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Merom Brachman  
Betty Davis  
Shirley Mays

David E. Freel,  
*Executive Director*



OHIO ETHICS COMMISSION  
8 East Long Street, 10<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 466-7090  
Fax: (614) 466-8368

[www.ethics.ohio.gov](http://www.ethics.ohio.gov)

June 27, 2008

Informal Opinion 2008-INF-0627-2

The Honorable Nancy H. Rogers  
Attorney General, State of Ohio

Dear Attorney General:

On June 3, 2008, the Ohio Ethics Commission received your statement and supporting documents describing your resolution of conflicts of interest as Attorney General, with your request that the Commission advise you on any additional steps necessary under Ohio's Ethics Law and related statutes. Two issues were presented.

The first involves two law firms—Vorys, Sater, Seymour & Pease LLP, in which your husband is a partner, and Buckingham, Ingersoll & Rooney LLP, in which your daughter is an associate—and your ability to participate in, or remove yourself from, matters before the Attorney General's Office concerning these firms. You described significant actions you have already taken, after consulting with our office, to remove yourself and others from these matters and have included a description of steps the Vorys firm took to address potential conflicts.

Since you submitted your request, your husband has announced his resignation from the Vorys firm, effective July 31, 2008. Further, your husband will take a retirement package from the law firm at the time of his resignation. At this time, even though your husband will be leaving the Vorys firm in the near future, he has a continuing connection to the firm. This opinion will therefore address conflicts of interest that could arise in matters affecting the Vorys firm, as well as the firm with which your daughter serves as an associate.

The second issue involves your relationship to The Ohio State University (OSU), which is regularly represented by the Attorney General's Office, and your ability to participate in, or remove yourself from, matters before the Office that directly affect OSU. In accepting the appointment as Attorney General, you took the significant step of resigning as the Dean of the Moritz College of Law. However, you have the right to return to OSU as a law school faculty member. You will also retain but pay for your OSU medical insurance. As Attorney General, you have acted to remove yourself from issues and contracts related to OSU.

At the outset, the Commission commends the steps you have taken to resolve and manage the potential for conflict of interest presented by these relationships. As you appreciate, conflicts of interest are not, in and of themselves, prohibited. To the contrary, conflicts may routinely arise because public officials have family, business, or other professional connections in their communities. Where one of these interests is definitely and directly affected by actions of his or her public agency, a conflict of interest can result for the official. The Ethics Law prohibits public officials from *acting* on these conflicts. The steps you took during your first days of service as Attorney General demonstrate your appreciation for and compliance with both the intent and the specific requirements of the Ethics Law.

### **Brief Answer**

As explained more fully below, if a regulatory, contractual, or other matter in which your husband, your daughter, or OSU has a definite and direct interest were to come before the Attorney General's Office, the Ethics Law and related statutes would prohibit you from performing your statutorily mandated duties regarding that matter.

Because the law would prohibit you from performing your duties, you would be under a "disability," as used in R.C. 109.04, regarding that matter. The first assistant attorney general is authorized and required, by R.C. 109.04, to perform the duties of the Attorney General, including all the rights, privileges, and powers conferred upon the Attorney General, during disability. In order to protect against any conflict of interest, the first assistant attorney general must perform all of the duties of your office in matters definitely and directly affecting your husband, your daughter, or OSU, without oversight, supervision, input, or approval by you.

### **Conflict of Interest and Public Contract Restrictions—R.C. 102.03(D) and 2921.42(A)(1)**

As Attorney General, you are a public official subject to the restrictions in the Ethics Law and related statutes. Of particular relevance are R.C. 102.03(D), which prohibits you from using your position to secure things of value, and R.C. 2921.42, which prohibits you from authorizing a public contract, if a family member, business associate, or other person or entity with which you have a similar relationship would benefit from the thing of value or have an interest in the contract.

These prohibitions serve the public interest in effective, objective, and impartial government by preventing the creation of a situation that could impair the objectivity and independence of judgment of a public official, and, therefore, the effectiveness of the public office with which she serves. Ohio Ethics Commission Advisory Opinions No. 89-014 and 90-002. The application of the restrictions is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 87-007 and 89-003.

R.C. 102.03(D) provides that no public official shall:

[U]se 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.

The term "anything of value" includes money and every other thing of value. R.C. 1.03; 102.03(G). A definite and direct beneficial or detrimental economic impact of the decision of a public entity is a thing of value. Adv. Ops. No. 85-012, 90-002, and 90-012. A public contract and the payment received under the contract are also things of value. Adv. Op. No. 89-008.

R.C. 2921.42(A)(1) provides 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.

A "public contract" includes any purchase or acquisition of goods or services by or for the use of a public agency. R.C. 2921.42(I)(1)(a). Adv. Op. No. 96-005. Your husband is a member of your family, as is your daughter even though she is an adult living outside your home. Adv. Op. No. 80-001.

The Ethics Commission has explained that a public official "authorizes" a contract where the contract could not have been awarded without the approval of the official or position in which the official serves. Adv. Ops. No. 88-008, 91-009, and 92-017. As Attorney General, you are ultimately responsible for the authorization of all contracts for the Office.

### **Matters Affecting Your Family Members**

In applying the conflict of interest provision in R.C. 102.03(D), the Ethics Commission has determined that a thing of value would have a substantial and improper influence on a public official if: (1) it will result from the official's exercise of her authority; and (2) the official, a business associate, a member of her family, or anyone else with whom she has a close family, economic, or business connection, would receive a definite and direct benefit from it. See Adv. Op. No. 89-008 (spouse and children); State v. Lordi (2000), 140 Ohio App.3d 561, 569, 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) (business interests). The Ethics Commission has also explained that R.C. 102.03(D) does not prohibit a public official from acting on a matter if the economic impact of a decision on the official's husband or child would be speculative and indirect rather than definite and direct. Adv. Op. No. 93-016.

R.C. 2921.42(A)(1) prohibits a public official from acting on a contract if a family member has a financial or fiduciary interest in the contract. The law does not prohibit a public official from authorizing or using her position to secure authorization of a public contract unless her family member's interest is definite and direct.

### **Husband's Law Firm**

Your spouse is a partner in the Vorys firm. A partner, owner, or officer of a company would have had a definite and direct interest in contracts of the firm, and may receive a definite and direct benefit from regulatory decisions affecting the firm. Adv. Op. No. 90-007 and 90-008.

You attached a Memorandum from the Vorys firm, dated May 28, 2008, setting forth the firm's creation of an ethical screen within the firm. The significant components of the screen regarding any of the firm's engagements in which the Attorney General, or any person or entity represented by the Attorney General, is an adverse party are:

- (1) Your husband withdrew from participating in those matters;
- (2) Your husband will not access any documents or other records and will not disclose any information to which he was formerly privy, in those matters;
- (3) Your husband will not initiate or engage in any discussions or communications with other personnel of the Vorys firm in those matters;
- (4) Other personnel of the Vorys firm will not seek the assistance of, or have any communication with, your husband in those matters.

These steps assist the law firm in complying with conflict of interest provisions in the law and the Rules of Conduct that apply to attorneys in Ohio. While they are vitally important and will help to ensure the public that your husband's interests in the matters before your Office are limited, these steps alone do not remove your husband's interest in matters before the Attorney General's Office.

R.C. 102.03(D) and R.C. 2921.42(A)(1) prohibit you from participating in matters before the Attorney General's Office that affect your husband's interests, or the interests of his partnership, the Vorys firm. However, R.C. 109.04, which you have exercised and is discussed below, provides a mechanism for the Office to objectively consider and decide, apart from your participation, regulatory matters or contracts involving your husband's interests or the interests of the Vorys firm.

### **Daughter's Employer**

Your daughter is an associate of Buckingham, Ingersoll & Rooney. Where the official's child is an employee of a company that will be affected by decisions of the official, it is necessary to determine whether the *employee*: (1) receives a definite and direct benefit from decisions that affect her employer; or (2) has a definite and direct interest in the contracts

awarded to her employer. Adv. Op. No. 89-008. A company employee who is not an owner or officer of the company is not considered to receive a definite and direct benefit from decisions that affect the company, or have a definite and direct interest in contracts of the company, unless she is involved in the company's work on the matter, is representing the company, or will receive payment or another benefit from the decision. Id.

Because your daughter is an associate, rather than a partner, owner, or officer of the law firm, most decisions that affect the law firm will not affect her interests. Further, in most situations, an associate of a law firm will not have a definite and direct interest in the contracts awarded to the firm. Adv. Op. No. 89-008.

Neither R.C. 102.03(D) nor R.C. 2921.42(A)(1) will prohibit you from participating in matters affecting the firm that employs your daughter unless she is definitely and directly affected by, or interested in, the matter. In such a case, you would be prohibited from participating, as Attorney General, in that matter. For example, if your daughter were to be compensated to provide services in connection with a contract with the Office, you would be prohibited from acting on the contract. Again, the mechanism in R.C. 109.04 is available to the Office if regulatory matters or contracts involving your daughter's interests are before it.

### Matters Affecting OSU

As noted above, R.C. 102.03(D) prohibits a public official from acting to secure a thing of value if the official or anyone else with whom she has a close family, economic, or business connection would receive a definite and direct benefit from her action. Adv. Op. No. 97-002. For example, R.C. 102.03(D) prohibits a public official from acting on matters that definitely and directly affect the interests of a business partner (Adv. Op. No. 90-007), public or private employer (Adv. Op. No. 2007-01), or organization of which she is a fiduciary (Adv. Op. No. 94-001).

R.C. 2921.42(A)(1) prohibits a public official from authorizing or securing a contract if her "business associate" has an interest in the contract. An official's business associate is a person or entity with which she is acting to pursue a common business interest. Adv. Op. No. 86-002. For example, a public official's outside employer, whether public or private, is her business associate. Adv. Ops. No. 89-008 and 2007-01.

However, where a public official has fully severed her association with a partner, employer, or organization, R.C. 102.03(D) and 2921.42(A)(1) do not prohibit the official from acting on matters that affect the interests of her *former* associate. Adv. Op. No. 2003-02. In such a case, it must be clear that there is no ongoing connection and no understanding between the parties that the official will resume the association after her public service.

While you have left your position as Dean of the Moritz College of Law at OSU, you have explained that your association with OSU has not ended. First, you have explained that you have the right to return to OSU as a law professor. In essence, you are on an unpaid leave of absence from employment with OSU. The Ethics Law does not absolutely prohibit a public official from working for one public agency while on an unpaid leave of absence from another. However, if there is an agreement that the official can return to her former public agency, the restrictions in R.C. 102.03(D) and 2921.42(A)(1) would apply to the official in matters affecting the future employer.<sup>1</sup>

In addition, you have explained that you will continue to receive medical insurance through OSU, although you are paying for OSU's share of the cost. While not as significant as your future economic interest in a return to employment, it is also a connection to OSU.

Therefore, while serving as Attorney General, you are prohibited from participating in matters before the Office if OSU will receive a definite and direct benefit, or avoid a detriment, as a result of the Office's action on the matter. For example, you would be prohibited from directing the work of assistant attorneys general or special counsel in their representation of OSU on specific lawsuits, contract negotiations, property acquisition, or other matters that definitely and directly affect OSU's financial interests.

However, you would not be prohibited from participating, as Attorney General, in matters that affect OSU as a part of the greater university community in Ohio. See Adv. Op. No. 2007-01 (a village council member who is employed by a college in the city is prohibited from participating in matters that definitely and directly affect the college, such as land use and regulatory decisions, but is not prohibited from participating in matters in which the college has an indirect or indefinite interest, such as tax matters that affect all employers or water rates that affect all residents). For example, if the Attorney General's Office is representing the Board of Regents on policy development that affects all institutions of higher education or all public colleges and universities in the state, including OSU, OSU's interest would not be so definite and direct that you would be prohibited from directing the work of assistant attorneys general or special counsel on those matters.

In addition, R.C. 2921.42(A)(1) prohibits you from authorizing or securing authorization of any contracts in which OSU has a definite and direct interest. For example, you would be prohibited from participating in the selection or appointment of special counsel to represent OSU.

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<sup>1</sup> The promise of future employment is specifically included within the definition of "anything of value." R.C. 1.03.

**First Assistant Attorney General—R.C. 109.04**

The statutory authority of the Attorney General resides with the Attorney General herself. R.C. Chapter 109. The Commission has explained that some high-level public officials and employees possess unique authority from which they cannot withdraw. Adv. Ops. No. 92-004 and 92-009. Alternately, a statute or municipal ordinance may empower an authority that is independent of the conflicted official to act in the official's stead. Adv. Op. No. 92-004. See also Adv. Ops. No. 85-002, 89-006, and 90-010. The issue is whether there are statutes that provide for such a transfer of authority for the Attorney General.

R.C. 109.04, which you noted in your organization of the Office, reads:

During the absence or disability of the attorney general, or when so directed by the attorney general, including all the rights, privileges, and powers conferred upon the attorney general by sections 2939.10, 2939.11, and 2939.17 of the Revised Code, the first assistant attorney general shall perform the duties of the attorney general.

R.C. 109.04 would allow that, when confronted with a definite and direct conflict of interest under the Ethics Law, you would be deemed to be under a "disability" and could not exercise the authority of your office or perform your statutorily mandated duties. See Ohio Ethics Commission Informal Advisory Opinions issued to Janet Jackson (August 6, 1999) and Karen Huey (February 23, 2007) (attached).

In such a case, R.C. 109.04 provides that the First Assistant Attorney General "shall" perform the duties of the Attorney General. The First Assistant Attorney General can perform these duties independent of assignment, and without supervision, input, or approval, by the Attorney General. Compare R.C. 4911.12 (In Advisory Opinion No. 93-011, the Commission concluded that the Consumers' Counsel was unable to withdraw from matters before the office in the event of a conflict of interest because the office's authority resided in the Counsel. The General Assembly subsequently amended the law to enable the Consumers' Counsel Governing Board, in the event of a conflict of interest for the Consumers' Counsel, to appoint a Deputy, assign the Deputy the duties of the Consumers' Counsel, and have the Deputy report to the Governing Board independent of the Consumers' Counsel).

The Ethics Commission appreciates the steps you have taken to inform all interested parties of situations that could give rise to conflicts of interests for you in the performance of your duties, and to facilitate the First Assistant Attorney General's functioning in the event of a conflict.<sup>2</sup> Your promptness and forethought will ease the execution of R.C. 109.04 should it be necessary.

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<sup>2</sup> One additional step you have taken was to appoint Sheryl Creed Maxfield as First Assistant Attorney General and to appoint Tom Winters, formerly a partner at the Vorys firm, to the position of Chief Deputy Attorney General. While this step may not have been required by law, it will aid the Office in avoiding even the appearance of impropriety should the First Assistant Attorney General have to act in matters involving the Vorys firm.

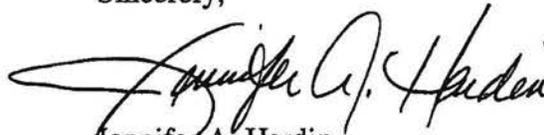
**Conclusion**

As explained more fully above, if a regulatory, contractual, or other matter in which your husband, your daughter, or OSU has a definite and direct interest were to come before the Attorney General's Office, the Ethics Law and related statutes would prohibit you from performing your statutorily mandated duties regarding that matter.

Because the law would prohibit you from performing your duties, you would be under a "disability," as used in R.C. 109.04, regarding that matter. The first assistant attorney general is authorized and required, by R.C. 109.04, to perform the duties of the Attorney General, including all the rights, privileges, and powers conferred upon the Attorney General, during disability. In order to protect against any conflict of interest, the first assistant attorney general must perform all of the duties of your office in matters definitely and directly affecting your husband, your daughter, or OSU, without oversight, supervision, input, or approval by you.

This staff advisory opinion represents the views of the undersigned, and has been reviewed by the Chair, Vice-Chair, and Executive Director of the Commission, based on the facts presented and the precedent of the Commission. This opinion provides you with advice under the provisions of R.C. 102.08. It is subject to review for further advice, if necessary, by the Advisory Committee at its meeting on July 2, 2008, and the Ethics Commission at its meeting on July 18, 2008. 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.

Sincerely,



Jennifer A. Hardin  
Chief Advisory Attorney

cc: Members of the Commission  
David E. Freel, Executive Director

Enclosure: Informal Advisory Opinions issued to—  
Janet Jackson (August 6, 1999)  
Karen Huey (February 23, 2007)