



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

Advisory Opinion Number 93-011
July 16, 1993

Syllabus by the Commission:

(1) Division (A) of Section 102.03 of the Revised Code prohibits a former commissioner or employee of the Public Utilities Commission of Ohio, who is appointed to the position of Consumers' Counsel, from representing any party, including consumers and municipal corporations, on matters in which he personally participated while he was a commissioner or employee of the Public Utilities Commission of Ohio;

(2) Depending upon the duties of a former commissioner or employee of the Public Utilities Commission of Ohio, the restrictions of Division (A) of Section 102.03 of the Revised Code may effectively prohibit the former commissioner or employee of the Public Utilities Commission of Ohio from accepting the appointment to the position of Consumers' Counsel.

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You have asked whether and to what extent the new Consumers' Counsel would be subject to the prohibition set forth in Section 102.03 (A) of the Revised Code, if a person who is currently a commissioner or employee of the Public Utilities Commission of Ohio is appointed to the office. Further, you have asked whether and to what extent the prohibition of R.C. 102.03 (A) would restrict the Office of the Consumers' Counsel itself from representing clients before the PUCO if a former commissioner or employee of the Public Utilities Commission of Ohio is appointed to the position of Consumers' Counsel.

By way of history, the Consumers' Counsel is an officer of the state of Ohio. R.C. 4911.06. The Consumers' Counsel must be an attorney admitted to the practice of law in Ohio, and must have the knowledge and experience to practice in public utility proceedings. R.C. 4911.03 (A). The Consumers' Counsel is appointed by the Consumers' Counsel Governing Board (Governing Board), and holds the office at the pleasure of the Governing Board. R.C. 4911.02 (A). See also R.C. 4911.17. Although the Consumers' Counsel is appointed by the Governing Board, the statutory duties of the Office of Consumers' Counsel reside not in the Governing Board, but in the Office of Consumers' Counsel itself. See, e.g., R.C. 4911.02, 4911.12, 4911.13, 4911.14, and 4911.15.

The Consumers' Counsel has numerous duties relative to every case that he or another party brings before the Public Utilities Commission of Ohio "involving the fixing of any rate, joint rate, fare, charge, toll, or rental charged for commodities or services by any public utility, the plant or property of which lies wholly within this state," and, to some extent, involving public

utilities lying only partly within this state. R.C. 4911.14. The Consumers' Counsel may sue or be sued, and has all powers and duties granted to him under Chapter 4911., and all necessary powers to carry out the purposes of this chapter. The Consumers' Counsel may: (1) have all rights and powers of any party in interest before the PUCO regarding examination and cross-examination of witnesses, presentation of evidence, and other matters; (2) take appropriate action with respect to residential consumer complaints concerning quality of service, service charges, and the operation of the PUCO; and (3) institute, intervene in, or otherwise participate in proceedings in both state and federal courts and administrative agencies on behalf of the residential consumers concerning review of decisions rendered by, or failure to act by, the PUCO. The Consumers' Counsel may represent either one or more residential consumers or one or more municipal corporations on applications before the PUCO. R.C. 4911.15.

It is clear from this brief review that the duties of the Consumers' Counsel include frequent and extensive contacts with various state and federal courts, the PUCO, and other administrative agencies.

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

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 he personally participated as a public official or employee.

The elements of this provision are: (1) a present or former public official or employee; (2) is prohibited from representing a client or acting in a representative capacity for any person (including a municipality or other public entity, see Ohio Ethics Commission Advisory Op. No. 82-002); (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. See Advisory Ops. No. 82-002, 89-003, and 91-003. (It should be noted that there is a broader prohibition in R.C. 102.03 (A) that applies to commissioners and attorney examiners of the Public Utilities Commission of Ohio, but only with regard to representation of public utilities.)

A commissioner or employee of the Public Utilities Commission of Ohio (PUCO) is a "public official or employee" for purposes of R.C. 102.03 (A), and is subject to its statutory prohibitions. See R.C. 102.01 (B) and (C); Advisory Op. No. 82-002. Accordingly, R.C. 102.03 (A) prohibits a commissioner or employee of the PUCO, during his service and for one year from the date he leaves the PUCO, from representing a client, a new employer, or any other party, before any public agency, on any matter in which he personally participated while he was a PUCO commissioner or employee. The provisions of R.C. 102.03 (A) apply in the situation you have described, even though the PUCO commissioner or employee would be moving from one public employer to another. See Advisory Ops. No. 82-002, 89-003, and 91-003.

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." R.C. 102.03 (A). In Advisory Op. No. 86-001, the Ethics Commission listed some activities that would fall within this definition of "represent":

[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.

R.C. 102.03 (A) prohibits a former PUCO commissioner or employee from "representing" any client, including a new employer, before any public agency, including but not limited to the PUCO, on a matter in which he personally participated. See Advisory Ops. No. 86-001 and 87-001. A "public agency" is defined in R.C. 102.01 (C) 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." (Emphasis added.)

Revised Code Section 102.03 (A) defines the term "matter" 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." The term "matter" is broadly defined under R.C. 102.03 (A) and includes any issue or question, as well as particular cases, proceedings, applications, and determinations. See Advisory Op. No. 91-009. The term "matter" would include all applications, suits, actions, and other proceedings instituted by the Consumers' Counsel, or in which his office would otherwise participate, pursuant to his statutory responsibilities.

Accordingly, R.C. 102.03 (A) would prohibit a former PUCO commissioner or employee, if appointed to the position of Consumers' Counsel, from representing any person, including a residential consumer or municipal corporation, before any public agency, including all courts and the PUCO, on any matter, including any application, suit, action, or other Consumers' Counsel proceeding, in which he personally participated while he was a commissioner or employee of the PUCO. R.C. 102.03 (A) defines "personal participation" to include "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion." In Advisory Opinion No. 91-009, the Ethics Commission held that "personal participation" in a matter also includes the exercise of "supervision or general oversight" over other personnel in their work on that matter, since supervision of a public official's or employee's activities involves decision-making, approval or disapproval, recommendation or advice, and other exercises of administrative discretion, by the supervisor, regarding that matter. See also Advisory Op. No. 86-001.

The one-year, post-employment prohibition of R.C. 102.03 (A) commences upon the date the PUCO commissioner or employee leaves his employment with PUCO. See Advisory Ops. No. 81-002, 86-001, 86-006, 87-001, 87-004, and 89-003. Therefore, R.C. 102.03 (A) prohibits a former PUCO commissioner or employee, for a period of one year from the date he leaves his position with the PUCO to become the Consumers' Counsel, from representing or acting in a representative capacity for any person, including consumers, municipal corporations, and others, before any state or federal court, the PUCO, or any other public agency, on any matter in which

he personally participated while he served with the PUCO, regardless of when the personal participation occurred during his tenure with the PUCO. See Advisory Ops. No. 89-003 and 91-009. However, R.C. 102.03 (A) does not prohibit a former PUCO commissioner or employee from representing a client, consumer, municipality, or other person before a public agency on new matters, legislative matters, or matters in which he did not personally participate as a PUCO official or employee. See Advisory Ops. No. 89-009 and 91-009.

R.C. 102.03 (A) does not, as a general matter, absolutely prohibit a former public official or employee from taking a new position, whether in the public or private sector. However, because of the considerable interactions between the PUCO and the Office of the Consumers' Counsel and the frequency with which both offices may be involved in a particular matter, it may be likely that a former PUCO commissioner or attorney with the statutorily required experience to hold the position of Consumers' Counsel would have personally participated in various matters over which the Consumers' Counsel would have jurisdiction and in which the office of the Consumers' Counsel would be involved. Therefore, depending upon the level and extent of personal participation of the individual PUCO commissioner or employee, it is likely that R.C. 102.03 (A) would prohibit a former PUCO commissioner or employee from performing some of the duties of the Consumers' Counsel. The issue thus arises whether the restrictions of R.C. 102.03 (A) would, in effect, bar a former PUCO commissioner or employee from serving as the Consumers' Counsel if he would be prohibited as Consumers' Counsel from representing parties in various matters in which he had personally participated while serving with the PUCO. In analyzing this issue, your second question, whether and to what extent Section 102.03 would preclude the Office of the Consumers' Counsel from representing clients, must also be considered.

The Ethics Commission has previously stated that R.C. 102.03 (A) imposes a restriction only on the former public official or employee, and not upon his new employer as a whole. See Advisory Ops. No. 89-009 and 91-009. For example, the Commission has stated that R.C. 102.03 (A) does not prohibit a private law firm by which a former public employee is employed from representing clients before a public agency on matters in which the former public employee participated. See Advisory Op. No. 91-009.

However, the situation you have described is significantly different. As stated above, the statutory duties of the Office of the Consumers' Counsel reside with the Consumers' Counsel himself. See, e.g., R.C. 4911.02, 4911.11, 4911.12, 4911.13, 4911.14, and 4911.15. The Office of the Consumers' Counsel is not comparable to a private law firm. Unlike a member of a private law firm, the Consumers' Counsel cannot be insulated from the activities of his own office. The Consumers' Counsel appoints, and is the ultimate supervisor of, all of the employees of his office. The Consumers' Counsel is empowered to hire employees to assist him in carrying out the "duties and exercise the powers conferred by law upon him." R.C. 4911.12. All of the expenses of the Office of the Consumers' Counsel, including employees, are paid from funds appropriated for the use of the Consumers' Counsel, "after being approved by the consumers' counsel." Id. Therefore, even if employees of the Office that the Consumers' Counsel hires, supervises, and compensates would perform work on a matter, the Consumers' Counsel is required by statute to be involved in all matters before his office. See generally Advisory Op. No. 89-015 and 92-009.

The Consumers' Counsel is ultimately responsible for all work performed by his office, and is unable to withdraw from this responsibility. See Advisory Op. No. 92-004.

Neither is the Consumers' Counsel comparable to an executive director or secretary of a state board or commission, who is employed to assist in performing the duties statutorily imposed upon the board or commission. See generally Advisory Op. No. 92-009. Although the Consumers' Counsel is appointed by and serves at the pleasure of the Governing Board, and "shall at all times remain responsible to the governing board," the Consumers' Counsel is not engaged to carry out the duties of the Governing Board. R.C. 4911.02 (A) and 4911.17. All of the powers and duties of the Office of the Consumers' Counsel, including the powers to sue and be sued, and to bring actions on behalf of consumers and others, are the powers of the Consumers' Counsel himself. See, e.g., R.C. 4911.02, 4911.12, 4911.13, 4911.14, and 4911.15. Therefore, the Consumers' Counsel cannot withdraw and have the employees of his office report directly to the Governing Board. Id.

Accordingly, the Consumers' Counsel would be unable to remove himself from the duties of the Office of the Consumers' Counsel with regard to matters in which he had personally participated while he was an employee of the PUCO. Compare Advisory Op. No. 92-004. If a former PUCO commissioner or employee is appointed to the position of Consumers' Counsel, and he must refrain from representing persons on matters in which he personally participated, the prohibition of R.C. 102.03 (A) will effectively prohibit the Office of the Consumers' Counsel itself from representing clients on matters in which the Consumers' Counsel had personally participated while he was an commissioner or employee of the PUCO. Therefore, in this narrow instance, R.C. 102.03 (A) may preclude a former commissioner or employee of the PUCO from accepting an appointment to the Office of Consumers' Counsel where his duties with the PUCO were such that he would be required to refrain from participating in activities of the Office of the Consumers' Counsel.

If a former PUCO commissioner or employee is appointed as Consumers' Counsel, he should also be aware of Division (B) of R.C. 102.03, which provides:

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.

Pursuant to this section, a former PUCO commissioner or employee is prohibited from disclosing confidential information that he acquired in his position with PUCO, and from using that information, without appropriate authorization. See Advisory Op. No. 92-005. This prohibition has no time limit, and is applicable during an individual's public service, and after, for as long as the information remains confidential.

In addition, Executive Order 92-61V imposes revolving door restrictions on certain state officials and employees. The Ohio Ethics Commission's jurisdiction is limited to issues arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code, and does not include restrictions imposed by executive order. You may wish to contact the Office of the Governor for more information about Executive Order 92-61V.

Finally, your situation may also raise issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. These issues are not within the jurisdiction of the Ethics Commission, but should be referred to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court and perhaps your local bar association.

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) of Section 102.03 of the Revised Code prohibits a former commissioner or employee of the Public Utilities Commission of Ohio, who is appointed to the position of Consumers' Counsel, from representing any party, including consumers and municipal corporations, on matters in which he personally participated while he was a commissioner or employee of the Public Utilities Commission of Ohio; and (2) Depending upon the duties of a former commissioner or employee of the Public Utilities Commission of Ohio, the restrictions of Division (A) of Section 102.03 of the Revised Code may effectively prohibit the former commissioner or employee of the Public Utilities Commission of Ohio from accepting the appointment to the position of Consumers' Counsel.


Jack Paul DeSario, Chair
Ohio Ethics Commission