



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

Advisory Opinion Number 90-007
May 14, 1990

Syllabus by the Commission:

- (1) Division (A)(4) of R.C. 2921.42 prohibits a county prosecutor from having an interest in a contract entered into by a township within his county for legal services.
- (2) Division (A)(1) of R.C. 2921.42 prohibits a county prosecutor from authorizing or using the authority or influence of his office, formally or informally, to secure authorization of a contract between a township which he is statutorily required to represent and his law partner in private practice.
- (3) Division (D) of R.C. 102.03 prohibits a county prosecutor from recommending, suggesting, withdrawing, or acting in any way, formally or informally, to secure employment of his law partner by township trustees the county prosecutor is statutorily required to represent.
- (4) Division (E) of R.C. 102.03 and Division (A) of Section 2921.43 prohibit a county prosecutor from receiving a distributive share of client fees received by his law partner for representing township trustees the prosecutor is statutorily required to represent.

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You have asked whether the Ohio Ethics Law and related statutes prohibit the private practice law partner of a county prosecutor from representing township trustees on negotiations involving annexation agreements and tax abatements with an adjoining municipality. The township and the municipality are both within the county served by the prosecuting attorney.

Division (A) of 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.

The term "public official" is defined, for purposes of R.C. 2921.42, in R.C. 2921.01(A) to include any elected or appointed officer of any political subdivision of the state. A county prosecuting attorney is a public official as it is so defined, since he is an elected officer of a county. See R.C. 309.01. A "public contract" is defined in R.C. 2921.42(E) to include 11[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." A contract between a township and a private lawyer for legal services is a "public contract" as it is defined in this section. See Advisory Opinions No. 74-001, 84-002, and 86-004.

An "interest" which is prohibited by Section 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. See Advisory Opinion No. 81-008. 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. See Advisory Opinions No. 78-001, 86-004, and 89-004.

A county prosecutor is "the legal adviser for all township officers" of townships within the county he serves. See R.C. 309.09. The county prosecutor is clearly "connected" with a township he is statutorily required to serve as legal adviser, for purposes of R.C. 2921.42(A)(4). See Advisory Opinion No. 89-004 (syllabus, paragraph one) (R.C. 2921.42(A)(4) "Prohibits a public official from having an interest in the public contracts entered into by all of the political subdivisions . . . with which he is connected"). Accordingly, the 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. See Advisory Opinion No. 79-001. 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.

Division (C) of Section 2921.42 provides an exception to the prohibition of Division (A)(4). Division (C) of R.C. 2921.42 provides as follows:

(C) This section does not apply to a public contract in which a public servant, member of his family, or one of his business associates has an interest, when all of the following apply:

- (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 servant'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 servant, member of his family, or business associate, and the public servant takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

However, the criteria of the exemption in Division (C) are strictly applied, and the requirement of Division (C)(2) that the goods or services be "unobtainable elsewhere for the same or lower cost" must be demonstrated by some objective standard, such as competitive bidding. See Advisory Opinions No. 86-009 and 89-004. It may be difficult to demonstrate that legal services provided by the prosecuting attorney's partner would be "unobtainable elsewhere for the same or lower cost." See Advisory Opinions No. 78-001 and 84-002. Division (A)(4) would, therefore prohibit the county prosecutor from having any interest in a contract between his law partner and the township trustees.

Assuming that all of the criteria of Division (C) could be met so that the township trustees and the prosecutor's law partner can properly contract, the prohibitions of Division (A) (1) of R.C. 2921.42 must also be met. Division (A)(1) of Section 2921.42 of the Revised Code prohibits the county prosecutor from knowingly authorizing, or using the authority or influence of his office to secure authorization of any public contract in which he or any of his business associates has an interest. The private law partner of a county prosecutor is considered the prosecutor's business associate. See Advisory Opinions No. 79-001, 86-004, and 89-015. Therefore, the county prosecutor would be prohibited by R.C. 2921.42(A)(1) from recommending his law partner, participating in discussions about his law partner, or otherwise using his official position, formally or informally, to secure authorization of a contract for services between his law partner and the township trustees. See Advisory Opinions No. 86-004 and 89-008. See also R.C. 2921.42(C)(4).

Divisions (D) and (E) of Section 102.03 of the Revised Code are also pertinent, and provide as follows:

(D) No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his duties.

(E) No public official or employee shall solicit or accept anything of value that is such a character as to manifest a substantial and improper influence upon him with respect to his duties.

A "public official or employee" is defined for purposes of Chapter 102. in R.C. 102.01(B) and (C) to include any person who is elected to an office of a county. A county prosecutor is a "public official or employee" for purposes of R.C. 102.03. See R.C. 309.01; Ohio Ethics Commission Advisory Opinions No. 79-001 and 83-009. The term "anything of value" is defined, for purposes of R.C. 102.03(D) and (E), to include money, the promise of future employment, and every other thing of value. See R.C. 102.01(G) and 1.03. Payment to the

prosecutor's partner for legal services rendered falls within this definition of "anything of value." See Advisory Opinions No. 86-004, 89-015, and 89-016. The distributive share of law firm profits to which the prosecutor is generally entitled as a partner in the firm also falls within the definition of "anything of value" for purposes of R.C. 102.03(D) and (E). Id. A county prosecutor is statutorily required to act as legal advisor to all township officials within the county with which he serves. See R.C. 309.09. However, the township officials are permitted to hire an attorney other than the county prosecutor in situations where the board of trustees "deems it advisable or necessary." see R.C. 309.09. The annexation proceeding in this matter is brought by a landowner who has approached a municipality and asked it to annex his property. See R.C. 709.02. The township trustees have elected to hire an attorney who can devote substantial time to this matter.

R.C. 102.03(D) prohibits a county prosecutor from using his official position to secure anything of value for himself, his partner in a private law firm, or the law firm partnership itself. See Advisory Opinions No. 88-004, 88-005, 89-015, and 89-016. It is clear that any payments made to the prosecutor's law partner for representing the township are of such character as to manifest a substantial and improper influence upon the prosecutor. Such payments would financially benefit the prosecutor's law firm and would be made for services rendered by the partnership which the prosecutor is, as a general matter, statutorily required to perform as part of his official duties. (See discussion of R.C. 102.03(E) and R.C. 2921.43 below.) Therefore, the county prosecutor is prohibited by R.C. 102.03(D) from using his official authority or influence to secure the employment of his law partner by the township. He is prohibited from making any formal or informal recommendations or suggestions concerning his law partner to the township trustees, and from taking any action, such as withdrawing from representation, in order to secure employment for his law partner by the township trustees. Division (E) of Section 102.03 would prohibit the prosecutor from soliciting the employment of his law partner by the township.

Additionally, it is possible that the county prosecutor will be called upon to provide legal advice, counsel, or representation to the county commissioners on this annexation matter. See R.C. 709.032, 709.033, and 709.07. At that time, the county prosecutor and his law partner could be placed in an adversarial posture. In Advisory Opinion No. 89-015, the Commission held that R.C. 102.03 "prohibits an individual from serving as a city law director where the law firm of which he is a member represents clients in adversarial actions against the city." Similarly, a person may not serve as a prosecutor where his law firm represents clients in matters where the county's interests and the client's interests are adversarial.

In addition, R.C. 102.03(E) would prohibit the prosecutor from receiving a distributive share of client fees earned by his law partner for representing the township. As noted above, the prosecutor is statutorily required to represent the township as part of his official duties. Fees which accrue to the private financial benefit of the prosecutor for services which are ordinarily the official responsibility of the prosecutor to perform are of an improper and substantial character. Therefore, the prosecutor is prohibited by R.C. 102.03(E) from receiving a share of the fees earned by his law partner for representing the township. This would also be prohibited by Division (A) of Section 2921.43 of the Revised Code, which provides in pertinent part:

(A) No public servant shall knowingly solicit or accept and no person shall knowingly promise or give to a public servant either of the following:

(1) Any compensation other than as allowed by divisions (G), (H), and (1) of section 102.03 of the Revised Code or other provisions of law, to perform his official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office. or public employment, or as a supplement to the public servant's public compensation. (Emphasis added.)

A "public servant" is defined for purposes of this section to include an elected or appointed officer of a political subdivision of the state. See R.C. 2921.01(A) and (B). A county prosecutor is a public servant for purposes of this section. See R.C. 309.01. A county prosecutor is therefore prohibited from soliciting or accepting any compensation or additional or supplemental compensation for the performance of his official duties other than the compensation he is entitled by law to receive as a county prosecutor. See Advisory Opinion No. 89-012. The county prosecutor is statutorily required to represent the townships in the county which he serves. See R.C. 309.09. Hence, the prosecutor is prohibited from receiving a distributive share of the fees, earned by his private practice law partner from the township the prosecutor is statutorily required to represent. Id.

The prosecutor should additionally be aware of Division (B) of R.C. 102.03, which reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

The prosecutor is prohibited by Section 102.03(B) from disclosing confidential information to his law partner, or to anyone else, or using such confidential information, without appropriate authorization. No time limitation exists for this prohibition which is in effect while he is employed by the county and after he leaves county service.

As a final note, the prosecutor should also be aware that it may create an appearance of impropriety if his law partner in private practice represented the township trustees he is statutorily required to represent. See Advisory Opinion No. 79-001. Your question also raises issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. These issues are not within the jurisdiction of the Ethics Commission, but should be referred to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

Therefore, it is the opinion of the Ethics Commission, and you are so advised, that: (1) Division (A)(4) of R.C. 2921.42 prohibits a county prosecutor from having an interest in a contract entered into by a township within his county for legal services; (2) Division (A)(1) of

R.C. 2921.42 prohibits a county prosecutor from authorizing or using the authority or influence of his office, formally or informally, to secure authorization of a contract between a township which he is statutorily required to represent and his law partner in private practice; (3) Division (D) of R.C. 102.03 prohibits a county prosecutor from recommending, suggesting, withdrawing, or acting in any way, formally or informally, to secure employment of his law partner by township trustees the county prosecutor is statutorily required to represent; and (4) Division (E) of R.C. 102.03 and Division (A) of Section 2921.43 prohibit a county prosecutor from receiving a distributive share of client fees received by his law partner for representing township trustees the prosecutor is statutorily required to represent.



David L. Warren, Chairman
Ohio Ethics Commission