



OHIO ETHICS COMMISSION

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Advisory Opinion Number 86-001
January 16, 1986

Syllabus by the Commission:

(1) Division (A) of Section 102.03 of the Revised Code prohibits a former assistant director of the Department of Insurance from representing a private client before the Department or any other public agency for a period of one year after her departure from state service on any matter in which she personally participated as a state employee.

(2) Division (A) of Section 102.03 of the Revised Code does not prohibit a former assistant director of the Department of Insurance from representing a private client before the Department or any other public agency on a matter in which she did not personally participate or a new matter that arose after her resignation.

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You asked whether the Ohio Ethics Law and related statutes prohibit a former assistant director of the Department of Insurance, who is a practicing attorney, from serving as a consultant to health maintenance organizations filing applications with the Departments of Insurance, Health, and Human Services.

You stated, by way of history, that you are an attorney who was employed as the assistant director of the Department of Insurance. You stated further that you were responsible for handling matters concerning Blue Cross and Blue Shield, health maintenance organizations (hereinafter HMO's), preferred provider organizations, and health insurance and rates. You indicated that you recently resigned from the Department of Insurance, and that you seek to serve as a consultant to HMO'S. Specifically, you would be consulting on applications for certificates of authority under to Section 1742.03 of the Revised Code, which are filed with the Department of Insurance and reviewed by the Department of Health. In addition, you would be consulting on applications for the following: (1) major modification of operations under Division (C) of Section 1742.03 of the Revised Code; (2) evidence of coverage under Section 1742.08 of the Revised Code; (3) schedules of rates under Section 1742.09 of the Revised Code; and (4) contracts with health care facilities and providers under Section 1742.10 of the Revised Code. Finally, you would be consulting with some HMO's applying to the Department of Human Services for a federal waiver from certain medicaid requirements. You indicated that you once were primarily responsible for HMO'S, but in recent months, the chief of the HMO division has taken this responsibility. Thus, the chief usually prepares the memorandum on each application, and the superintendent makes the decision concerning approval or disapproval. However, you indicated that you occasionally held staff meetings concerning the status of HMO applications, approved one HMO application in the absence of the superintendent, and worked with the Office of the Attorney General in drafting two orders for a hearing on a proposed denial. Other

applications were filed while you were assistant director, but no action had been taken by the Department of Insurance at the time of your resignation. You asked whether Division (A) of Section 102.03 of the Revised Code would prohibit you from consulting with HMO's regarding matters before the Department of Insurance and other state agencies, including applications filed before your resignation.

Division (A) of Section 102.03 of the Revised Code, the "revolving door" prohibition of the Ohio Ethics Law, provides, in pertinent part:

No present or former public official or employee shall, during his 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 he personally participated.

This provision prohibits: (1) a present or former public official or employee; (2) from representing a client or acting in a representative capacity for any person (defined in Section 1.59 of the Revised Code to include an individual, a corporation, a partnership, association, or other similar entity); (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 (See: Ohio Ethics Commission Advisory Opinions No. 80-008, 81-002, and 82-002). An assistant director of the Department of Insurance is a "public official or employee" as defined in Division (B) of Section 102.01 of the Revised Code. A former assistant director is not prohibited from selling her general expertise in insurance matters to prospective clients and employers. However, she is prohibited from representing a private client before the Department of Insurance or any other public agency for a period of one year after her departure from state service on any matter on which she personally participated as a state employee.

Under the facts presented, the former assistant director is serving as a consultant, rather than as an attorney. Regardless of this distinction, the real issue is whether the consulting relationship involves representation before a public agency. The term "public agency" as defined in Division (C) of Section 102.01 of the Revised Code would include the Departments of Insurance, Health, and Human Services. For purposes of Division (A) of Section 102.03 of the Revised Code, the term "represent" is defined to include "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." Clearly, this 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. However, an attorney who engages in such consulting should be certain that such conduct is not prohibited by the Code of Professional Responsibility. Such questions are within the jurisdiction of the Office of the Disciplinary Counsel, Supreme Court of Ohio.

The statute 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." This would include applications for the following: (1) certificates of authority and notices of modification of operations under Section 1742.03 of the Revised Code; (2) evidence of coverage under Section 1742.08 of the Revised Code; (3) schedules of charges under Section 1742.09 of the Revised Code; and (4) contracts with health care facilities and providers under Section 1742.10 of the Revised Code. In addition, the request for a federal waiver filed with the Department of Human Services is a "matter" for purposes of the prohibition.

The statute defines personal participation as "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion." Thus, in those cases where the assistant director prepared a memorandum for the superintendent recommending approval or disapproval, helped to draft an order with the Office of the Attorney General, or approved or disapproved an application, she clearly personally participated in those applications for purposes of the prohibition. In addition, in those cases where the assistant director exercised supervision or general oversight over agency personnel working on an application, she also would be considered to have personally participated in those applications for purposes of the prohibition. However, if an application had merely been filed, but no administrative action other than to receive the filing had taken place prior to her resignation, the assistant director would not be considered to have personally participated in the application. Nevertheless, it would create the appearance of impropriety for the former assistant director to represent a private client on an application that was pending while she was in government service.

Division (A) of Section 102.03 of the Revised Code does not prohibit a former assistant director of the Department from representing a private client before the Department or any other public agency on a new matter that arose after her resignation (See: Advisory Opinion No. 84-005). This would include any new applications filed after the date of her resignation from the Department of Insurance. However, some filings, such as service area expansions, involve a notice of modification of operations under Division (C) of Section 1742.03 of the Revised Code. In addition, filings to request changes in the evidence of coverage under Section 1742.08 of the Revised Code, schedules of rates under Section 1742.09 of the Revised Code, and contracts with health care facilities and providers under Section 1742.10 of the Revised Code would permit changes in the terms or conditions of existing approved applications. Such amendments or changes in the terms or conditions under which an HMO operates are not new matters for purposes of the statute. Thus, the former assistant director would be prohibited from representing a private client on such filings if she personally participated in the original application for a certificate of authority, or subsequent amendments or changes.

The statute prohibits representation before any public agency, not merely before the agency with which the former public official or employee served. Thus, the former assistant director is prohibited from representing a private client before the Departments of Health and Human Services, if the representation is on a matter in which she personally participated. Applications filed with the Department of Insurance that are required to be reviewed by the Department of Health clearly are the same matter. Therefore, the former assistant director is

prohibited from representing a private client before the Department of Health on any application in which she personally participated as an employee of the Department of Insurance. However, the application for a federal waiver filed with the Department of Human Services is a separate and distinct issue from an application with the Department of Insurance. Consequently, the prohibition would not apply to representation on such a matter.

The prohibition of Division (A) of Section 102.03 of the Revised Code applies for one year following departure from government service. Thus, the prohibition would apply to the former assistant director for one year from the effective date of her resignation.

This advisory opinion is based on the facts presented, and is limited to questions arising under Chapter 102. and Section 2921.42 of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (A) of Section 102.03 of the Revised Code prohibits a former assistant director of the Department of Insurance from representing a private client before the Department or any other public agency for a period of one year after her departure from state service on any matter in which she personally participated as a state employee; and (2) Division (A) of Section 102.03 of the Revised Code does not prohibit a former assistant director of the Department of Insurance from representing a private client before the Department or any other public agency on a matter in which she did not personally participate or a new matter that arose after her resignation.


Merom Brachman, Chairman
OHIO ETHICS COMMISSION