

OHIO ETHICS COMMISSION

Merom Brachman
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Website: www.ethics.state.oh.us

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Informal Opinion 2000-INF-0928

Marilyn S. Hatfield, Executive Director
Butler County Republican Party



Dear Ms. Hatfield:

You have asked whether the Ohio Ethics Laws and related statutes prohibit a county recorder who is a licensed realtor from selling real estate that is located within the county while serving in office. You ask this question in light of the fact that a candidate who is running for county recorder holds a real estate license.

As explained below, a county recorder is not prohibited from holding a real estate license and selling real estate that is located within the county while serving in office. The Ohio Ethics Law does, however, place important restraints upon the county recorder with respect to his private real estate business. A county recorder is prohibited from using relationships developed while performing his public duties to advantageously affect his private outside business activity.

Outside Employment—R.C. 102.03(D) and (E)

The receipt of income by a public official or employee for engaging in private outside employment or business activity implicates Divisions (D) and (E) of Section 102.03 of the Revised Code, which read:

- (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.

The pertinent elements of Divisions (D) and (E) are: (1) a public official or employee; (2) is prohibited from accepting, soliciting, or using the authority or influence of his office or employment to secure; (3) anything of value, or the promise or offer of anything of value; (4) which could manifest a substantial and improper influence; (5) upon him with respect to his duties.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office of a political subdivision. R.C. 102.01(B) and (C). A county recorder is a "public official or employee" and subject to the prohibitions of R.C. 102.03(D) and (E). Ohio Ethics Commission Advisory Opinion No. 81-007.

R.C. 1.03 defines "anything of value" for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 102.01(G). A definite and direct pecuniary benefit to a person is considered to be a thing of value under R.C. 102.03(D) and (E). Adv. Ops. No. 79-010 and 89-008. The commission that a real estate salesperson receives from a client would fall within the definition of "anything of value." Adv. Op. No. 85-006

R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his official position to secure anything of value if the thing of value could manifest a substantial and improper influence upon him with respect to his duties. Adv. Op. No. 90-003. The Ethics Commission has held that in order to be prohibited for purposes of R.C. Section 102.03, the thing of value must be of both a substantial and improper character. Adv. Ops. No. 88-004, 89-006 and 89-014. Generally, the compensation that a public official or employee receives from private outside employment or business activity is not incidental or minimal in amount, and thus, would be of a substantial nature. Adv. Op. No. 96-004.

In the instant situation, it is initially important to remind an individual who would be elected to the position of county recorder that the Ethics Law would prohibit any use of authority or influence of his office to advance his interests as a real estate sales person. See Adv. Op. No. 96-004 (setting forth the prohibitions against a public official or employee using the authority or influence of his office or employment to advance his private financial interests). (A copy of Advisory Opinion No. 96-004 is enclosed for your reference.) In addition, Division (E) of Section 102.03 of the Revised Code does not require that the public official or employee use the authority or influence of his office or employment to secure an improper thing of value; it prohibits a public official or employee from merely soliciting or accepting an improper thing of value. Adv. Ops. No. 90-004 and 95-001.

Restriction Imposed By R.C. 102.03(E)

Division (E) of Section 102.03 of the Revised Code was enacted as part of Am. Sub. H.B. 300, 116th Gen. A. (1986) (eff. September 17, 1986) to supplement the prohibitions imposed by R.C. 102.03(D). Prior to the enactment of Am. H.B. 300, Division (D) of Section 102.03 prohibited a public official or employee from using the authority or influence of his office or employment to secure a thing of value for himself that would not ordinarily accrue to him in the performance of his duties if the thing of value was of such a character as to manifest a substantial and improper influence upon him with respect to his duties. Adv. Op. No. 77-005.

The Ethics Commission held that R.C. 102.03(E) prohibits a public official or employee from soliciting or receiving a thing of substantial value if the thing of value could manifest a substantial and improper influence upon the official or employee. Adv. Op. 86-011. The Ethics Commission has held that the controlling factor for determining whether a thing of value could have an improper influence upon a public official or employee for purposes of R.C. 102.03(E) is whether the relationship between the public official or employee and the source of the thing of value is such that the public official's or employee's objectivity and independence of judgment could be impaired with regard to his official decisions and responsibilities regarding the party. Adv. Ops. No. 87-008, 89-006, and 96-004.

Thus, the Commission has opined that a public official or employee who engages in a private outside business or the practice of a profession is prohibited from accepting, soliciting, or using his authority or influence to secure commissions, fees, or other payments from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the official's or employee's public agency because such payments are of such a character as to improperly influence the official or employee with respect to the performance of his duties regarding those parties. 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). The application of R.C. 102.03(E) is dependent upon the facts and circumstances of each individual situation. Adv. Op. No. 91-002.

The issue of your request then becomes whether the receipt of a real estate commission by a county recorder from a client, whose real estate transaction would be recorded by the county recorder, could impair the objectivity and impartiality, and therefore, the effectiveness, of the county recorder with regard to his official decisions and responsibilities regarding the recording of the transfer of the client's property. In order to address this issue, the duties of a county recorder and the functions of a real estate salesperson must be examined.

County Recorders

County recorders are elected quadrennially and hold office for four years. R.C. 317.01. County recorders are required by statute to perform a myriad of tasks. Many of these tasks are described in Chapter 317., however, others are found elsewhere in the Revised Code. Generally, county recorders are responsible for recording into the public records various documents that are presented to them. State statutes determine which documents are required to be, or may be, recorded in the office of the county recorder. Many of these documents are legal records concerning the ownership of interests in real estate, and include, among others, notices of liens in favor of the United States, matters in reference to bankruptcy, mortgages, deeds, land contracts, and instruments that transfer, convey, or encumber real property. See R.C. 317.09, 317.10, 5301.23, and 5301.25, respectively.

As stated above, R.C. 102.03(E) prohibits a county recorder from receiving compensation from a party that is interested in matters before, regulated by, or doing or seeking to do business with the recorder's officer because the recorder's objectivity and independence of judgement could be impaired with regard to the recorder's performance of official matters that affect the interests of that party. The Ethics Commission has recognized that some acts of public officials and employees are ministerial because the officials and employees do not exercise independent discretionary judgement and, in such instances, the prohibitions of R.C. 102.03(D) and (E) may be inapplicable. See Adv. Op. 92-010 (a township clerk who is married to a township trustee is not prohibited from affixing his counter-signature to a warrant for the payment of her husband's statutorily mandated compensation). The issue becomes whether the duties of county recorders require the exercise of independent discretionary judgement in relation to real estate transactions in which the recorder is involved on behalf of a client.

The recording into the public records, by a county recorder, of instruments that are presented to him has been described as a ministerial duty. Att'y Gen. Ops. No. 90-068, 96-019 and 99-014. The Attorney General stated in Attorney General Op. No. 80-029, "the recorder has no authority to determine the validity or legal effect of an instrument, but rather must record all instruments which may, by statute, be recorded." See also Att'y Gen. Op. No. 94-066.

As explained below, however, the duties of a county recorder involve some tasks that demand the exercise of independent discretionary judgement. For example, the county recorder has no authority to record an instrument where there is no statutory provision mandating that the instrument be recorded. See Att'y. Gen. Ops. 86-006 (no authority to record a declaration of land patent that does not fall within the provisions of R.C. 5301.38), 90-061 (no authority to record notice of a common law lien), and 90-068 (no authority to record a zoning variance as a separate instrument). In addition, a county recorder is prohibited from recording an instrument that does not meet specific statutory mandates. See R.C. 711.121 (a county recorder may not record a deed that does not meet the statutory mandates of R.C. Chapter 711., which governs the platting of subdivisions, and may require the presenter of the deed to provide an affidavit to establish an exemption from the provisions of R.C. Chapter 711).

Thus, the first task for a county recorder, upon presentation of an instrument, is to examine the nature and form of the instrument and decide whether it is entitled by statute to be recorded. Therefore, it is apparent that a county recorder exercises a degree of independent discretionary judgement in some matters involving the recording of legal records that concern the ownership of interests in real estate. It is equally apparent that parties to a real estate transaction that would be memorialized in legal documents which would be recorded by the county recorder are interested in matters before the county recorder's office.

Real Estate Brokers and Salespersons

Real estate brokers and salespersons are licensed and regulated by the Ohio Real Estate Commission. See generally R.C. 4735.01 (defining brokers and salespersons), 4735.02 (requiring licensure), and 4735.03 (defining general powers and duties of the Ohio Real Estate Commission). Generally, real estate brokers and salespersons are involved in the selling, exchanging, purchasing, renting, leasing, or transferring of real estate for a commission. See Att'y Gen. Op. No. 89-105, quoting Haggins, Real Estate Brokerage: In a Nutshell, 19 Clev. St. L. Rev. 126, 126 (1970) ("[t]he real estate broker is the middleman whose duty is to bring the buyer and the seller together"). Generally, an owner of real estate enters into a written contract with a real estate salesperson in which the owner incurs an obligation to pay a commission, which is determined as a percentage of the purchase price, to the salesperson for finding a purchaser for the owner's property upon the transfer of the property to the buyer. See Bell v. Dimmerling 149 Ohio St. 165 (1948).

In light of the authority of a county recorder and the functions of a real estate salesperson, the question becomes whether a county recorder may sell real estate that is located in the county. The issue is whether the receipt of real estate commissions in such circumstances would manifest an improper influence upon a county recorder with regard to his official decisions and responsibilities involving the exercise of discretionary judgement in matters involving the recording of instruments that document the ownership of interests in real estate for property sold through him as a licensed real estate salesperson.

As stated above, real estate brokers and sales persons are involved in the selling, exchanging, purchasing, renting, leasing, or transferring of real estate for a commission, which is determined as a percentage of the purchase price, paid by the seller of the property upon the transfer of the property to the buyer. The Supreme Court of Ohio has held that "a deed does not have to be recorded to pass title. Whether or not recorded, a deed in Ohio passes title upon its proper execution and delivery." See The Wayne Building & Loan Co. v. Yarbrough, 11 Ohio St. 2d 195, 212 (1967). See also Briggs v. Jeffers, 7 Ohio Misc. 44 C.P. Monroe County (1965) (a contract for the sale of real estate became an executed contract and title passed to the purchaser when the loan was closed, the purchaser paid the purchase price, and the deed delivered to the purchaser despite the fact that the deed was not recorded).

Thus, it is clear that a real estate transaction is concluded and the title passes when the purchase price is paid by the purchaser to the seller. The function of a real estate salesperson of bringing the buyer and the seller together ends when the real estate transaction is concluded. Because it appears that recording a deed is not necessary for a real estate transfer to be consummated, a county recorder could not be improperly influenced by the receipt of a commission with regard to the exercise of his independent discretionary judgement in examining the nature and form of a deed and deciding whether it is entitled by statute to be recorded when the property was sold through him as a licensed real estate salesperson. Therefore, R.C. 102.03(E) does not prohibit a county recorder from holding a real estate license and selling real estate that is located within the county while serving in office.

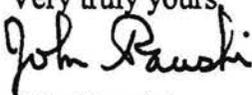
The Ethics Commission, however, has recognized that a public official or employee will develop working relationships by cooperating with other public officials and employees while performing his official duties. R.C. 102.03(D) prohibits a public official or employee who engages in private outside employment or business activity from using relationships developed while performing his public duties to secure a favorable decision or action by another public official or employee regarding his private interests or the interests of his business associates. Adv. Op. 96-004.

As a county elected officer, a county recorder will have access to other county officials and employees which is unique to that enjoyed by other licensed real estate salespersons who do not hold elective office. R.C. 102.03(D) prohibits a county recorder who is a licensed real estate salesperson from using, formally and informally, his unique position and access, as an elected county official, and his working relationship with other public officers and employees, to advantageously affect his private outside business activity.

Conclusion

As explained above, a county recorder is not prohibited from holding a real estate license and selling real estate that is located within the county while serving in office. The Ohio Ethics Law does, however, place important restraints upon the county recorder with respect to his private real estate business.

The Ethics Commission approved this informal opinion at its meeting on September 28, 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 further questions, please feel free to contact this Office again.

Very truly yours,

John Rawski
Staff Attorney

Enclosure: Advisory Opinion No. 96-004