



OHIO ETHICS COMMISSION

8 East Long Street, 10th Floor

Columbus, Ohio 43215

Telephone: (614) 466-7090

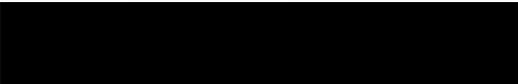
Fax: (614) 466-8368

Web site: www.ethics.ohio.gov

March 5, 2004

Informal Opinion 2004-INF-0305

Alfred E. Schrader
Schrader, Romanoski, Stevenson & Grant



Dear Mr. Schrader:

In a letter that was received by the Ohio Ethics Commission on December 22, 2003, you ask whether the Ohio Ethics Law and related statutes prohibit you from rendering legal services to political subdivisions and public agencies within Summit County in light of the fact that you have been appointed to the Summit County Council.

Because of the complexity of situations that could be presented when a county council member represents public agencies within the same county, the Commission must carefully and comprehensively apply the law in order to provide you with a practical advisory opinion.

Brief Answer

As explained below, the Ohio Ethics Law imposes significant limits on you with respect to the representation of townships and municipalities within the county because of the extent of possible conflicts of interest. However, the Law does not absolutely prohibit you from representing the clients you have described.

The Law prohibits you from: (1) voting, discussing, deliberating, or taking any other action on matters before county council in which your clients have an interest; (2) accepting compensation from any client for services rendered on matters that are, or will be, before any agency of the county; and (3) representing any person, before any public agency, on any matter on which you personally participated as a member of county council. Because of the extent of possible conflicts of interest, you must be diligent about withdrawing from matters involving your clients.

Facts

You state that you have been appointed to the Summit County Council as representative of District 8 that includes the City of Green; the Villages of Clinton, Lakemore, and New Franklin; and the Townships of Coventry, Franklin, and Springfield. You also state that clients of your law practice include political subdivisions and public agencies within Summit County.

You state that you render legal services for Twinsburg Township, which is within Summit County, as Township Attorney. You also state that you render legal services for various Joint Economic Development District Boards within Summit County. You further state that, prior to your appointment to county council, you were retained by Franklin Township, which is within Summit County, to represent them in litigation and that the matter is still pending.

You ask whether you may continue to render legal services for political subdivisions and local public agencies within Summit County. You state that you plan to abstain, as a council member, from matters involving the political subdivisions and public agencies within Summit County that are your clients whenever those political subdivisions and public agencies have matters pending before the Summit County Council. You also state that you will not render legal services for political subdivisions and public agencies on matters involving the Summit County government.

Organization of the Summit County Government

Summit County operates under a charter form of government. The Attorney General succinctly described the county charter form of government in Attorney General Advisory Opinion No. 2003-041:

Summit County has authority, “through properly adopted charter provisions, to restructure its government with respect to both the form of county government and its officers,” so long as the charter provides for the exercise of all powers and the performance of all duties imposed by statute on counties and county officers.” 2001 Op. Att’y Gen. No. 2001-020 at 2-113 (quoting 1994 Att’y Gen. Op. No. 94-095 at 2-469).

The restructuring of the form of county government and its officers does not alter the general relationship that county agencies have with political subdivisions and public agencies within the county’s borders.

This advisory opinion cannot provide an analysis of every situation that could arise where the county council would be faced with a matter that pertains to a political subdivision or public agency within the county’s borders. However, the fact that overlapping relationships exist will control the application of the Ohio Ethics Law to your question. The fact that you plan to abstain, as a council member, from matters involving the political subdivisions and public agencies within Summit County that are your clients whenever they have matters pending before the Summit County Council, illustrates that overlapping relationships exist and that you recognize that matters involving your public clients will come before the council.

For example, the county council is the legislative and taxing authority of the county. State ex. rel. O'Connor v. Davis, (2000) 139 Ohio App.3d 701,709. The Attorney General determined that, for purposes of compatibility of offices, a potential common law conflict of interest exists for a person holding positions as a township clerk and county commissioner due to the competition between the county the township for moneys in the undivided local government fund and the undivided local government revenue assistance fund, stating:

[I]f a person were to assist in the preparation and presentation of both the county's and township annual tax budget to the county budget commission, that person might be subject to influences that could prevent him making completely objective, disinterested decisions.

Att'y Gen Op. No. 2003-006.¹ However, the Attorney General did not consider the prohibitions imposed by the Ohio Ethics Law in its advisory opinion.

It must also be noted that, despite the fact you are the county council member representing District 8, you possess the authority as a county council member to participate in matters affecting all of Summit County. Therefore, the fact that some political subdivisions and local public agencies within Summit County for which you desire to render legal services are outside of District 8 does not affect the application of the prohibitions imposed by the Ohio Ethics Law and related statutes.

Securing or Soliciting Improper things of Value—R.C. 102.03(D) and (E)

The issue of rendering legal services to political subdivisions and public agencies within Summit County implicates the conflict of interest restriction contained in R.C. 102.03(D) and (E), 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.

¹ The Attorney General determined that the common-law conflict of interest could be remedied if the person holding positions as township clerk and county commissioner did not prepare or present the township's tax budget to the county budget commission or explain to the county budget commission the township's need for moneys from the undivided local government fund and the undivided local revenue assistance fund.

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 council member is a public official for purposes of R.C. 102.03(A).

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 102.01(G). A definite and direct pecuniary benefit is considered to be a thing of value under R.C. 102.03(D). Ohio Ethics Commission Advisory Opinions No. 79-008, 86-007, and 89-005. The compensation that an attorney receives for rendering legal services for his clients is falls under the definition of "anything of value."

A thing of value is considered to be of an improper character for purposes of R.C. 102.03(D) and (E) whenever the thing of value is secured from a party that is interested in matters before, regulated by, or doing or seeking to do business with the public agency with which the official or employee serves, or where the thing of value could impair the official's or employee's objectivity and independence of judgment with respect to his official actions and decisions for the public agency with which he serves or by which he is employed. Adv. Ops. No. 89-006, 90-012, and 92-009. The Ethics Commission has explained that a public official or employee must exercise his duties without hindrance by any improper influence. Adv. Op. No. 89-010.

R.C. 102.03(D) prohibits a public official or employee from participating in matters that will benefit himself or parties with whom he has a close family, economic, or business relationship because the relationships may impair the public official's objectivity and independence of judgment. Adv. Op. No. 98-002. R.C. 102.03(E) prohibits a public official or employee from merely soliciting or receiving an improper thing of value and does not require that he use the authority or influence of his position to secure it. See State v. Lordi, 140 Ohio App.3d 561, 569 (2000), discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001) (a county commissioner convicted of a violation of R.C. 102.03(E) by soliciting private business from an official of a township that was interested in matters pending before the board of county commissioners).

As a member of county council, you serve as a representative of county residents and must exercise your authority in an independent and objective manner, with no motivation for your decisions beyond what you assess to be the best interests of the citizens in the county. As explained above, it is likely and foreseeable that political subdivisions and public agencies within the county may, under limited circumstances, be interested in matters that come before the county council. If these political subdivisions and public agencies are your clients, then you would be subjected to conflicting and divided loyalties to the extent that it would be impossible for you to exercise your duties in a manner that will advance the best interests of the county. See Adv. Op. No. 90-008.

Possibility of Withdrawal

The Ethics Commission has explained that a public official who faces a conflict affecting a party may withdraw from matters that affect that party in order to satisfy the prohibitions of the Ethics Law. Adv. Ops. No. 82-002, 89-008, and 96-004. You have stated that you plan to abstain, as a council member, from matters involving the political subdivisions and public agencies within Summit County that are your clients whenever those political subdivisions and public agencies have matters pending before the Summit County Council.

It is impossible in an advisory opinion to predict when, or how often, matters involving the political subdivisions and public agencies within Summit County that are your clients will have matters pending before the Summit County Council. However, if you are required to withdraw on a frequent basis, your withdrawal may create a substantial detriment to the county residents that you represent and the overall functioning of the county council. See Adv. Op. No. 99-002. Also, as explained below, your withdrawal must also be made in order to avoid violations of the prohibitions imposed upon you by either R.C. 102.04(C) or R.C. 102.03(A).

Representation of Clients Before County Agencies—R. C. 102.04(C)

Your attention is directed to R.C. 102.04(C), which reads:

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. (Emphasis added.)

A county council member is “a person . . . elected or appointed to an office of . . . a county” and subject to the prohibitions imposed by R.C. 102.04(C). “Compensation” is defined for purposes of R.C. 102.04 as money, a thing of value, or a financial benefit, and would include the money that an attorney receives from clients for legal services, whether from hourly fees or a contingency agreement. R.C. 102.01(A); Adv. Op. No. 92-006.

The Ethics Commission has defined the rendering of services, for purposes of R.C. 102.04, as “the performing of services such as advising, consulting, representing or the like which involve matters ‘before’” an agency, department, board, bureau, commission, or other instrumentality, of the county. Adv. Op. No. 75-006. The Commission has also explained that, for purposes of R.C. 102.04, a matter is “before” a governmental agency “when it is being considered by, decided by, in the presence of or under the official purview of an agency of a governmental entity.” Adv. Op. No. 76-009.

R.C. 102.04(F) provides that the prohibition imposed by R.C. 102.04(C) does not extend to the performance of ministerial functions including, but not limited to, the filing or amendment of tax returns, applications for permits and licenses, incorporation papers, and other documents. R.C. 102.04(D) sets out an additional exception that applies to public officials appointed to nonelective office and public employees. The exception in R.C. 102.04(D) is not applicable to you because you serve in an elected office. Adv. Op. No. 89-016.

Therefore, as a county council member, you are prohibited from accepting "compensation" for any non-ministerial service rendered or to be rendered by you personally in any case, proceeding, application, or other matter that is before any agency, department, board, bureau, commission, or other instrumentality of Summit County, excluding the courts.

As set forth above, you state that you plan to abstain from matters involving the political subdivisions and local public agencies within Summit County that you personally represent whenever those subdivisions and public agencies have matters pending before the Summit County Council. You also state that you will not represent or advise public agencies within Summit County on matters involving the Summit County government.

It must be stressed that R.C. 102.04(C) prohibits a person who is appointed to an office of a county from receiving compensation for personally rendering services in any case, proceeding, application, or other matter that is before any agency, department, board, bureau, commission, or other instrumentality of the entity that he serves. R.C. 102.04(C) does not allow the office-holder to receive compensation for personally rendering services in a case, proceeding, application, or other matter that is before an agency, department, board, bureau, commission, or other instrumentality of the entity that he serves even if he abstains from the matter when it comes before the public entity that he serves. Therefore, you would be unable to comply with the prohibition imposed by R.C. 102.04(C) if you receive compensation for personally rendering services to the political subdivision or local public agency on those matters, regardless of whether you abstain, as a council member, from matters involving the political subdivisions and public agencies within Summit County.

For example, you stated that you serve Twinsburg Township as its Township Attorney.² Because of the prohibition imposed by R.C. 102.04(C), the only permissible compensation you could receive for personally rendering services for Twinsburg Township would be for a case, proceeding, application, or other matter that is not before any agency, department, board, bureau, commission, or other instrumentality, of Summit County, excluding the courts. In Advisory Opinion No. 82-001, the Ethics Commission explained that an officer of a political subdivision, who is subject to the prohibition imposed by R.C. 102.04(C) is prohibited from receiving compensation from clients for rendering services "in a matter which is or will be become part of a 'case, proceeding, application, or other matter,' before [his political subdivision] or any agency of his [political subdivision]. (Emphasis added).

² Your simultaneous service as a county council member and township attorney may raise issues regarding the "compatibility" of public positions. For guidance on compatibility, you should contact the County Prosecutor.

Therefore, to avoid violating R.C. 102.04(C), you would be required to exercise extraordinary diligence to determine that the case, proceeding, application, or other matter for which you represent Twinsburg Township is not and will not foreseeably be a matter pending before any agency, department, board, bureau, commission, or other instrumentality, of Summit County, excluding the courts. In addition, you must also be certain that the case, proceeding, application, or other matter for which you represent Twinsburg Township cannot ever become a matter that will be pending before any agency, department, board, bureau, commission, or other instrumentality, of Summit County, excluding the courts.

If you were to represent Twinsburg Township in a case, proceeding, application, or other matter because you believe that the matter is not pending before any agency, department, board, bureau, commission, or other instrumentality, of Summit County, excluding the courts, and the matter later comes before any agency, department, board, bureau, commission, or other instrumentality, of Summit County, excluding the courts, then a serious issue under R.C. 102.04(C) will arise. In such a situation, in order to comply with the prohibition imposed by R.C. 102.04(C), you may be required to resign your position as a county council member.

Representation of Franklin Township on an Ongoing Legal Matter

You stated that, prior to your appointment to county council, you were retained by Franklin Township to represent the Township in litigation and that the matter is still pending. Because R.C. 102.04(C) specifically excludes the courts, you are not prohibited from accepting compensation from a client, including public agencies within the county, for any service that you personally render in a case, proceeding, application, or other matter before the Summit County courts provided that you comply with other provisions of the Ethics Law. This provision of R.C. 102.04(C) will enable you to continue to represent Franklin Township in litigation that is before the courts. However, the litigation must not present any contingent matter to any other agency, department, board, bureau, commission, or instrumentality, of the County to avoid any application of R.C. 102.04.

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, also imposes restrictions upon present and former public officials and employees representing clients or acting in a representative capacity for any persons or entities. R.C. 102.03(A) will prohibit you from representing any client, including political subdivisions and public agencies, on a particular matter before any public agency if you have you personally participated in the matter in your capacity as county council member.

R.C. 102.03(A) provides, in pertinent part:

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.

R.C. 102.03(A) sets forth the prohibitions that it imposes upon present and former public officials and employees, specifically: (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. Adv. Ops. No. 80-008, 86-001, and 92-005. For purposes of the prohibition of R.C. 102.03(A), the term "person" includes another a public agency. Adv. Op. No. 82-002.

Accordingly, R.C. 102.03(A) prohibits you, as appointed county council member, from representing a client or any other party, including political subdivisions and public agencies within Summit County on any matter in which you personally participated in your capacity as county council member.

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.

It must be noted that R.C. 102.03(A) prohibits a present or 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. Adv. 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."

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." Adv. Op. No. 91-009. See also Adv. Op. No. 86-001. R.C. 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 terms "case," "proceeding," "application," "determination," "issue," and "question" are not defined for purposes of R.C. 102.03(A). In Advisory Opinion No. 99-001, the Ethics Commission determined that the term "matter" is broadly defined and encompasses many things. In that opinion, the Commission stated:

"Matter" includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, or investigation, a lawsuit or legal proceedings, an oral or written application, and a settlement of a dispute or question. "Matter" also includes such abstract items as a dispute of special or public importance and a controversy submitted for consideration.

However, the Commission also explained that the Legislature did not intend the prohibition of R.C. 102.03(A) to be so broad as to encompass general subject matters.

R.C. 102.03(A) prohibits you, during your public service as county council member, and for a period of one year from the date you leave the position, from representing any client, before any public agency, including the courts, on any matter in which you personally participated while you served as a council member. If you personally participate in a particular matter as a council member, then you are prohibited, during your service and for one year after leaving office, from representing any client, including political subdivisions and public agencies within Summit County, on that particular matter.

Therefore, in order to comply with R.C. 102.03(A), you would be required to exercise diligence to determine that the matter for which you represent political subdivisions and public agencies within Summit County is not a matter in which you personally participated as a member of the Summit County Council. Also, because R.C. 102.03(A), unlike R.C. 102.04(C) does not exclude the courts, the prohibition imposed by R.C. 102.03(A) may, depending upon the facts and circumstances, have an impact on your ability to represent Franklin Township in litigation.

Conclusion

As explained above, the Ohio Ethics Law imposes significant limits on you with respect to the representation of townships and municipalities within the county because of the extent of possible conflicts of interest. However, the Law does not absolutely prohibit you from representing the client you have described.

Alfred E. Schrader
March 5, 2004
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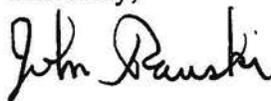
The Law prohibits you from: (1) voting, discussing, deliberating, or taking any other action on matters before county council in which your clients have an interest; (2) accepting compensation from any client for services rendered on matters that are, or will be, before any agency of the county; and (3) representing any person, before any public agency, on any matter on which you personally participated as a member of county council. Because of the extent of possible conflicts of interest, you must be diligent about withdrawing from matters involving your clients.

You should also be aware that rendering legal services to political subdivisions and public agencies within Summit County while serving as a member of county council may raise issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. These issues do not fall within the jurisdiction of the Ethics Commission. Please refer your questions to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court for more information about the Code of Professional Responsibility.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on March 5, 2004. The Commission commends you for requesting guidance before taking any actions that could be prohibited by law. Because of the nature and complexity of the limits described in this opinion, the Commission asks that you provide a copy of the opinion to your public clients.

The 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. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



John Rawski
Staff Attorney

Enclosure: Advisory Opinion No. 93-004

cc: David Hannan, Summit County Council Clerk
Sandy Rubino, Assistant Summit County Prosecutor