therefore, R.C. 2921.42 (A)(1) prohibits you, as city law director, from authorizing, or using the authority or influence of your office to secure authorization of, the employment for compensation of any of your business associates or family members as assistant law directors. You are prohibited from authorizing, or using your authority or influence with respect to the city and county you serve as law director and prosecutor in the municipal court to secure authorization of, the employment of your business associates as assistant law directors and the payment of compensation for such employment from the city or the board of county commissioners for your business associates. See Advisory Opinion No. 90-007.

You have stated that you would like to engage two attorneys with whom you are associated in private practice to assist you in the prosecution of criminal cases brought before the municipal court arising in the unincorporated areas within the territory of the court and that the two attorneys in your question will be named to the position of assistant city law director in order to facilitate the performance of their duties. You have stated that the two attorneys in your question will not be compensated by the city, and will not be compensated directly by the county. Rather, you have stated, you will be compensated by the county commissioners, as provided in R.C. 1901.34, and you, in turn, will pay the other attorneys from your own funds.

In the situation you have described, and which is examined in greater detail below, the assistant law directors would be performing the services specified in R.C. 1901.34 (A). The assistant law directors are entitled to whatever payment is made by the county commissioners, pursuant to statute, for their performance of these duties. Therefore, the assistant law directors have an "interest" in the payment made by the county for legal services they perform, whether payment is made directly from the county commissioners to the assistant law directors, or from the county commissioners to you and then from your funds to the assistant law directors. See Advisory Opinion No. 86-009 (a city council member would have an "interest" in a lease of land between the city and a private party where the private party engages and compensates the council member to farm the property, even though the arrangement between the lessee and the council member may not, in a strict sense, be a subcontract under the public contract).

It must, therefore, be determined whether two attorneys who are affiliated with you in an association of sole practitioners are considered to be your business associates for purposes of the prohibition in R.C. 2921.42 (A)(1). The Ethics Commission specifically held in Advisory Opinion No. 83-002 that lawyers who are affiliated in an association where only expenses, and not fees, are shared are "business associates" for purposes of R.C. 2921.42. Persons who are partners, associates, or employees in a law firm are also considered to be "business associates" for purposes of R.C. 2921.42 (A)(1). See Advisory Opinions No. 79-001, 86-002, 86-004, 89-015, 90-007, and 90-008. In this case, you have stated that all of the attorneys in your association of sole practitioners share costs, and that it is your intention to compensate those attorneys in your association whom you choose to assist you in performing your mandatory duty for the county. Therefore, the attorneys with whom you are affiliated in an association of sole practitioners, and with whom you share office expenses, are your business associates for purposes of R.C. 2921.42.

You are prohibited, by R.C. 2921.42 (A)(1), therefore, from authorizing, or discussing, deliberating, recommending, formally or informally lobbying, or otherwise using the authority or influence of your position as city law director or prosecutor in the municipal court to secure authorization of, a public contract, including a contract or other arrangement for the provision of legal services, between the city or the county and the attorneys with whom you share office expenses. You are prohibited from hiring the attorneys as assistant law directors. This prohibition applies to part-time and temporary employment arrangements, as well as permanent employment relationships. See Advisory Opinion No. 90-010 (an employment contract which falls within the prohibitions of R.C. 2921.42 can be for full-time, part-time, temporary, or permanent employment). See generally Advisory Opinion No. 87-002 (the term "public contract" includes casual, as-needed purchases, as well as formal, written contracts). You are also prohibited from securing, or using your position to secure, compensation for the attorneys from the county or the city.

As set forth above, you have explained that the two attorneys in your question would be named as assistant law directors, but would not be compensated by the city, nor directly by the county. Rather, you have stated, you are compensated by the county commissioners, as provided in R.C. 1901.34, and you, in turn, will pay the other attorneys from your own funds. You have asked if this payment arrangement, whereby payment for your business associates does not stem from the city or directly from the county, would fall within the prohibition of R.C. 2921.42 (A)(1). It must initially be stated that the Commission has no authority to review the lawfulness of this method of payment under statutes other than Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code, or to comment on the ramifications that this method of payment would have on the benefits or other incidents of compensation to which you or your assistants may otherwise be entitled.

You have explained that you are paid by the county for prosecuting cases in the municipal court pursuant to Revised Code Section 1901.34. Division (C) of R.C. 1901.34 states as follows:

The village solicitor, city director of law, or similar chief legal officer shall perform the same duties, as far as they are applicable thereto, as are required of the prosecuting attorney of the county. He or his assistants whom he shall appoint shall receive for such services additional compensation to be paid from the treasury of the county as the board of county commissioners prescribes. (Emphasis added.)

As you have explained it, you propose to personally receive the additional compensation for all services performed in prosecuting cases both by you and by your business associates. You will then disburse payment to your business associates, from your own funds, to reimburse them for their time. However, the statute clearly states that the city law director, or any assistants whom he appoints, shall receive additional compensation from the county, as the county prescribes, for performance of their services set forth in R.C. 1901.34. It is apparent that the particular individual who rendered the legal service--whether it is the law director or an assistant law director--is entitled to any money paid by the county commissioners for those legal services. It would be unreasonable to assume that the legislature intended for a city law director to receive additional compensation for work actually performed by someone other than himself, and you have stated that the assistants will be paid for their time. The fact that R.C. 1901.34 (C) states

that the law director or his assistants shall receive additional compensation from the county does not mean that only the law director or only his assistants can be paid by the county, regardless of who performs the services. See R.C. 1.02 (F) ("As used in the Revised Code . . . 'or' may be read 'and' if the sense requires it"). The language of R.C. 1901.34 does not contemplate that either the law director or his assistants would retain all of the money paid by the county regardless of who performs the services. Rather, it merely contemplates that the law director may hire attorneys to assist him, and authorizes the county to pay the assistants, as well as the law director, for their services. Whether the money for the assistants' services is paid by the county commissioners to you for disbursement to the assistants, or directly to your assistants, it is clearly earned by, and owed to, whomever performs the services. Therefore, in the situation you have described, you are prohibited by R.C. 2921.42 (A)(1) from authorizing, or using the authority or influence of your position as city law director or prosecutor in the municipal court to secure authorization of, the employment of attorneys in your association to prosecute cases in the municipal court, or any other arrangement whereby the attorneys in your association would be compensated by either the county or the city for services provided. This prohibition applies regardless of whether the assistants would be compensated directly by the city or the county, or indirectly through you. See City of Parma v. Schroeder, 26 Ohio Op. 2d 119, 122 (C.P. Cuyahoga County 1963) (a public official cannot do indirectly that which he cannot lawfully do directly).

Furthermore, R.C. 2921.42 (A)(4) prohibits you as city law director from having an interest in the profits or benefits of a public contract entered into by or for the use of a political subdivision with which you are connected. In this instance, you are "connected" with the county, as well as the city, in prosecuting cases in municipal court. See Advisory Opinion No. 89-004 (R.C. 2921.42 (A)(4) "prohibits a public official from having an interest in the public contracts entered into by all of the political subdivisions . . . with which he is connected"); Advisory Opinion No. 90-007. See also Kime v. Wise, 634 F. Supp. 514 (N.D. Ohio 1985), 1952 Ohio Op. Att'y Gen. No. 2183, and Ohio Op. Att'y Gen. No. 85-086 (discussed above). Furthermore, as discussed above, an arrangement for the employment of assistant law directors to prosecute offenses arising in the unincorporated areas within the municipal court's jurisdiction and payment therefor by the county, constitutes a public contract entered into by and for the use of the county. See generally 1952 Ohio Op. Att'y Gen. No. 2183. You are prohibited, by R.C. 2921.42 (A)(4), from having any direct and definite, pecuniary or fiduciary interest in the profits or benefits of the compensation paid by the county for services provided by your assistant law directors, and due to be paid to those assistant law directors. See Advisory Opinions No. 81-008, 83-002, and 90-007. You are prohibited, by R.C. 2921.42 (A)(4), from retaining any money paid by the county commissioners for work performed pursuant to R.C. 1901.34, if the work was performed by an assistant law director.

A public official or employee, including a city law director, is also prohibited by R.C. 102.03 (D), from using the authority or influence of his office to secure anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. See Advisory Opinions No. 89-015 and 90-007. The Ethics Commission has identified the payment of fees for legal services as within the definition of "anything of value" for purposes of this restriction. See Advisory Opinions No. 86-004, 89-015, 90-007, and 90-008. R.C. 102.03 (D) prohibits you, as city law director or prosecutor, from using your official position to secure anything of value for yourself, in matters which affect your personal pecuniary interests. See Advisory Opinions No. 76-005, 79-003, 80-007, 85-006, 86-007, and 88-004. You would be

prohibited by R.C. 102.03 (D) from hiring your business associates as assistant law directors and retaining for yourself compensation paid by the county for the performance of your business associates' services. The Commission has also held that 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 your responsibility, as city law director, to appoint assistant law directors to aid you in the performance of your duties. See generally R.C. 1901.34. Payments made, directly or indirectly, from the county commissioners to attorneys with whom you share expenses are of such a character as to manifest a substantial and improper influence upon you in the performance of this responsibility, since such payments could aid the attorneys in the payment of their share of expenses, thereby freeing you of any potential liability for their share of the expenses. See generally Advisory Opinion No. 90-007. The relationship between you and the attorneys in your association is such that your objectivity and independence of judgment, in appointing them as assistant law directors, could be impaired where they would have a financial interest in the appointments. See Advisory Opinion No. 90-008. Therefore you are prohibited, by R.C. 102.03 (D), from appointing the attorneys in your legal association as assistant law directors and otherwise using your authority or influence to secure payments for legal services, from the city or the county, to attorneys with whom you are affiliated in a legal association. See Advisory Opinion No. 90-007. Of course, you are empowered to hire assistant law directors to aid you in the performance of your official duties, so long as those assistants are neither your business associates, nor members of your family. See generally Advisory Opinion No. 80-001 (setting forth who is considered to be a member of a public official's family for purposes of R.C. 2921.42 (A)(1)).

This advisory 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.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a city law director from authorizing, or using his authority or influence with respect to the city and county he serves as law director and prosecutor in the municipal court to secure authorization of, the employment of his business associates as assistant law directors and the payment of compensation from the city or the board of county commissioners for his business associates for serving as assistant law directors; (2) For purposes of Division (A)(1) of Section 2921.42 of the Revised Code, attorneys who are affiliated in an association where only expenses, and not fees, are shared are "business associates"; and (3) Division (D) of Section 102.03 of the Revised Code prohibits a city law director from employing, as assistant law directors, attorneys with whom he is affiliated in a legal association where expenses are shared, and from otherwise using his authority or influence to secure compensation, from the city or the county he serves as law director or prosecutor in the municipal court, for attorneys with whom he is affiliated in a legal association.


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