



OHIO ETHICS COMMISSION

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COLUMBUS 43215

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Advisory Opinion No. 78-001

February 16, 1978

Syllabus by the Commission:

- 1) The Ohio Ethics Law, Chapter 102. of the Revised Code, does not, per se, prohibit the appointment of a former member of city council, who is a law partner of a present member of city council, to the position of City Solicitor.
- 2) Section 2921.42 (A)(4) of the Revised Code prohibits a member of city council from knowingly having an interest in the profits or benefits of a contract for legal services between the city and the law firm with which he is associated.

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In your request for an Ohio Ethics Commission Advisory Opinion, you asked whether the Ohio Ethics Law and other relevant statutes, particularly Section 2921.42 of the Revised Code, would prohibit the appointment of a former member of city council, who is a law partner of a present city council member, to the position of City Solicitor.

You state, by way of history, that you wish to appoint a member of city council as City Solicitor upon his resignation from council. In December, 1976, the council passed an ordinance raising the salary of the City Solicitor to \$7,800 per year; the council member in question seconded the motion and voted to approve the ordinance. At a subsequent council meeting in January, 1977, the present City Solicitor was reappointed. A new member of council, who took office on January 2, 1978, is a law partner of the council member who would become City Solicitor. You ask "whether, under the Ohio Ethics Law and any other relevant statutes, most particularly Section 2921.42 of the Revised Code, the appointment may be made and confirmed by Council without legally jeopardizing the two individuals involved."

Your attention is directed to Divisions (A) and (D) of Section 102.03 and Division (C) of Section 102.04 of the Revised Code. A member of city council and a City Solicitor, as city officials,- are subject to the prohibitions of these provisions (See: Ohio Ethics Commission Advisory Opinion No. 76-005). In general, Division (A) of Section 102.03 of the Revised Code would prohibit a member of city council from representing a client on a matter before council during his term or for twelve months thereafter; Division (D) of Section 102-03 would prohibit a member of city council from using or attempting to use his official position for personal gain. Division (C) of Section 102.04 of the Revised Code would prohibit a member of city council from receiving direct or indirect compensation, other than from the city, for personal services rendered for a client on a matter before city council or any agency of the city. These provisions are inapposite under the facts of the instant case as you describe them, although they may become relevant under other factual situations.

Section 102.08 of the Revised Code authorizes the Ohio Ethics Commission to render advisory opinions interpreting Section 2921.42 as well as Chapter 102. of the Revised Code. Section 2921.42 of the Revised Code provides, in pertinent part:

"(A) No public official shall knowingly do any of the following:

(1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest;

. . . .

(4) 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;"

Section 2921.42 of the Revised Code applies to any "public official," a term defined in Section 2921.01 of the Revised Code to include "any elected or appointed officer or employee, or agent of the state or any political subdivision thereof . . ." (emphasis added) The term "public contract" is defined in Division (E)(1) of Section 2921.42 of the Revised Code to include "the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state or any of its political subdivisions, or any agency or instrumentality of either." The term "public contract" would comprehend a contract for legal services by or for the use of a municipal corporation.

Division (A)(1) of Section 2921.42 of the Revised Code would prohibit a member of city council, a "public official" for purposes of this Section, from knowingly authorizing or using the authority or influence of his office to secure authorization of a contract for legal services between the city and a law firm in which he, a member of his family, or any of his business associates has an interest. Division (A)(4) of Section 2921.42 of the Revised Code would prohibit a member of city council from knowingly having an interest in the profits or benefits of a contract between the city and the law firm or a member of the law firm with which he is associated. Division (A)(1) prohibits the use of influence, but Division (A)(4) prohibits merely having an interest. Thus, Division (A)(4) appears more relevant to the facts of the instant case, since there is no evidence of the use of influence by either council member.

Division (A)(4) of Section 2921.42 would prohibit a member of city council from knowingly having an interest in the profits or benefits of a contract for legal services between the city and his law firm. Receipt of a distributive share of partnership profits obtained by virtue of a contract for legal services between the city council member's law partner or law firm and the city would constitute such an interest. It should be noted that it is the person who remains a member of city council, not the person who resigned to become City Solicitor, who could be in violation of this provision.

Division (B) of Section 2921.42 of the Revised Code provides that, in the absence of bribery or fraud, a public servant, a member of his family, or any of his business associates shall

not be considered to have an interest in a public contract when: 1) the public servant's interest in such a contract is limited to owning shares of a corporation, 2) the shares he owns do not exceed five per cent of the outstanding shares of the corporation, and 3) he files with the governmental entity an affidavit establishing his status with the corporation or organization. This exception does not apply in the instant case, since the law partner who remains on city council is a participating partner with more than a mere ownership interest in the law firm.

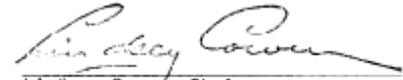
Division (C) of Section 2921.42 of the Revised Code provides that the prohibitions of that Section do not apply to a public contract in which the public servant has an interest when all of the following apply: 1) the subject of the contract is necessary supplies or services; 2) the services are unobtainable elsewhere for the same or lower cost or are furnished as part of a continuing course of dealing established prior to the public servant's association with the governmental entity; 3) the treatment accorded the governmental entity is either preferential or the same as that accorded to other customers or clients in similar transactions; and 4) the entire transaction is conducted at arm's length with full knowledge by the governmental entity of the interest of the public servant, and the public servant takes no part in the deliberations or decision with respect to the contract. These are factual determinations, and whether a particular transaction meets the criteria of Division (C) of Section 2921.42 of the Revised Code depends upon the facts and circumstances of the individual case.

In the instant case, it would appear that only three of the four criteria for the exemption are met. The subject of the contract, legal services, is a service necessary to the city. It appears that the treatment accorded the city would be the same as that accorded other clients of the law firm. In addition, you have stated the entire transaction would be conducted at arm's length with the full knowledge of city council of the interests of the council member and his partner, and that the person who remains on council would take no part in the deliberations or decision with respect to the appointment of the City Solicitor. However, no continuing course of dealing was established prior to the new council member's election. The existence of the position of City Solicitor, with another person serving in that position, does not constitute a continuing course of dealing for purposes of this exemption. It is the Commission's judgment that the phrase "continuing course of dealing" contemplates a continuing relationship between a governmental entity and the person or firm seeking the exemption. In addition, the legal services are probably obtainable elsewhere at the same or lower cost. Therefore, it appears that the exemption of Division (C) of Section 2921.42 of the Revised Code would not apply in the instant case. We conclude that, unless the criteria for exemption are met, Section 2921.42 of the Revised Code prohibits a member of city council from knowingly having an interest in the profits or benefits of a contract for legal services between the city and his law firm.

The conclusions of this advisory opinion are based on an examination of the facts and circumstances of the instant case as you have presented them. The Ohio Ethics Commission cautions that its advisory opinions may be relied upon only with respect to questions arising under Chapter 102. and Section 2921.42 of the Revised Code, and do not address possible violations of other laws or rules.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: 1) the Ohio Ethics Law, Chapter 102. of the Revised Code, does not, per se, prohibit the

appointment of a former member of city council, who is a law partner of a present member of city council, to the position of City Solicitor; and 2) Section 2921.42 (A)(4) of the Revised Code prohibits a member of city council from knowingly having an interest in the profits or benefits of a contract for legal services between the city and the law firm with which he is associated.



Lindsey Cowen, Chairman
The Ohio Ethics Commission

