

THE JOINT LEGISLATIVE ETHICS COMMITTEE

Advisory Opinion 99-001
February 2, 1999

Syllabus by the Committee:

- (1) A member of the General Assembly is not prohibited from prosecuting misdemeanor cases or providing legal advice and research for a county court; and
- (2) A member of the General Assembly is not prohibited from accepting criminal assignments from a county court; and
- (3) A member of the General Assembly is not prohibited from being retained by a judicial corrections board established pursuant to R.C. 2301.51; and
- (4) A member of the General Assembly is prohibited from being appointed as special counsel to the Attorney General where the member is compensated.

Jurisdiction and Question Presented

Pursuant to sections 101.34 and 102.08 of the Revised Code that direct the Joint Legislative Ethics Committee to act as an advisory body to the members and employees of the General Assembly on questions relating to ethics, conflicts of interest, and financial disclosure, the Joint Legislative Ethics Committee advises the members and employees of the General Assembly on the following questions: (1) Can a member of the General Assembly be retained by a county court to prosecute misdemeanor cases and provide legal advice and research? (2) Can a member of the General Assembly accept criminal assignments from a county court to represent indigent defendants? (3) Can a member of the General Assembly be retained by a judicial corrections board? and

(4) Can a member of the General Assembly be retained as special counsel to the Attorney General?

Background

Certain members of the General Assembly have asked various questions regarding the practice of law. Each member maintains a private law practice either as a sole practitioner or as a partner in a law firm. The members have asked whether they may perform legal services for various entities, which are specifically set forth below. Initially, it must be noted nothing in the Ethics Law is applicable to the work performed by the partners in a member's law firm; the prohibitions, if any, are applicable only to members of the General Assembly.

Consideration of the Issues

Prosecuting or Defending Cases

The question before the Committee is whether a member of the General Assembly may perform legal work for a county court. Specifically, may a member be employed by a county court to prosecute cases or accept payment for appointments for defending indigent defendants.

Initially, the Committee would direct the members to Advisory Opinions 95-006, 95-012, and 95-016 which address many issues involving member-lawyers. Pursuant to R.C. 102.08, when the Committee renders an Advisory Opinion that has been publicly sought and that relates to a special set of circumstances involving ethics, conflicts of interest, or financial disclosure under Chapter 102. or section 2921.42 or 2921.43 of the Revised Code, the person to whom the opinion was directed *or who was similarly situated* may reasonably rely upon such opinion and shall be immune from criminal prosecutions, civil suits, or actions for removal from his office or position of employment for a violation of Chapter 102. or section 2921.42 or 2921.43 of the Revised Code based on the facts and circumstances covered by the opinion. Therefore, the members are advised to review those Opinions. Portions of those opinions will be reiterated here for application to the specific facts of this opinion.

R.C. 102.04(A)

Pursuant to R.C. 102.04(A), members are prohibited from appearing before certain governmental agencies, division 102.04(A) provides:

Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

Pursuant to R.C. 102.04(A), courts are specifically excluded from the prohibition. In the instant case, the work contemplated by the members would fall within this exclusion. However, if the work to be performed involves an entity other than the court, the members are prohibited from personally rendering any service, *for compensation*, in any matter before the General Assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state. (See Advisory Op. 95-012 at page 3 for definitions of "department, division, institutions, and board, commission, or bureau of the state.")

R.C. 2921.42(A)

Another section applicable to this situation is R.C. 2921.42(A). Divisions (A)(1), (4) and (5) of section 2921.42 of the Revised Code read as follows:

(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;

(5) Have an interest in the profits or benefits of a public contract which is not let by competitive bidding when required by law, and which involves more than one hundred fifty dollars.

A member of the General Assembly is a "public official," as defined by section 2921.01 of the Revised Code. A "public contract" is defined in division (E)(2) of section 2921.42 of the Revised Code as follows:

(E) As used in this section, "public contract" means any of the following:

(1) 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 subdivision, or any agency or instrumentality of either;

(2) A contract for the design, construction, alteration, repair, or maintenance of any public property.

"Service" is not defined in Chapter 2921. of the Revised Code nor in any other section of the Revised Code for use in Chapter 2921. of the Revised Code. "Services" is defined in division (E) of section 2913.01 of the Revised Code for use within Chapter 2913. of the Revised Code to include labor, personal services, professional services, public utility services, common carrier services, and food, drink, transportation, entertainment, and cable television services. We find that definition to be sufficient for our use in determining whether employment as a prosecutor, a legal advisor, or criminal assignments is a public contract. We believe each type constitutes a public contract, because each is the acquisition of professional services by an instrumentality of a political subdivision.

However, our inquiry does not end with that determination since members of the General Assembly are only prohibited from having certain types of interests in public contracts. As noted above, division (A)(1) of section 2921.42 of the Revised Code prohibits members from using the influence of their office to secure authorization of any public contract in which they have an

interest. Clearly, the members have an interest in the public contract--the compensation received by each member. However, it seems equally clear that the appointments are not a result of the members' membership in the General Assembly. In fact, these positions predated the members' election to the General Assembly. Therefore, division (A)(1) of section 2921.42 of the Revised Code does not apply to the situation under review.

Divisions (A)(4) and (5) of section 2921.42 of the Revised Code also do not apply to the contract in question. The contract is not entered into by or for the use of the General Assembly, the governmental instrumentality with which the members are connected; therefore, division (A)(4) is not applicable. There is no statutory requirement that competitive bidding be used when a court seeks attorneys to prosecute cases, provide legal advise, or represent indigent defendants; therefore, division (A)(5) does not apply in this situation.

Although section 2921.42 of the Revised Code is not directly on point in the instant case, the Committee cautions the members that all contracts between a member and a governmental entity must be conducted in the normal course of business dealings. Membership in the General Assembly cannot be allowed to influence the terms of any contract between the member and a governmental entity. The Committee therefore assumes that the members will not receive any compensation other than that received by other attorneys providing comparable legal representation, will not use the members' office to increase the amount of that compensation, and will not otherwise influence such contracts to the members' benefit.

Therefore, a member of the General Assembly is not prohibited from prosecuting misdemeanor cases for, providing legal advice to, or accepting criminal assignments from, a county court.

Judicial Corrections Board

Next, it has been asked whether a member may perform legal work for the Judicial Corrections Board ("Board"). Established pursuant to R.C. 2301.51, the Board is a county-based body comprised of judges from that particular county. The Board administers the county's community-based correctional facilities and programs. The Board is not supported in whole or

in part by state funds; it is funded solely with county funds. The Presiding Judge of the county in which the Board sits appoints all members of the Board. The work to be performed by the member would include advising the Board on matters such as contracting, bidding, and human resources issues.

The Board is considered a part of the court, hence, the reasoning set forth in the section above is equally applicable in this situation. Therefore, providing the work is performed within the confines of the Revised Code sections above, there are no prohibitions against a member of the General Assembly from performing legal work on behalf of the Judicial Corrections Board.

Special Counsel

Next, it has been asked whether a member can be retained as special counsel to the Attorney General. As noted above, pursuant to R.C. 102.04(A), a member is prohibited from receiving compensation other than from the agency with which the member serves for any service rendered or to be rendered by the member personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts. Unlike the above situation where the work contemplated was before and on behalf of a court, work on behalf of the Attorney General is clearly a matter before a department, division, institution, instrumentality, board, commission, or bureau of the state.

Therefore, a member of the General Assembly is prohibited from being appointed as special counsel to the Attorney General where the member is compensated. Of course the member is not prohibited from performing work *pro bono*. Again it should be noted this prohibition lies only with the member, it does not prohibit other partners of the member's law firm from accepting special counsel positions with the Attorney General.

R.C. 102.03

Lastly, the Committee cautions the members about the use of their status as a member of the General Assembly in any of the above situations. Division (D) of Section 102.03 of the Revised Code limits the use of a member's influence and reads 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.

Based upon this language, R.C. 102.03(D) prohibits a public official or employee from using his official authority or influence to secure anything of value, either for himself or for any other party, if the thing of value is of such a character as to manifest a substantial and improper influence upon him with respect to his official duties by impairing his objectivity and independence of judgment as a public official or employee. Therefore, the member should avoid taking any actions that would result in their membership in the General Assembly being used to secure anything of value or the promise of anything of value, such as preferential consideration for a state or local government contract.

This advisory opinion is based on the facts presented. 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.

Conclusion

Accordingly, the Committee finds and the members and employees of the General Assembly are so advised: (1) A member of the General Assembly is not prohibited from prosecuting misdemeanor cases or providing legal advice and research for a county court; and (2) A member of the General Assembly is not prohibited from accepting criminal assignments from a county court; and (3) A member of the General Assembly is not prohibited from being retained by a judicial corrections board established pursuant to R.C. 2301.51; and (4) A member of the General Assembly is prohibited from being appointed as special counsel to the Attorney General where the member is compensated.

Jo Ann Davidson, Chairman
Joint Legislative Ethics Committee