

OHIO ETHICS COMMISSION

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August 2, 2002

Informal Opinion 2002-INF-0802-3

Jonathan E. Rosenbaum
Rosenbaum & Muhek

Dear Mr. Rosenbaum:

In a letter received by the Ohio Ethics Commission on March 25, 2002, you ask whether the post-employment restrictions of the Ohio Ethics Law prohibit you from representing a developer in a potential lawsuit that would involve alleged tortious interference by an attorney with the developer's contracts.

Facts

You state that you resigned, on February 15, 2002, from your position as an assistant county prosecuting attorney for Lorain County. While you were an assistant county prosecutor, you prosecuted a former city service director for violating R.C. 102.03(A), the "revolving door" statute. The former city service director violated the revolving door statute by receiving compensation, from a subsidiary of the developer who wishes to engage you, for providing private consultation services regarding a city sewer project in which he had been involved in his public capacity. The city sewer project was necessary to facilitate the building of a planned community development (PCD) within the city by the developer. The safety service director had attended the preliminary meetings concerning the city sewer project and afterwards became a paid consultant in the project for one of the developer's subsidiaries.

The developer desires to retain you to represent him in a lawsuit. The lawsuit involves alleged tortious interference by another attorney with the developer's contracts. The developer alleges that the attorney instigates litigation that is intended to interfere with the municipal administrative process regarding development of two PCD's. One of these PCD's will be serviced by the sewer project on which the former city employee provided consulting services. The attorney had attempted to stop the city from rezoning the land to a PCD as a means of stopping the sewer project because, without high-density development, the sewer would be unnecessary.

You state that the issue of tortious interference by the attorney with the developer's contracts, in and of itself, was not a matter with which you were involved as an assistant prosecutor. You also state that the attorney in question had no role in the prosecution of the safety service director.

Brief Answer

As explained below, because both the sewer project and the developer were part of the "matter" in which you actively participated involving the prosecution of the former city service director, R.C. 102.03(A)(1) prohibits you from representing the developer in any matter related to the sewer project for one year from the date you left your position with the county. You are not, however, prohibited from representing the developer on matters that are wholly unrelated to the sewer project or the prosecution of the former city service director, or from providing advice or guidance to the developer on any matters so long as you are not representing the developer before a public agency.

Your question also raises issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. These issues are not within the jurisdiction of the Ohio Ethics Commission. For more information about the Code of Professional Responsibility, you may wish to contact the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

Post-Employment Restrictions

The Ohio Ethics Law and related statutes impose post-employment restrictions upon former public officials and employees in three areas. Two of the restrictions are relevant in your situation, and prohibit a former public official or employee, after leaving public service, from: (1) representing parties, on certain matters, before public agencies; and (2) releasing confidential information.

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, prohibits former public officials and employees from representing any person before any public agency on any matter in which he personally participated as a public official or employee. R.C. 102.03(A) provides, in pertinent part:

- (1) 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 through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

....

- (5) As used in divisions (A)(1), (2), and (3), "matter" includes 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. . . . As used in this division, "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)(1) prohibits you, for a period of one year from the date you left your position with the Lorain County prosecutor's office, from representing any person, including the developer or any other client, before any public agency, including a court, on any matter in which you personally participated as an assistant county prosecutor.

The term "represent" is defined in R.C. 102.03(A) 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 that would fall within 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.

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 solely before the agency with which he was previously employed. Adv. Op. No. 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).

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." The services that you had performed as an assistant county prosecuting attorney in prosecuting a case would be considered "personal participation" for purposes of R.C. 102.03(A)(1). See, generally, Adv. Op. No. 99-001.

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."

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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. Any issue or question, as well as a particular case in which you participated as an assistant county prosecutor, would be a "matter" for purposes of R.C. 102.03(A).

The one-year, post-employment prohibition of R.C. 102.03(A)(1) commences the date a public official or employee leaves his public employment. Adv. Ops. No. 81-002 and 89-003. Therefore, as stated above, R.C. 102.03(A)(1) prohibits you, for a period of one year after leaving your employment with the Lorain County prosecutor's office, from representing any person before any public agency on any matter in which you personally participated while performing your public duties. Adv. Op. No. 91-009. You are not prohibited from representing clients on new matters, or on matters in which you did not personally participate as an assistant county prosecuting attorney.

As explained above, you prosecuted the former city service director for violating R.C. 102.03(A). Therefore, the prosecution of the former city service director for providing private consultation services regarding a city sewer project in which he had been involved in his public capacity is a "matter" in which you "personally participated," through a "substantial exercise of administrative discretion." From the facts you have provided, the prosecution of the city service director involved both the sewer project and the developer. The litigation you have described is being brought on behalf of the developer against another attorney for tortious interference with contracts. It is entirely foreseeable that the circumstances involving the sewer project could become part of this litigation. As attorney for the plaintiff developer, you would have little if any control over whether the same issues and questions in which you were involved as a prosecutor will become a part of this litigation involving the PCD.

Therefore, you personally participated, through a "substantial exercise of administrative discretion," in a matter involving the sewer project and the developer, and R.C. 102.03(A)(1) prohibits you, for one year from the date you left your position with the county, from being retained to represent the developer in the lawsuit that you have described. You are not, however, prohibited from representing the developer on matters that are wholly unrelated to the sewer project or the prosecution of the former city service director, or from providing advice or guidance to the developer on any matters so long as you are not representing the developer before a public agency.

Disclosure of Confidential Information—R. C. 102.03(B)

Once the one-year limit has elapsed, you will not be barred from representing the developer with respect to the matter you have described. At that time, you should also be aware of R.C. 102.03(B), which prohibits a former public official from disclosing or using confidential information. 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.

While you state that you have not acquired any "inside" information that would benefit you with respect to the representation of the developer, Division (B) of Section 102.03 prohibits a present or former public official from disclosing or using, without appropriate authorization, any confidential information acquired by him in the course of his official duties. No time limitation exists for this prohibition, and it is effective while a person serves in a public position and after he leaves public service. Adv. Op. No. 88-009. R.C. 102.03(B) prohibits you from releasing confidential information that you acquired during your service as an assistant county prosecuting attorney to any other party and from using that information in any way.

Code of Professional Responsibility

Your question also raises issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. Specifically, DR 9-101(B) provides that a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee. Other Disciplinary Rules impose limits on former public attorneys. These issues are not within the jurisdiction of the Ohio Ethics Commission. For more information about the Code of Professional Responsibility, you may wish to contact the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

Conclusion

As explained above, because both the sewer project and the developer were part of the "matter" in which you actively participated involving the prosecution of the former city service director, R.C. 102.03(A)(1) prohibits you from representing the developer in any matter related to the sewer project for one year from the date you left your position with the county. You are not, however, prohibited from representing the developer on matters that are wholly unrelated to the sewer project or the prosecution of the former city service director, or from providing advice or guidance to the developer on any matters so long as you are not representing the developer before a public agency.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on August 2, 2002. The Commission commends you for requesting guidance before taking any actions that could be prohibited by law.

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The opinion is 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 and does not purport to interpret other laws or rules. I have enclosed a copy of the Commission's Post-Employment Memorandum, which should provide you with more details about the Ethics Law and related statutes. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

Enclosure: Post-Employment Memorandum