

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

May 1, 2007

Informal Opinion 2007-INF-0501

Ted Mallo
Vice President and General Counsel
The University of Akron
Akron, Ohio 44325-4706

Dear Mr. Mallo:

On March 8, 2007, the Ohio Ethics Commission received your request for an advisory opinion. You wrote to the Commission as the General Counsel and Board Secretary of the University of Akron (University). In your letter and several communications to our office, you explained that a member of the University Board of Trustees (Board) is a lawyer in private practice. On January 1, 2007, the Board member (Trustee) became a member of a law firm (Firm) that has provided legal representation to the University by appointment of the Attorney General of Ohio.

You have asked whether the Ethics Law and related statutes prohibit the Trustee from continuing to serve as a member of the Board while the Firm provides special counsel services to the University. If the Trustee is not prohibited from continuing to serve as a member of the Board of the University, you have asked what actions he and the University should take in order to continue to conduct their relationship according to the requirements of the Ethics Law and related statutes.

Brief Answer

As explained more fully below, under the facts presented, the Trustee is not prohibited from continuing to serve as a member of the Board as long as he does not receive any profits or benefits from the contract between the University and a Firm that has represented the University for a number of years. Now that he is a shareholder in the Firm, the Trustee is prohibited from participating, formally or informally, in any matter before the Board that affects the interests of the Firm.

Facts

You have explained that the Trustee was appointed to the University Board in 2001. His term will expire in 2010. On January 1, 2007, the Trustee joined the Firm that provides representation to the University. In joining the Firm, the Trustee became a shareholder in the Firm. The Firm has provided continuous legal representation as special counsel to the University since 1967.

You have explained that the Trustee's compensation from the Firm is fixed for 2007, and does not have a variable component that will be affected by revenue from legal work derived from the University. The Trustee's retirement plan contributions by the Firm are fixed as a proportion of his salary and do not vary based on the Firm's profitability. The Firm can subtract revenues derived from representation of the University in determining its profitability and revenues for purposes of shareholder compensation for the Trustee. The revenue earned by the Firm from its representation of the University is less than one percent of its total revenues. The Firm will not use the Trustee's participation on the University Board as a factor in determining his compensation based on community service. The Trustee will not work on any legal matters concerning the University and has not done so in the past.

You have also explained that the Board does not currently vote to recommend law firms or attorneys for appointment as special counsel. If the Board were to engage in that activity in the future, the Trustee will recuse himself from participating in the Board's deliberations or decision in any way. The Trustee will not participate in any board committee activity, or in any discussion or other interaction with the President or General Counsel involving the direction of the University's legal work.

Interest in a Public Contract Law—R.C. 2921.42(A)(4)

The public contract law, set forth in R.C. 2921.42 (A)(4), provides that no public official shall knowingly:

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. (Emphasis added.)

A member of the board of trustees of a state university is a "public official" for purposes of R.C. 2921.42. The Attorney General is empowered to appoint assistant attorneys general and Special Counsel. See R.C. 109.03 and 109.07, respectively. The Attorney General's appointment of an attorney to provide legal services to a university is a public contract pursuant to R.C. 2921.42(G), because it is the purchase or acquisition of legal services by or for the use of both the Attorney General and the university. An "interest" which is prohibited under R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. Ohio Ethics Commission Advisory Opinion No. 81-008.

As stated above, R.C. 2921.42(A)(4) prohibits a public official from having 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." A member of a university board of trustees is "connected" with the university. See Adv. Op. No. 95-004. A contract for Special Counsel for a state agency is between the Attorney General and the attorney; however, the contract is "for the use of" the state agency who receives, and pays for, the legal services provided by the Special Counsel.

In 1995, the Ethics Commission was asked whether the Ethics Law would prohibit an associate in a private law firm from being appointed as an attorney for a state university if a partner in the law firm was a member of the university board of trustees. In that situation and the one you have described, the attorney is hired by the Attorney General's Office to provide legal services to a university.

In Advisory Opinion No. 95-004, the Commission concluded that, if the associate were selected to serve as special counsel for the university, the board member who was a partner in the law firm would have a prohibited interest in the contract because of his distributive share in the partnership profits earned from the associate's work as counsel to the board. Adv. Op. No. 95-004. Because a contract for Special Counsel is entered into by the Attorney General's Office "for the use" of the University, and a Trustee is connected with the University, R.C. 2921.42(A)(4) prohibits a University Trustee from having an interest in a contract for Special Counsel serving the University. A partner in a Firm who receives a distributive share in the profits of the Firm has an interest in the contracts of the Firm, including a contract to provide legal services to a University. Adv. Op. No. 78-001.

Exception Contained in R.C. 2921.42(C)

There is an exception to R.C. 2921.42(A)(4), set forth in R.C. 2921.42(C), which provides that the prohibition in R.C. 2921.42(A)(4) does not apply to a public official when all four of the following criteria are met:

- (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
- (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision or governmental agency or instrumentality involved;
- (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;

- (4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of his family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

Each of the provisions in Division (C) is a question of fact which, when applied to the circumstances of the individual case, will determine whether a particular transaction fits within the exception. Adv. Ops. No. 80-003 and 88-008. The criteria of Division (C) are strictly construed against the public official, and the official must show compliance with all four requirements in the exception. Adv. Ops. No. 83-004, 84-011, and 88-008.

One of the key requirements in the exception is Division (C)(2), which provides that the contract is for supplies or services that are "unobtainable elsewhere for the same or lower cost," or that the supplies or services are furnished as "part of a continuing course of dealing established prior to" the public official's becoming associated with the instrumentality involved. In order to qualify for the exception, the Trustee would have to meet one of these alternative requirements, as well as the other three elements.

The Commission has explained that it would be extremely difficult to demonstrate that legal services provided by a law firm with which a public official is affiliated are "unobtainable elsewhere for the same or lower cost." The provision of services is often not competitively bid and there is no indication of any kind of competitive process in the selection of the Firm to represent the University. Therefore, the Trustee cannot meet the "unobtainable elsewhere for the same or lower cost" requirement.

The second requirement is that the contract represents a "continuing course of dealing" established before the Trustee was associated with the University. The Commission has explained that it is possible for a person to meet the continuing course of dealing requirement when services were being provided before he became associated with the public agency, even if the person did not acquire his interest in the contract until after he was appointed to the public agency. Adv. Op. No. 93-009. However, in order to meet the requirement, the public official must show that there has been no material change to the terms or conditions of the contract between the time he was appointed to the public agency and the time he acquires an interest in the contract. Any material changes to the agreement during that time, including modifications, extensions, or renewals, would indicate that the contract is not within the Division (C)(2) exemption because such changes alter the original understanding of the parties, unless the contract provides that it can be automatically renewed without any action of the parties or changes to the contract terms. Adv. Op. No. 88-008.

In the situation you have described, the Firm has been serving as special counsel for the University since 1967 and the Trustee was appointed to the University Board in 2001. The Trustee did not acquire an interest in the contract of the Firm, by becoming a shareholder in the Firm, until 2007. However, there were six years between the Trustee's appointment and his affiliation with the Firm. It is likely that the terms and conditions of the contract for legal services have significantly changed or undergone alteration in that six-year period. If that is the case, the requirement in R.C. 2921.42(C)(2) cannot be met, and the exception in R.C. 2921.42(C) does not apply.

"Profits or Benefits"—R.C. 2921.42(A)(4)

You have explained that the Firm has the ability to subtract revenues derived from the University when determining its profitability before determining shareholder compensation for the Trustee as a member of the Firm. In Advisory Opinion No. 95-004, the Commission was not asked to consider whether the partner who was the university trustee had the ability to waive his partnership interest in any revenue earned by the associate in an existing contract and, by so doing, did not have a prohibited interest in the profits or benefits of a contract whereby the university acquired legal services from the law firm.

In Advisory Opinion No. 90-007, the Commission considered the application of R.C. 2921.42(A)(4) to a county prosecuting attorney whose partner was representing a township within the county. With respect to partnership profits, the Commission stated:

An "interest" which is prohibited by Section 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. A partner in a law firm *who receives a distributive share of partnership profits* has an interest in the contracts of his firm, even when he does not personally render the legal services.

In Advisory Opinion No. 90-007, the Commission went on to state:

[T]he prosecutor is prohibited from having an interest in the profits or benefits of a contract entered into between a township within the prosecutor's county and a member of the prosecutor's private law firm. *The county prosecutor would, therefore, be prohibited from receiving a distributive share of the fees earned by his law partner if the partner were to represent a township within the county.* (Citations omitted. Emphasis added.)

In order to make sure the Trustee does not have an interest in any profits or benefits of the University's contract with the Firm, the Trustee and the Firm have proposed the following conditions:

- (1) The Trustee is not working, and will not work, on any matters involving the University;
- (2) The Trustee's compensation for the first year is fixed, and will not have a variable component based on revenue from legal work derived from the University;
- (3) The Trustee's retirement plan contributions from the Firm will not vary based on the Firm's profitability; and
- (4) The Firm has the ability to subtract the revenues derived from the University in determining its profitability and revenues for purposes of shareholder compensation for the Trustee.

The factors described above appear to establish that the Trustee does not profit or benefit from the University contract with the Firm. However, in order to avoid profiting or benefiting from the University contract in any fashion in the future, the Trustee's compensation cannot have any variable component based on revenue received from the Firm's legal work for the University not only in the first year but in all succeeding years of his service as a Trustee. The Firm must subtract University revenues from the compensation it provides to the Trustee during his entire tenure as a member of the Board. As long as the Trustee does not, at any time, receive any distributive portion of the compensation earned by the Firm from the University and the other factors listed above are met, he is not prohibited from continuing to serve as a Trustee. Both the Trustee and the Firm must be vigilant in assuring that the Trustee receives no profit or benefit from the Firm's contract.

Other Considerations

If the Trustee meets the criteria set forth above so that he can continue to serve, you have asked what actions he and the University should take in order to continue to conduct their relationship according to the requirements of the Ethics Law and related statutes. There are several restrictions that are applicable to the Trustee.

First, R.C. 2921.42(A)(1) prohibits the Trustee from using his position on the Board to secure additional or new contract work for the law firm. Further, R.C. 102.03(D) and (E) would prohibit the Trustee from soliciting or securing anything of substantial value, including any contracts or payments under contracts, for the law firm. The Trustee is prohibited, by these sections, from voting, discussing, deliberating about, or taking any other action to secure any contract-related benefits for the Firm. He is also prohibited from discussing the Firm's contract or work with any University officials or employees, and from seeking any payments, from the University or its representatives, for the Firm. Adv. Op. No. 90-007.

R.C. 102.03(D) and (E) also prohibit the Trustee from participating in any matter before the Board if the Firm with which he is affiliated: (1) is representing any party to the matter; or (2) has performed any services, for the University or any other party, on the matter. Adv. Op. No. 90-008. This restriction applies even if the Firm is representing, or has performed services for, a party other than the University on the matter.

There are Ethics restrictions that applied to the Trustee before he became affiliated with the Firm and continue to apply. For example, R.C. 102.04(A) prohibits the Trustee from receiving compensation to perform any services on any matter before any state agency unless he complies with the exception set forth in R.C. 102.04(D). R.C. 102.04(A) would prohibit the Trustee from receiving compensation to represent a client before the General Assembly, a state department, office, or board, on any matter. To provide the Trustee with information about the restriction and the exception, copies of Advisory Opinions No. 92-006 and 93-010 are enclosed along with a copy of the disqualification statement described in the exception. If the Trustee has any questions about the application of R.C. 102.04(A) and (D), he should contact you and this office for more information.

Finally, R.C. 102.03(B) would prohibit the Trustee from disclosing or using, without appropriate authorization, any confidential information he acquired as a Trustee. There is no time limit on this prohibition and it applies to the Trustee during his service to the University and after he leaves that position.

Conclusion

As explained more fully above, under the facts presented, the Trustee is not prohibited from continuing to serve as a member of the Board as long as he does not receive any profits or benefits from the contract between the University and a Firm that has represented the University for a number of years. Now that he is a shareholder in the Firm, the Trustee is prohibited from participating, formally or informally, in any matter before the Board that affects the interests of the Firm.

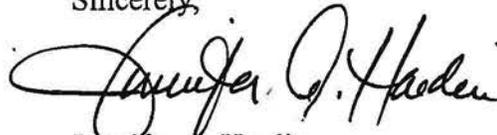
The Trustee should also be aware that his continuing service as a Trustee now that he is affiliated with the Firm may raise issues concerning the professional conduct of attorneys under the Supreme Court Rules of Professional Conduct. These issues are not within the Ethics Commission's jurisdiction. For further information about the Rules, the Trustee should consult with the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on March 23, 2007. The Commission commends the Trustee and the University for requesting guidance before taking any actions that could be prohibited by law.

Ted Mallo
May 1, 2007
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This 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,

A handwritten signature in black ink, appearing to read "Jennifer A. Hardin". The signature is written in a cursive style with a large initial "J" and "H".

Jennifer A. Hardin
Chief Advisory Attorney

Enclosed: Advisory Opinions No. 92-006 and 93-010
 R.C 102.04(D) Statement