



OHIO ETHICS COMMISSION

8 East Long Street, Suite 1200

Columbus, Ohio 43215-2940

Telephone: (614) 466-7090

Fax: (614) 466-8368

Advisory Opinion Number 96-004

November 15, 1996

Syllabus by the Commission:

(1) The Ohio Ethics Law and related statutes do not prohibit public officials and employees from engaging in private outside employment or business activities provided that no conflict of interest exists between the private interests and public duties of the public official or employee and there is no misuse of the public office or employment of the official or employee, as described below;

(2) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibits a public official or employee from engaging in private outside employment or business activity with parties that are interested in matters before, regulated by, or doing or seeking to do business with his own public agency unless it is determined by his public employer that he is able to withdraw, as a public official or employee, from consideration of matters that affect the interests of the party with which he desires to engage in private outside employment or business activity;

(3) Division (D) of Section 102.03 of the Revised Code prohibits a public official or employee who engages in private outside employment or business activity from: (a) using public time, facilities, personnel, or resources in conducting a private business or while engaging in private outside employment including conducting demonstrations for clients using public equipment; (b) using his official title or identification on private business cards or other written materials or appearing in uniform while soliciting business or conducting demonstrations for clients; (c) using his relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding his private interests; (d) discussing, deliberating, or voting on any matter involving his private business, including recommending his outside employer's or business's services to his own public agency; (e) receiving fees for providing services rendered on projects that he has recommended in his official capacity; (f) participating in decisions or recommendations regarding his competitors; and (g) using his public position or authority in any other way to secure a benefit for his outside employer or private business.

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You have asked whether the Ohio Ethics Laws and related statutes prohibit you from conducting a private public relations and advertising consulting business in light of the fact that you have been appointed by a city as its full-time service director.

You state that, before accepting employment with the city, you had established a firm specializing in providing public relations and advertising consulting services. Presently, all of your clients are private sector entities. You also state that you do not foresee the city that employs you requiring the type of services that you offer through your private consulting service. You further state that none of the clients for which you provide consulting services has a relationship with your employing city. Also, your private firm has never done business with your employing city. You have stressed that you will not seek to do business with your employing city.

The Ethics Commission's jurisdiction is limited to Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code. R.C. 102.06 and 102.08. The Ohio Ethics Law and related statutes apply to all public officials and employees, whether on the state or local level. These provisions, with attendant criminal sanctions, prohibit public officials or employees from misusing their official positions for their own personal financial gain or benefit, or for the gain or benefit of family members, business associates, or others where there is a conflict of interest. Thus, all public officials and employees must be aware of the relevant sections of the Ohio Ethics Law so that they may act properly in instances where they wish to engage in private outside employment or business activities while continuing their public service. The Ethics Commission has consistently held that the Ohio Ethics Law and related statutes do not prohibit public officials and employees from engaging in private outside employment or business activities provided that no conflict of interest exists between the official's or employee's private interests and public duties. Advisory Ops. No. 84-009, 86-008, and 90-002.

Accordingly, the Ohio Ethics Law and related statutes do not prohibit you from owning and operating a firm specializing in providing public relations and advertising consulting services. However, as described below, restrictions are imposed upon your conduct to serve the public interest in effective, objective, and impartial government by preventing the creation of a conflict of interest that may impair your objectivity and impartiality, and therefore, the effectiveness of the public agency with which you serve. Advisory Ops. No. 89-014 and 90-002.

In addition to restrictions imposed by the Ethics Law and related statutes, all public officials and employees should be aware that they may be subject to additional statutory provisions or agency rules based upon the function of their public agency, that may further restrict their ability to engage in private outside employment or business activity. For example, your employing city, either by charter provision or ordinance, may have established stricter standards upon its employees holding outside private employment than are imposed by the Ohio Ethics Law and related statutes. Advisory Op. No. 83-004. You should contact the appropriate individuals within your city government for information regarding restrictions that may be imposed by either by charter provision or ordinance.

Restrictions Imposed by R.C. 102.03 (D) and (E)

The receipt of income by a public official or employee for engaging in private outside employment or business activity implicates Divisions (D) and (E) of Section 102.03 of the Revised Code, which read:

(D) No public official or employee shall use 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.

(E) No public official or employee shall solicit or accept 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 pertinent elements of Divisions (D) and (E) are: (1) a public official or employee; (2) is prohibited from accepting, soliciting, or using the authority or influence of his office or employment to secure; (3) anything of value, or the promise or offer of anything of value; (4) which could manifest a substantial and improper influence; (5) upon him with respect to his duties.

The term "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office or is an employee of any public agency. R.C. 102.01 (B). The term "public agency" is defined to include the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or instrumentality of the state or its political subdivisions, and any other governmental entity. R.C. 102.01 (C). Thus, the prohibitions of Divisions (D) and (E) apply to employees, and elected and appointed officers, of all local levels of government as well as the State. Advisory Op. No. 89-014.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 1.03, 102.01 (G). The Ethics Commission has held that compensation received from engaging in private outside employment or business activity is a thing of value for purposes of R.C. 102.03 (D) and (E). Advisory Ops. No. 79-002, 89-010, and 92-005.

R.C. 102.03 (D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his official position to secure anything of value if the thing of value could manifest a substantial and improper influence upon him with respect to his duties. Advisory Op. No. 90-003. The Ethics Commission has held that in order to be prohibited for purposes of R.C. Section 102.03, the thing of value must be of a substantial and improper character. Advisory Ops. No. 88-004, 89-006 and 89-014. Generally, the compensation that a public official or employee receives from private outside employment or business activity is not incidental or minimal in amount, and thus, would be of a substantial nature.

Restriction Imposed By R.C. 102.03 (E)

Division (E) of Section 102.03 of the Revised Code was enacted as part of Am. Sub. H.B. 300, 116th Gen. A. (1986) (eff. September 17, 1986) to supplement the prohibitions imposed by R.C. 102.03 (D). Prior to the enactment of Am. H.B. 300, Division (D) of Section 102.03 prohibited a public official or employee from using the authority or influence of his office or employment to secure a thing of value for himself that would not ordinarily accrue to him in the performance of its duties if the thing of value was of such character as to manifest a substantial and improper influence upon him with respect to his duties. In its application of Division (D), before the enactment Division (E), the Ethics Commission held that a public official or employee was prohibited from using the authority or influence of his public position to solicit or receive

consulting fees from a party that is interested in matters before, regulated by, or doing or seeking to do business with his public agency. Advisory Ops. No. 79-002, 85-014, and 86-008.

However, R.C. 102.03 (E) does not require that the public official or employee use the authority or influence of his office or employment to secure an improper thing of value. Rather it prohibits a public official or employee from merely soliciting or accepting an improper thing of value. Advisory Op. No. 90-004. The Ethics Commission has held that the controlling factor for determining whether a party is an improper source for purposes of R.C. 102.03 (E) is whether the relationship between the public official or employee and the source of the thing of value is such that the public official's or employee's objectivity and independence of judgment could be impaired with regard to his official decisions and responsibilities regarding the party. Advisory Ops. No. 87-008, 89-006, and 90-004. In further defining those parties within this nexus to the public official or employee, the Ethics Commission has held that R.C. 102.03 (E) prohibits a public official or employee from soliciting or accepting anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with his own public agency. Advisory Ops. No. 87-006, 89-006, and 93-015.

The application of R.C. 102.03 (E) is dependent upon the facts and circumstances of each individual situation. Advisory Ops. No. 90-004 and 91-002. The Ethics Commission has held that in certain situations, a public official or employee may withdraw from consideration of matters that could pose a conflict of interest. Advisory Ops. No. 89-006, 90-002, and 93-015. A public official's or employee's withdrawal from consideration of issues concerning parties who are interested in matters before, regulated by, or doing or seeking to do business with his own public agency may be accomplished only when such a withdrawal: (1) does not interfere with the official's or employee's performance of his assigned duties; and (2) is approved by his employing agency. Advisory Ops. No. 89-006, 89-010, and 90-002. See also Advisory Op. No. 90-010.

In some situations, a public official or employee may not have assigned duties that bring him into contact as an official or employee with the interested or regulated party or vendor with whom he desires to engage in outside private employment or business activity. However, in such a situation, based upon the duties and responsibilities of the public agency, those appropriate officials or employees within the agency may be required to review and approve the proposed outside consulting of the official or employee to protect against any potential conflict with the authority of the agency. It may therefore be necessary that the appropriate officials at the agency of the affected official or employee approve the proposed action of the official or employee. For example, the public agency would be required to approve the outside activities of an official or employee if the existence of a private employment or business relationship could restrict the ability of the public agency to assign new duties to the official or employee, where the new duties would bring him into contact with the interested or regulated party or vendor in the future. Advisory Op. No. 90-002.

Therefore, R.C. 102.03 (E) prohibits a public official or employee from engaging in private outside employment or business activity with parties that are interested in matters before, regulated by, or doing or seeking to do business with his own agency unless he is able to withdraw from consideration of matters that could pose a conflict of interest and the withdrawal is appropriately approved by the public agency employing the public official or employee.

Restrictions Imposed By R.C. 102.03 (D)

Generally, the Ethics Commission has held that compensation secured by a public official or employee while engaging in private outside employment or business activity is a thing of value of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to his duties. The Commission has reasoned that the public interest could be adversely affected when a public servant receives compensation for private activities if the compensation is paid as a result of the public servant's use of, or failure to exercise, his official authority, or if the receipt of compensation could impair the performance of public duties and therefore burden public resources entrusted to the public servant in favor of his own personal financial interests. Accordingly, the Ethics Commission has identified restrictions which R.C. 102.03 (D) impose upon a public official or employee who engages in a private outside business. These restrictions are described below. Because the application of R.C. 102.03 (D) is dependent upon the facts and circumstances of each individual situation, some of these restrictions may not apply to every situation. Advisory Op. No. 87-008.

Using Public Time, Resources, or Facilities

A public official's or employee's duty is to the exercise of the public trust by performing the tasks assigned to him by the public agency with which he serves. Advisory Op. No. 89-010. A public agency provides resources to its officials and employees for the performance of these tasks and not for the official's or employee's personal financial gain or benefit. Advisory Op. No. 89-004. Therefore, R.C. 102.03 (D) prohibits a public official or employee from using public time, facilities, personnel, or resources in operating a private business or while engaging in private outside employment, including conducting demonstrations for clients on public equipment. Advisory Ops. No. 84-013. See also Advisory Ops. No. 84-012, 85-013, 85-014, 90-003, and 90-009.

Using An Official Title

Public officials and employees occupy positions and perform duties that are highly visible to the public. Whenever a public official or employee engages in outside employment or business activity, there is a possibility that he could inject the influence of his public office or employment into his private interests. The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official or employee from using his official title or identification on private business cards or other written materials or appearing in uniform while soliciting business or conducting demonstrations for clients. Advisory Op. No. 84-013. See also Advisory Ops. No. 90-003, and 90-009. The prohibition against a public official or employee using his official title or identification in soliciting private outside employment or conducting private business activity insures that the official's or employee's clients cannot become confused as to whether the public agency of the public official or employee has endorsed or advocated the services offered by the official or employee, or whether the services are being performed at the cost, or within the responsibility, of the public agency.

Using Official Authority or Influence

A public official or employee will develop working relationships by cooperating with other public officials and employees while performing his official duties. R.C. 102.03 (D)

prohibits a public official or employee who engages in private outside employment or business activity from using these relationships to secure a favorable decision or action by another official or employee regarding his private interests. For example, in Advisory Opinion No. 90-002, the Ethics Commission explained that a Department of Agriculture meat inspector who owned and operated a meat processing plant in an inspection district other than his own could not use his relationship with other Department personnel to intervene in regulatory decisions regarding his plant.

Participating in Official Decisions

The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official or employee from securing a substantial thing of value that results from his participation in a matter upon which the private interests of the official or employee are dependent or contingent. Advisory Ops. No. 76-005, 79-003, 79-008, and 88-005. A public official or employee who engages in private outside employment or business activity is prohibited from discussing, deliberating, or voting on any matter involving his private business, including recommending his employer's or business services to his own public agency. See generally Advisory Op. No. 84-013.

Providing Services On Projects Recommended In An Official Capacity

The Ethics Commission has also held that 102.03 (D) prohibits an official or employee who engages in private outside employment or business activity from receiving fees for providing services rendered on projects that he has recommended in his official capacity. Advisory Ops. No. 84-012, 84-013, and 85-013. A public official or employee who advocates that his public agency proceed with a project is prohibited by R.C. 102.03 (D) from receiving future compensation, employment, consulting fees, or any other thing of value from his public agency on the same project regardless of whether he resigns or retains his public position. Advisory Ops. No. 84-012, 84-013, and 85-013. See also 79-003, 79-008, and 80-007.

Performing or Not Performing Duties To Secure Private Business

A public official or employee engaging in private outside employment or business activity may not perform, or refrain from performing, his public duties in a manner that would enable him to realize personal financial gain. For example, in Advisory Opinion No. 79-001, the Ethics Commission held that a county prosecutor could not refuse to provide child support services for his county welfare department and then offer to perform the services for the county welfare department under a contract as a private attorney.

Rendering Official Services For A Fee

All public officials and employees have the public duty to provide services that will fulfill the mandated and defined duties of the public agency with which they serve. Advisory Op. No. 89-010. R.C. 102.03 (D) prohibits a public official or employee from charging clients fees for the same services that he is required to provide as an public official or employee. Advisory Op. No. 84-012. For example, in Advisory Opinion No. 93-002, the Ethics Commission held that a employee of the Bureau of Worker's Compensation was prohibited from providing private training or consulting services, where he had created and administered a similar training and

consulting program in the course of his public service, and the Bureau offers the training and consulting free of charge, despite the fact that the employee no longer administered the program.

Participation In Matters Concerning Competitors

R.C. 102.03 (D) prohibits a public official or employee engaged in private outside business from participating in decisions or making recommendations regarding his competitors. Advisory Ops. No. 86-007 and 90-002. The Ethics Commission has explained that a decision by an official or employee that adversely affects a competitor to his private business could result in financial gain for the official or employee making the decision, due to the narrowing of the market, and could create an automatic challenge that the official's or employee's decision was improperly motivated. Advisory Op. No. 90-002.

R.C. 102.03 (B) - Prohibited Use of Confidential Information

A public official or employee who engages in private outside business is prohibited from disclosing or using confidential information. Division (B) of Section 102.03 of the Revised Code reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that 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.

R.C. 102.03 (B) prohibits a public official or employee from disclosing or using, for his private business endeavors, without appropriate authorization, any confidential information acquired in the course of his official duties. No time limitation exists for this prohibition, and it is effective while the public official or employee serves as a public official or employee and after he leaves public office or employment. Public officials and employees are subject to this prohibition for as long as the information remains confidential. Advisory Op. No. 88-009.

Financial Disclosure Requirements

R.C. 102.02 identifies those public officials and employees who are required to file financial disclosure statements with the Ohio Ethics Commission. The provisions of R.C. 102.02 will affect a public official or employee who is in a class of officials and employees that must file a financial disclosure statement and who engages in private outside employment or business activity.

R.C. 102.02 (A)(1) requires the disclosure of the name under which an official or employee and each member of his immediate family does business. If an official or employee

who is required to file a financial disclosure statement engages in private outside business activity, then he would be required to disclose the name under which he does business.

R.C. 102.02 (A)(2) requires the disclosure of income received for the benefit or use of the official or employee. Advisory Op. No. 75-036. If an official or employee who is required to file a financial disclosure statement engages in private outside employment or business activity, then he would be required to disclose his employer or business as a source of income. The degree of information required to be disclosed by the official or employee regarding his or her sources of income depends upon the office or employment held by the official or employee. See R.C. 102.022 (university trustees and persons serving with political subdivisions who are paid less than \$16,000 per calendar year for their public service are required to disclose only sources of income over \$500) and R.C. 102.02 (A)(2)(a) (requiring disclosure of all sources of income regardless of amount.) Furthermore, a public official or employee who files a financial disclosure statement is required to disclose the source and amount of income received from any person the filer knows or has reason to know that the person is doing or seeking to do business with the official's or employee's public agency. R.C. 102.02 (A)(2)(a).

Public officials and employees having questions concerning the filing of a financial disclosure statement should contact the Ethics Commission for more information regarding restrictions that may be applicable to the specific business endeavors and their public duties.

Additional Restrictions

In addition to the general ethics-related prohibitions imposed by R.C. 102.03 (B), (D) and (E), as set forth above, other statutes under the jurisdiction of the Ethics Commission may be relevant if the public official or employee desires to conduct business with, or represent clients before, public agencies.

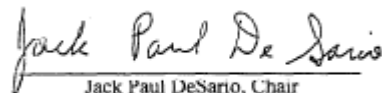
For example, R.C. 2921.42 (A)(4) prohibits a public official from entering into a public contract with his own public agency unless certain exceptions can be met. Advisory Op. No. 90-003. R.C. 2921.42 (A)(1) prohibits a public official from authorizing, or using his authority or influence to secure a public contract for himself, a family member, or business associate. Advisory Ops. No. 79-004, 85-015, and 89-015, respectively. Also, R.C. 2921.42 (A)(3) prohibits a public official from occupying a position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization unless the contract was competitively bid and was awarded to the lowest and best bidder. Furthermore, R.C. 102.04 (B) prohibits state officers and employees from selling goods and services to state entities except through competitive bidding unless certain conditions are met. Advisory Op. No. 89-010.

Finally, R.C. 102.03 (A) and R.C. 102.04 (A) and (C) impose restrictions upon public officials who wish to represent clients before public agencies. Advisory Op. No. 89-016. Public officials and employees having questions concerning their ability to do business with, or represent clients before, public agencies should contact the Ethics Commission for more information regarding restrictions that may be applicable to the specific business endeavors and their public duties.

Public officials and employees should also inquire as to whether there are departmental policies, charter provisions, local ordinances, collective bargaining provisions, or other restrictions that may further address their ability to engage in private outside employment or business activity. However, the Ethics Commission is statutorily authorized to address only issues arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code and cannot address the application of restrictions imposed by provisions of law beyond its jurisdiction.

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules.

Therefore, it is opinion of the Ohio Ethics Commission, and you are so advised, that: (1) The Ohio Ethics Law and related statutes do not prohibit public officials and employees from engaging in private outside employment or business activities provided that no conflict of interest exists between the private interests and public duties of the public official or employee, and there is no misuse of the public office or employment of the official or employee, as described below; (2) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibits a public official or employee from engaging in private outside employment or business activity with parties that are interested in matters before, regulated by, or doing or seeking to do business with his own public agency unless it is determined by his public employer that he is able to withdraw, as a public official or employee, from consideration of matters that affect the interests of the party with which he desires to engage in private outside employment or business activity; and (3) Division (D) of Section 102.03 of the Revised Code prohibits a public official or employee who engages in private outside employment or business activity from: (a) using public time, facilities, personnel, or resources in conducting a private business or while engaging in private outside employment including conducting demonstrations for clients using public equipment; (b) using his official title or identification on private business cards or other written materials or appearing in uniform while soliciting business or conducting demonstrations for clients; (c) using his relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding his private interests; (d) discussing, deliberating, or voting on any matter involving his private business, including recommending his outside employer's or business's services to his own public agency; (e) receiving fees for providing services rendered on projects that he has recommended in his official capacity; (f) participating in decisions or recommendations regarding his competitors; and (g) using his public position or authority in any other way to secure a benefit for his outside employer or private business.


Jack Paul DeSario, Chair
Ohio Ethics Commission