

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

March 7, 2008

Informal Opinion 2008-INF-0307

Michael T. Cassetty
Cassetty, Muse & Reed

Dear Mr. Cassetty:

In a letter received by the Ohio Ethics Commission on October 2, 2007, you asked if the Ethics Law prohibits the Summit County Executive (SCE), Russell Pry, from hiring you or attorneys in your legal association to represent the County in a lawsuit.

In your letter, you explained that, before he became the SCE in July 2007, Mr. Pry was a solo practitioner in an independent legal association known as Cassetty, Muse and Pry. You were a practitioner in the same legal association. You and Mr. Pry are also members of an LLC known as Mackatt, LLC, which was formed to purchase an office building to rent to the legal association. You and Mr. Pry are personally liable on the mortgage for the building.

When Mr. Pry became the SCE, the legal association was dissolved. The building owned by Mackatt is now rented to Cassetty, Muse & Reed, another independent legal association. In a telephone conversation with an Ethics Commission staff member, Jason Dodson, Legal Counsel for the County, stated that you or the SCE would be willing to divest any interest in the LLC.

In July 2006, James McCarthy, SCE at that time, hired you to represent nurses involved in a criminal investigation at the Summit County Jail. Your representation lasted through July 2007. The County and the nurses you represented have now been named in a civil lawsuit.

Purpose of an Advisory Opinion

The purpose of an Ethics Commission advisory opinion is to provide guidance to a public official or employee upon which he or she can rely before engaging in an action that may be prohibited by the Ethics law. The Commission has explained that its function in rendering an advisory opinion is not a fact-finding process. Ohio Ethics Commission Advisory Opinion No. 94-002. An advisory opinion explains the prohibitions in the law and the standards and criteria that an official must observe in order to avoid violating the law in a given set of facts. *Id.* Thus, the Commission can render an advisory opinion only in response to a hypothetical question or a question that involves the prospective conduct of the person who requests the opinion. *See, generally*, Adv. Op. No. 75-037.

Because you are not the SCE, the Commission cannot provide you with an advisory opinion regarding his actions. However, it can provide you with general information about the provisions of the Ethics Law and related statutes that apply to this kind of question.

Summary of Restrictions

As explained more fully below, R.C. 2921.42(A)(1) prohibits a County official from authorizing a contract if his or her business associate has an interest in the contract. If a County official is a member of an LLC, all of the other members of the LLC are his or her business associates. When a County official is prohibited from authorizing a contract because his or her business associate has an interest in the contract, other County officials at that same or higher level could enter into the contract if they have the authority to contract on behalf of the County. Finally, the law does not prohibit a County official from entering into a contract with a former business associate, provided that the business association is fully severed with no understanding that it will be resumed in the future.

Public Contract Restrictions—R.C. 2921.42

A person serving in a county elective office is a public official subject to R.C. 2921.42(A)(1), which states that no public official shall knowingly:

Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public official's business associates has an interest.

R.C. 2921.01(A). The purchase of legal services by a County is a "public contract." R.C. 2921.42(I)(1)(a). Adv. Op. No. 95-004.

R.C. 2921.42(A)(1) prohibits a public official from authorizing or participating in the award of a public contract in which his or her business associates have an interest. Adv. Op. No. 78-001. A "business associate" includes any person or entity with which the official is pursuing an ongoing business enterprise. Adv. Ops. No. 85-004, 86-002, and 87-003. For example, the Ethics Commission has determined that: (1) a private employer is the business associate of an employee (see, e.g., Adv. Op. No. 78-006); (2) a firm is the business associate of its representatives or agents (Adv. Op. No. 84-013); (3) law partners are business associates (see, e.g., Adv. Op. No. 90-007); and (4) business partners are business associates (Adv. Op. No. 85-004). All of these are relationships of parties involved in ongoing business enterprises.

An LLC is a business structure that, under Ohio law, is neither a partnership nor a corporation but has attributes of both. *In re: ICLNDS Notes Acquisition, LLC* (Bkrtcy. N.D. Ohio 2001), 259 B.R. 289. Generally, an LLC has the limited liability features of a corporation and the tax features of a partnership. *Id.* at 292-93. The Ethics Commission explained in Advisory Opinion No. 2006-02 that a "membership interest" in an LLC is a member's share of

the profits and losses of the LLC and the right to receive distribution.¹ See R.C. 1705.01(H). See also R.C. 1705.17 (a membership interest in an LLC is personal property).

A public official with a membership interest in an LLC is pursuing an ongoing business enterprise with the other members of the LLC. The other members of the LLC are the official's "business associates." A County official would be prohibited from hiring, or participating in the decision of other County officials to hire, an attorney who is his or her business associate in an LLC.

Your second question involves the ability of a County official to engage a law firm with which his or her business associate is affiliated. In Advisory Opinion No. 85-004, the Ethics Commission determined that R.C. 2921.42(A)(1) prohibited the Chairman of the Ohio Building Authority, who was involved in a number of business partnerships with the principal of an architectural firm, from awarding or using the authority or influence of his or her office to secure authorization a public contract with the architectural firm, even though the Chairman had no business association with the architectural firm itself. The principal of the firm was the Chairman's business associate because of the business partnerships.

A member of a law firm has an interest in each contract of the law firm even if another lawyer in the firm is providing legal services in connection with a specific contract. Therefore, R.C. 2921.42(A)(1) prohibits a County official from hiring a law firm of which his or her business associate is a member, even if an attorney other than his or her business associate would provide the legal services to the County. The restriction applies even when the official's business association is unrelated to the provision of legal services and regardless of which attorney in the firm provides the services.

R.C. 2921.42(A)(1) provides no exception from its prohibitions for any reason in order to protect the public from conflicts of interest the public official may hold apart from the public interest, which is paramount. Therefore, the fact that a particular attorney may have a relevant expertise or familiarity with a case does not affect the application of the restriction.

Withdrawal From Authorizing a Contract

The Ethics Commission has determined that, in some circumstances, when R.C. 2921.42(A)(1) prohibits a public official from participating in the award of a contract, officials at the same or higher level of authority may approve the contract where the services are necessary for the public good, and the public official receives no personal benefit. Adv. Op. No. 90-010. In other words, while R.C. 2921.42(A)(1) prohibits a County official from authorizing a County contract in which his or her business associate has an interest, the law does not prohibit a County official at the same or higher level from authorizing a contract with the official's business associate.

¹ Because a member of an LLC has a "beneficial interest" in LLC property, a person filing a financial disclosure statement is required to disclose real property owned by an LLC in which he or she is a member on his or her annual financial disclosure statement. See Adv. Op. No. 2006-02.

Michael T. Cassetty
March 7, 2008
Page 4

If applicable local and state charter, laws, and ordinances permit, County officials at a level of authority that is the same as or higher than the official with the conflict can independently act in his or her place in all matters pertaining to a contract in which the conflicted official's business associate has an interest. In that case, the County would not be precluded from entering into the contract provided that the official with the conflict did not use his or her position of authority to secure authorization of the contract. County legal counsel is the appropriate authority to determine whether applicable local and state provisions allow officials at the same or higher level as the official with the conflict to act in his or her place.

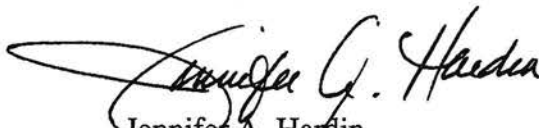
However, even if another official has the authority to enter into a contract with his or her business associate, the County official with the conflict of interest is prohibited from discussing, participating in, recommending, or taking any other formal or informal action to secure the contract. Any action by the official to secure a contract for his or her business associate, whether formal or informal in character, would constitute a violation of R.C. 2921.42(A)(1).

Finally, it should be noted that, when a public official fully and finally severs a business association, the restriction in R.C. 2921.42(A)(1) no longer applies to the official with respect to contracts involving his or her former business associate. In other words, absent any other business connection, if a public official who is a member of an LLC fully divests his or her interest, the other members of the LLC are no longer his or her business associate. Alternately, if another member of the LLC divests any interest in the LLC, the divested individual is no longer the business associates of the remaining members.

If either situation were to occur, the restriction in R.C. 2921.42(A)(1) would not apply, and the County official would not be barred from authorizing a contract to his or her former business associate. However, it must be clear that any divestiture is true and complete, there is no other business association between the parties, and there is no understanding or agreement between the parties to resume the association at a future date.

The Ohio Ethics Commission reviewed your question and authorized this letter response at its meeting on February 29, 2008. This letter 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. It is not an advisory opinion. The letter serves only to provide you with general information about the Ethics Law and Commission precedent and does not reach any conclusions as to the specific facts in the situations that you have set forth. Please do not hesitate to contact this office again if you have any further questions or need additional information.

Sincerely,


Jennifer A. Hardin
Chief Advisory Attorney

Cc: Russell M. Pry, Summit County Executive