

**INFORMAL OPINION IO-2002-002**  
**ISSUED DECEMBER 13, 2002**

You have requested an ethics interpretation which has been converted to an informal staff opinion. You have asked the following question:

*Is there a conflict of interest if the general counsel of a board of regents for an institution of higher education ["the Board"] and vice president of the same institution accepts employment in a part-time "of counsel" capacity with a law firm ["the Firm"], which does work for the Board, for which he will be compensated?*

**FACTS**

You have provided additional facts and conditions. These are:

- The Firm requests that you work for them approximately one day per week.
- You will be compensated by the Firm; and your state employment compensation will be reduced in proportion to your work at the Firm; i.e. your state employment compensation will be reduced to 80% to reflect your part-time status as general counsel to the Board. Should you work more than one day per week for the Firm, you will draw on accrued annual leave.
- You propose to enter into a written agreement with the Board regarding your relationship with the Firm that will spell out the terms and restrictions on the outside employment [the "Board Agreement"]. The Board agreement will include:
  - " a requirement that you not be allowed to work on nor be compensated by the Firm for work on any Board matters;
  - " a requirement that you not have the authority to approve engagement of the Firm on work for the Board or any of its constituent universities. Someone of equal or greater position within the institutions would be vested with that authority and with the authority to review and approve fees charged by the Firm to the Board; and
  - " a prohibition on you participating or interfering in such decisions.
- The Firm currently serves, and has served for many years, as outside counsel to the Board on employee benefits matters. The Firm has also worked on many other matters for the Board including work over the past year relating to the sale of certain property owned by the institution of higher education.
- You propose that any fees that cause the aggregate annual fees paid to the Firm to exceed the average annual fees paid by the Board to the Firm over the preceding five years require the specific advance approval of the Audit Committee of the Board.

- You recommend that the Audit Committee of the Board review the relationship between the Board and the Firm on at least an annual basis.
- As with the Board, you propose to enter into a written agreement with the Firm establishing the specific constraints on your employment [the “Firm Agreement”]. The Firm Agreement will include a provision that you will not be compensated by the Firm for any work on behalf of the Board or its constituent universities.

## **ANALYSIS**

Simply stated, your question is whether a conflict of interest exists if the general counsel accepts employment with a law firm which contracts with the primary employer agency. This is not a question of first impression for the Commission.

The Director believes that this question is like others where the Commission found that Section 257:20-1-4 controls. This provision prohibits solicitation or acceptance of compensation or employment which would impair a state officer’s or employee’s independence of judgment in carrying out services/public duties.

### **Misuse of office**

\* \* \*

(c) No state officer or state employee shall:

(1) receive or solicit any compensation that would impair his or her independence of judgment for his or her services as an officer or employee of any state agency, from any source other than the state, unless otherwise provided by law; or

(2) accept or solicit other employment which would impair his or her independence of judgment in performance of his or her public duties.

\* \* \*

Section 257:20-1-4

Whether independence of judgment is impaired in a given case is a fact question. You have provided conditions which would safeguard against such conflicts.

In EI-1999-001 the Commission found the Attorney General’s view on this issue persuasive. In interpreting a statute similar to the rule, the Attorney General found that dual employment with two state entities is not, per se, prohibited.

...It has long been the opinion of the Attorney General that it is not a per se violation of state law for a state employee to accept employment with more than one state agency... Because dual employment is not per se prohibited, the determination of an ethics violation is a factual question which must be made on a case by case basis.

The opinion further stated:

The Attorney General has said that state employees may maintain dual employment so long as no conflict arises between the duties imposed, the hours of the two jobs are not contemporaneous, and the primary employer is notified and provided a schedule of the secondary employment.

The determination of whether or not the secondary employment would impair the independent judgment of an employee is also a fact question which must be considered on a case by case basis. In A.G. Opin. No. 74-149, the Attorney General noted that dual employment was permissible as long as a conflict of interest did not arise between the duties imposed by each job and the hours were not contemporaneous. In order to avoid possible conflict, the primary employer should be notified of the secondary employment and the part-time work schedule...

A full time employee of a state agency may accept compensated part-time employment with another state agency if such secondary employment does not impair the employees's independence of judgment and performance of public duties...

Id.

If the general counsel's duties do not include contracting with or supervising the work of the Firm, there would be no conflict between the public duties of the primary employment [for the Board] and secondary employment [for the Firm]. EI-1999-001, the Commission further held:

Under this condition, Section 257:20-1-4(c) would be satisfied, so long as no conflict arises between duties imposed by the two [employers], the hours of the two jobs are not contemporaneous and the primary employer is notified and provided a schedule of the secondary employment.

Provided these criteria are met, the Commission finds that the General Counsel of the Board may accept the proposed employment.

## CONCLUSION

**It is therefore the Informal Opinion of the Executive Director of the Ethics Commission that Rules Section 257:20-1-4(c) does not prohibit the general counsel of the Board from working for the Firm, provided his or her his salary is reduced to 80% of the general counsel's salary to reflect the one day per week he or she spends working for the Firm; he or she takes approved leave for the hours spent working for the Firm in addition to the eight hours agreed upon; the hours of the two jobs are not contemporaneous; and the Board and the Firm are notified and agree in writing to the conditions stated above to avoid the appearance of impropriety and/or potential conflicts of interest. Because the Commission wishes to assure itself that these conditions precedent have been met, we request that signed copies of the Board Agreement and the Firm Agreement be provided for our records.**

Like ethics interpretations, informal staff opinions are fact specific. They answer only the question or questions put forth in the underlying request according to information described in the "Facts" section [*supra*]. While they may shed light on other situations, this opinion does not necessarily control them.

The Rules permit the Commission staff to issue informal opinions, upon the approval of the Chair or Vice Chair, provided the matter is reasonably susceptible to a single analysis and is not the subject of litigation, investigation or legislation. We hope these informal letters shed light on the issues and provide guidance. They are not, however, official pronouncements.

This opinion letter has been approved by the Commission Chairman. According to policy, this opinion will be submitted to the members, any of whom can request that the matter be converted to an ethics interpretation and considered by the full Commission.

Informal opinions are published with sufficient deletions to prevent identification of the person or persons involved in the situations herein described. The name of the requestor is considered confidential. This letter has been labeled accordingly.