



OHIO ETHICS COMMISSION

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

September 1, 1988

Informal Opinion 1988-INF-0901-2

Elisabeth A. Squeglia, Esquire
Bricker & Eckler

Dear Attorney Squeglia:

In your letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes prohibit the firm of Bricker and Eckler (hereinafter Law Firm) from serving as legal counsel to an investment banking firm (hereinafter Underwriter) which seeks to underwrite bonds to be issued by the Franklin County Convention Facilities Authority (hereinafter Convention Authority) when a partner with the Law Firm also serves as Chairman and a member of the Board of Directors of the Convention Authority.

You state, by way of history, that no contract or other legal relationship presently exists or is anticipated between the Law Firm and the Convention Authority. The Convention Authority anticipates the issuance of bonds for a public improvement and will retain separate legal counsel to serve as bond counsel in this issue. The Underwriter will bid to underwrite the bond issue, and is purchasing the Law Firm's services as counsel for their own use. If the Underwriter is selected by the Convention Authority, the Law Firm will provide continuing legal services to the Underwriter throughout the course of the contract between the Underwriter and the Convention Authority. You have also indicated that the Law Firm's fee will be paid entirely by the Underwriter; however, the fee will be calculated into the discount quoted by the Underwriter in its response to the Convention Authority's request for proposals, and in the discount agreed upon by the Convention Authority and Underwriter, if the Underwriter is the successful bidder.

You also state that the Underwriter will be asked to designate its legal counsel prior to the submission of its proposal to the Convention Authority and that the Convention Authority will know the identity of the Underwriter's counsel at the time the proposals are reviewed and selected. You state that this disclosure of Underwriter's counsel is not a condition of the bid but is merely informational, and that the Convention Authority does not require the Underwriter to retain legal counsel and will not participate in the Underwriter's selection of legal counsel. You further state that it is likely, but not certain, that the contract will be awarded by the Convention Authority to the lowest bidder unless there are other criteria in the request for proposals that the lowest bidder does not meet such as minority participation goals, or requirements to favor local and Ohio-based companies.

Finally, you state that the partner of the Law Firm who is also the Chairman and a director of the Convention Authority will not perform any work in connection with the Law Firm's representation of the Underwriter. In addition, you state that this partner will not participate in any Convention Authority deliberations, discussions, voting, and other considerations regarding the Underwriter.

Division (A)(4) of Section 2921.42 provides:

(A) No public official shall knowingly do any of the following:

...

- (4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

R.C. 2921.42 defines the term "public official" to include any elected or appointed officer or employee of a political subdivision. See R.C. 2921.01(A). The Franklin County Convention Facilities Authority is a body corporate and politic created pursuant to Section 351.02 of the Revised Code, see R.C. 351.01, and is governed by a board of directors. See R.C. 351.04. A member of the board of directors of the Franklin County Convention Facilities Authority is a public official as defined in Division (A) of Section 2921.01 of the Revised Code since she is an appointed officer of a political subdivision.

R.C. 2921.42(E)(1) defines a "public contract" for purposes of that section to include "[t]he purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state or any of its political subdivisions, or any agency or instrumentality of either." In addition, a subcontract under a public contract is also considered a "public contract" as defined in R.C. 2921.42(E)(1) of the Revised Code. See Advisory Opinions No. 82-007 and 85-002. Under the facts presented, if the Underwriter is selected by the Convention Authority, the proposed contract between the Convention Authority and the Underwriter is a "public contract" as defined in R.C. 2921.42(E)(1) since the Convention Authority is purchasing the Underwriter's services to underwrite bonds to be issued by the Convention Authority. However, the contract between the Underwriter and the Law Firm is not a "subcontract" under the principal public contract to underwrite bonds for the Convention Authority, since the Law Firm is not being engaged to perform the underwriting services in whole or part for the investment banking firm. See Advisory Opinion No. 85-002.

In order to be prohibited under R.C. 2921.42, the interest of the public official must be a definite and direct interest, and may be either pecuniary or fiduciary in nature. See Ohio Ethics Commission Advisory Opinions No. 78-005, 81-003, 81-008, and 86-002. Thus, the issue is whether the Law Firm, and therefore, the partners in the Law Firm who share in a distributive share of the Firm's earnings, have a definite and direct interest in the public contract between the Convention Authority and the Underwriter.

Under the facts presented, the contract to underwrite bonds is between the Convention Authority and the Underwriter; neither the law partner who is Convention Authority Chairman and a director nor her Law Firm is a party to that contract. The furnishing of legal services to the Underwriter may aid the Underwriter in fulfilling its contractual duties and thus be important to the issuance of bonds; however, the Law Firm, by selling legal services to the Underwriter which contracts with the Convention Authority, would benefit only indirectly from the public contract and would not have a definite and direct interest. See Advisory Opinion No. 85-002. In Advisory Opinion No. 78-005, the Ethics Commission held that a partner in an accounting firm did not have a sufficiently definite and direct interest under R.C. 2921.42 in the issuance of industrial revenue bonds to a company (a public contract) where his sole interest in the issuance was a distributive share of the fees earned by his accounting firm for services rendered to the company seeking the bonds. The opinion notes that an accountant is not considered to have an "interest" in the business dealings of his client merely because he receives a fee for professional services rendered for his client. As the Ethics Commission further stated in Advisory Opinion No. 86-002: "It would be unreasonable to hold that lawyers, accountants, insurance agents, and other professionals have an interest in the contracts of their business clients. In general, such professionals are not deemed

to be interested in the business dealings of a client, merely because they receive fees for professional services." Therefore, under the facts presented, the Law Firm does not have a definite and direct interest in a public contract, and R.C. 2921.42(A)(4) would not prohibit the Law Firm from serving as legal counsel to the Underwriter who has contracted with the Convention Authority on the grounds that a partner with the Law Firm also serves as a member of the Convention Authority.

Division (A)(3) of Section 2921.42 of the Revised Code provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid.

You have stated that the Underwriter will be determined by competitive bidding, and it is assumed that the bidding will be conducted in a lawful and objective fashion and that the contract will be awarded to the lowest and best bidder. Under those circumstances, the requirements of R.C. 2921.42(A)(3) would be satisfied.

Your attention is also directed to Division (C) of Section 102.04 of the Revised Code, which provides, in pertinent part:

Except as provided in Division (D) of this Section, no person who is elected or appointed to an office of or employed by a county, township, municipal corporation, or any other governmental entity, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which he is an officer or employee.

R.C. 102.01(B) defines a "public official or employee" for purposes of R.C. Chapter 102. as "any person who is elected or appointed to an office." A member of the Convention Authority is a person appointed to an office of a governmental entity. Thus, Division (C) of Section 102.04 of the Revised Code would prohibit a member of the board of directors of the Convention Authority who is a partner in the Law Firm from receiving compensation from a private client for personal services rendered on a matter, including the Underwriter's contract, before the Convention Authority, the governmental entity with which she serves. However, it would not prohibit her from receiving a distributive share of partnership profits generated by the personal services of other members of the firm representing clients before the Convention Authority, provided that she does not personally render the legal services. See Advisory Opinions No. 74-009 and 86-004.

Also, R.C. 102.03(B) 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.

The Chairman of the Convention Authority is thus prohibited from disclosing confidential information to the Law Firm or to the Underwriter or any other party, or using such confidential information without authorization. It is important to note that no time limit exists for this prohibition and it is effective while the partner serves as a director of the Convention Authority and after leaving office.

You have stated that the Chairman who is a partner in the Law Firm will not participate as a member of the board of directors of the Convention Authority in any deliberations, discussions, voting, and other considerations of the Underwriter's contract with the Convention Authority, and also that she will not participate or perform any work in connection with the Law Firm's representation of the Underwriter. If the Chairman does vote, or participate in formal or informal deliberations or discussions of matters involving the Underwriter's contract, she would be in violation of other provisions of the Ohio Ethics Law. See Advisory Opinion No. 86-004.

In conclusion, the Ohio Ethics Law does not prohibit Bricker & Eckler from serving as counsel to the investment firm which has contracted with the Convention Authority to act as Underwriter, on the basis that a partner with the Law Firm is the Chairman and a director of the Authority. This conclusion is specifically based on your representation that the Chairman will not participate in any manner in matters involving the Underwriter's contract; that the Authority will engage in a lawful and fair selection process to choose the Underwriter who submits the lowest and best bid; and that employment of a law firm by the Underwriter is not a requirement of the public contract. If the Law Firm and the Convention Authority wish to enter into a contractual relationship in the future, or if the Law Firm's services provided to the Underwriter expand, perhaps due to future developments in the contractual relationship between the Convention Authority and the Underwriter, you should contact this office again, since there are other provisions within the Ethics Law which may either prohibit or restrict the actions and activities of the partner who is serving as a Convention Authority Chairman.

The situation you have described may also be a matter with which the Board of Commissioners on Grievance and Discipline of the Bar, and possibly your local bar association, may be concerned under the Code of Professional Responsibility, even in light of the fact that there is compliance with the Ohio Ethics Law. Thus, you, or the interested parties, may want to contact those organizations with regard to this issue.

This informal staff advisory opinion was approved by the Ethics Commission at its meeting on September 1, 1988, based on the facts presented, and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. This informal opinion is based on an interpretation of the Ethics Law and related statutes and does not purport to interpret other laws or rules. If you have any questions, or wish to request a formal advisory opinion from the Commission, please contact me.

Very truly yours,



Melissa A. Warheit
Executive Director