

OHIO ETHICS COMMISSION

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March 16, 2000

Informal Opinion 2000-INF-0316-3

Jonathan E. Rosenbaum, Esquire
Chief Counsel, Criminal Division
Office of the Lorain County Prosecutor
[REDACTED]

Dear Mr. Rosenbaum:

In a letter received by the Ethics Commission by fax on March 10, 2000, you ask whether the Ohio Ethics Laws and related statutes prohibit you from continuing to serve as a Special Prosecuting Attorney for Stark County after you resign from your position as Chief Counsel for the Criminal Division of the Lorain County Prosecutor's Office.

As explained below, because of the exception to the Revolving Door Prohibition set forth in R.C. 102.03(A)(6), you are not prohibited from continuing to serve as a Special Prosecuting Attorney for Stark County and receiving compensation from Stark County for your service after you leave your position with Lorain County.

Facts

You state that you plan to resign from your position with the Lorain County Prosecutor's Office to join a private law firm. While serving with the Lorain County Prosecutor, you were appointed as Special Prosecuting Attorney for Stark County. You state that you do not receive additional compensation from Stark County for your service as Special Prosecutor. As Special Prosecutor, you exercise the same powers as the elected prosecuting attorney to participate in matters in Stark County including the authority to appear before a regular or special session of the Stark County Grand Jury. You state that you desire to continue to serve as Special Prosecutor for Stark County after resigning from your position with Lorain County. In such a situation, however, Stark County would compensate you for your service as Special Prosecutor.

The Revolving Door Prohibition—R.C. 102.03(A)

Division (A) of Section 102.03 of the Revised Code, the "Revolving Door" prohibition of the Ohio Ethics Law, imposes restrictions upon the ability of former public officials and employees to represent a client or act in a representative capacity for any person after leaving public service. R.C. 102.03(A)(1) provides:

No present or former public official or employee shall, during 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 the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

The pertinent 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; (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 Ohio Ethics Commission Advisory Opinions No. 86-001, 89-009, 91-009, and 92-005. The Franklin County Court of Appeals upheld the "Revolving Door" prohibition as constitutional in State v. Nipps, 66 Ohio App. 2d 17 (1979).

R.C. 102.01(B) and (C) define the term "public official or employee" to include any person who is elected or appointed to an office or is an employee of any bureau or other instrumentality of the state. As a Chief Counsel for the Criminal Division of the Lorain County Prosecutor's Office, you are subject to the statutory prohibitions of R.C. 102.03(A). Accordingly, R.C. 102.03(A) prohibits you, for a period of one year from the date you leave your employment with the Lorain County Prosecutor's Office, from representing a client, new employer, or any other party before any public agency, on any matter in which you personally participated while you were serving with the Lorain County Prosecutor's Office. Adv. Ops. No. 91-009 and 92-005.

The term "represent" is defined in R.C. 102.03(A)(5) to include "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." Examples of the types of activities which would fall within the definition of the term "represent," for purposes of this section, were described by the Ethics Commission in Advisory Opinion No. 86-001:

[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.

A "person," for purposes of R.C. 102.03(A)(1), has been interpreted by the Commission to include governmental agencies, individuals, corporations, business trusts, estates, trusts, partnerships, and associations. R.C. 1.59(C) and Adv. Ops. No. 82-002 and 89-003. In the instant situation, this would include Stark County, any of its departments, and any other person.

R.C. 102.03(A) prohibits a former public official or employee from "representing" a client, new employer, or any other party, on a matter in which he personally participated, before any public agency, and not just before the agency with which he was previously employed. Adv. Ops. No. 86-001, 87-001, and 92-005. 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." A grand jury and a court would fall within the definition of "public agency" for purposes of R.C. 102.03(A).

R.C. 102.03(A)(5) 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." In Advisory Opinion No. 99-001, the Ethics Commission held that the term "matter" as defined in R.C. 102.03(A)(5), includes "any case, proceeding, application, determination, issue, or question," and includes, but is not limited to, a specific occurrence or problem requiring discussion, decision, research, or investigation, a lawsuit or legal proceedings, an oral or written application, a settlement of a dispute or question, a dispute of special or public importance, and a controversy submitted for consideration. See also Adv. Ops. No. 91-009 and 92-005. The Commission has held that "matter" also includes such abstract items as a dispute of special or public importance and a controversy submitted for consideration. Adv. Op. 99-001. In the instant situation, any case, proceeding, application, determination, issue, or question with which you have personally participated, in your capacity as Special Prosecuting Attorney for Stark County, would constitute a "matter" for purpose of R.C. 102.03(A).

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. Adv. Op. No. 92-005. In the instant situation, you would have "personal participation" in any decision, recommendation, investigation, or other substantial exercise of administrative discretion that you made as Special Prosecutor in Stark County.

Therefore, R.C. 102.03(A) prohibits you, for one year after you leave your position with the Lorain County Prosecutor's Office, from representing Stark County before any public agency on any matter in which you participated as Special Prosecutor in Stark County through decision, recommendation, investigation, or other substantial exercise of administrative discretion.

Exemption to the Revolving Door Prohibition—R.C. 102.03(A)(6)

R.C. 102.03(A)(6) provides a limited exception to the prohibition described above, reading as follows:

Nothing contained in division (A) of this section shall prohibit, during such period, a former public official or employee from being retained or employed to represent, assist, or act in a representative capacity for the public agency by which the public official or employee was employed or on which the public official or employee served.

The Ethics Commission has held that the exemption of R.C. 102.03(A)(6) is available to a former county official only with respect to the particular entity or office of the county with which he previously served, and does not permit him to represent any other county department, division, office, or agency of the county before any public agency, on matters in which he personally participated. Adv. Ops. No. 91-005 and 91-009. However, in the instant situation, you "served" more than one public agency. You served the Lorain County Prosecutor's Office as Chief Counsel for the Criminal Division and the Stark County Prosecutor's Office as a Special Prosecutor.

In Advisory Opinion No. 91-005, the Ethics Commission determined, according to the rules of statutory construction, that the exemption of R.C. 102.03(A)(6), which permits a former official to be employed by the "public agency by which he was employed or on which he served," may be read to permit the former official to be employed by the "public agencies" on which he served. See R.C. 1.43 (in construing a statute, "the singular includes the plural, and the plural includes the singular"); Adv. Op. No. 89-004. Therefore, in Advisory Opinion No. 91-005, the Ethics Commission held:

The exemption to the Revolving Door Law of Division (A) of Section 102.03 of the Revised Code, which permits a former public official or employee to be "retained or employed to represent, assist, or act in a representative capacity for the public agency by which he was employed or on which he served" allows a former official or employee to be employed by all of the public agencies by which he was employed or on which he served. (Emphasis added).

The exemption of R.C. 102.03(A)(6) applies to the situation you have set forth. Because you previously served as a Special Prosecutor in Stark County, you are not prohibited, after leaving your service with Lorain County, from "being retained or employed to represent, assist, or act in a representative capacity for" Stark County in your continuing role as Special Prosecutor. Therefore, R.C. 102.03(A) would not prohibit you, after you leave your position with Lorain County, from continuing to serve as a Special Prosecuting Attorney for Stark County and receiving compensation from Stark County for your services.

Post-Employment Restrictions Outside the Ethics Law

The situation for which you seek an opinion may also raise issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. Issues concerning the professional conduct of attorneys under the Code of Professional Responsibility are not within the jurisdiction of the Ethics Commission. You may wish to seek advice from the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

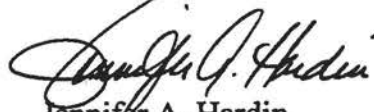
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Conclusion

As explained above, because of the exception to the Revolving Door Prohibition set forth in R.C. 102.03(A)(6), you are not prohibited from continuing to serve as a Special Prosecuting Attorney for Stark County and receiving compensation from Stark County for your service after you leave your position with Lorain County.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on March 16, 2000. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, 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 contact this Office again.

Sincerely,


Jennifer A. Hardin
Chief Advisory Attorney