



OHIO ETHICS COMMISSION

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October 8, 1998

Informal Opinion 1998-INF-1008-1

Frank A. Lordi



Dear Mr. Lordi:

In a letter received by the Ethics Commission on April 30, 1998, you have asked for guidelines pertaining to the establishment of a legal defense fund. You have stated that you may choose to set up such a legal defense fund, and that you desire all information regarding pertinent statutes.

It is first necessary to explain that the Ohio Ethics Law and related statutes contain no specific provisions with respect to legal defense funds. These statutes attempt to protect against conflicts of interest by listing general prohibitions against public officials and employees soliciting, accepting, or using their positions to secure anything of value that is of a substantial and improper character. The laws also specify disclosure requirements with respect to income and gifts. In response to your questions, these provisions restrict your solicitation of contributions to your legal defense fund, as discussed more fully below.

There may also be other statutes or legal provisions, outside those contained in the Ohio Ethics Law, that condition the solicitation for, and accumulation of, legal defense funds in Ohio. For more information about any such provisions, you should contact the county prosecutor of Mahoning County and a private attorney.

**Soliciting, Accepting, or Using Position to Secure Anything of Value—
R.C. 102.03(D) and (E)**

With respect to the Ethics Law and related statutes, there are several provisions you should note and must follow. Divisions (D) and (E) of R.C. 102.03 prohibit a public official from accepting, soliciting, or using the authority or influence of his official position to secure anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. The Ethics Commission has held that R.C. 102.03(D) and (E) prohibit a public official from accepting, soliciting, or

using the authority or influence of his office to secure anything of substantial value from a person or party that is regulated by, doing business or seeking to do business with, or interested in matters before, the agency or office with which the public official serves. Ohio Ethics Commission Advisory Opinion No. 92-015.

As a county commissioner, you are a public official who is subject to the prohibitions of R.C. 102.03. R.C. 102.01(B) and (C); Adv. Op. No. 88-003. The term "anything of value" is defined to include money, goods, chattels, promissory notes, warrants, and checks, and every other thing of value. R.C. 102.01(G); 1.03. Contributions made to a legal defense fund would be included within the definition of anything of value. Therefore, you are prohibited from soliciting or accepting a contribution to your legal defense fund from any party who is regulated by, doing or seeking to do business with, or interested in any matter before, the office of the County Commissioners. Payments or donations from these persons could affect your objectivity or independence of judgment, and thus, be of such a character as to improperly influence you with respect to your duties. Adv. Ops. No. 79-008, 84-010, 87-004, 88-004 and 88-005.

For example, you are prohibited from soliciting contributions to your legal defense fund from any individual, company, or partnership that is doing business with the county, and from the principals and owners of those companies or partnerships. You are also prohibited from accepting or using contributions to your legal defense fund from any of these parties, even if the contributions are solicited by someone other than yourself, but are for your use or benefit. However, R.C. 102.03(D) and (E) would not prohibit you from soliciting or accepting contributions to your legal defense fund from parties who are not doing or seeking to do business with, regulated by, or interested in matters pending before the county commissioners, where there is no reasonable foreseeability that an action will come before, or that they will seek to do business with, the county commissioners. See generally Adv. Op. No. 89-002.

In concluding that you are not prohibited by R.C. 102.03 from accepting or soliciting donations from parties that are not doing or seeking to do business with, regulated by, or interested in matters pending before the county commissioners, it must be emphasized that all donations must be voluntary and can never be solicited or given to influence you. Adv. Ops. No. 86-003. Private parties are prohibited from promising, offering, or giving donations to your legal defense fund with the purpose of improperly influencing you with respect to your duties. R.C. 102.03(F) and 2921.43(A). You are prohibited from soliciting or accepting contributions given to improperly influence you with respect to the discharge of your official duties, and from basing any official decisions in the future on a person's contributions or failure to contribute. Such conduct would be in violation of R.C. 102.03, and possibly other criminal statutes that are outside the scope of the Ethics Commission's jurisdiction. See, e.g., R.C. 2921.02

A determination of whether a public official is prohibited by R.C. 102.03 from soliciting or accepting contributions to a legal defense fund is based upon the facts and circumstances of the instant situation. Although a public official is subject to the restrictions described above, he is not prohibited by the Ethics Law from accepting a gift or contribution of the kind you ask about from members of his family, his personal friends, or others with whom he has a personal relationship where the circumstances make it clear that the relationship existed prior to, and apart from, the public servant assuming his official position, where the gift is a result of the personal relationship rather than based upon the individual's public office, and where the person providing the gift is not among the list of restricted parties previously described.

Finally, you should be aware that soliciting or accepting a contribution to your legal defense fund from any party that has done business with, or been regulated by, the county in the past, even if there are no interactions between the party and the county at the time the contribution is made, may also present an appearance of impropriety.

Disclosure of Contributions to a Legal Defense Fund—R.C. 102.02

The provisions of Ohio's Financial Disclosure Law also apply to your question. These provisions are designed to remind you of your sources of income and financial interests that may present conflicts of interest, and to allow the public to be aware of those interests. As a county elected official, you are required to file an annual financial disclosure statement, disclosing financial information for the preceding calendar year. R.C. 102.02(A)(2)(a) requires that you disclose every source of income, of any amount, received in your own name or by any other person for your use or benefit. You are also required to include a brief description of the nature of the services for which the income was received. R.C. 102.02(A)(2)(a). Further, R.C. 102.02(A)(7) requires that you disclose the source of each gift of over seventy-five dollars, received by you or by any other person for your use or benefit, excluding gifts received by inheritance, trust, and from most family members.

There is no question that you will be required to disclose the sources of contributions to your legal defense fund on your financial disclosure statement, whether the contributions are made directly to you, or are made to a third-party for your use and benefit. The question is whether these sources of contributions to your legal defense fund must be identified as sources of income or as sources of gifts valued at over \$75.

Disclosure of Contributions as Income or Gifts

"Income," for purposes of the financial disclosure requirements, includes gross income as defined and used in the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1, as amended, and interest and dividends on obligations or securities of any state or

political subdivision. R.C. 102.01(E). The Internal Revenue Code specifically excludes gifts, devises, bequests, and inheritances from the definition of "gross income." 26 U.S.C.A. §102. The Supreme Court explained, in Commissioner v. Duberstein, 363 U.S. 278, 80 S.Ct. 1190, (N.Y. 1960), that the determining factor in deciding whether a "common law" gift is included under gross income, for federal income tax purposes, or whether it is a "gift," is the intention with which the payment has been made.

With regard to gifts, the word "gift" is not statutorily defined for purposes of the Ohio Ethics Law. The Ethics Commission addressed the definition of the word "gift" in Advisory Opinion No. 94-003. The issue in that opinion was whether the value of multiple gifts from a single source were counted alone or together for purposes of meeting the seventy-five dollar financial disclosure reporting requirement threshold. The Commission discussed the definition of the word "gift," and quoted the Black's Law Dictionary definition of the word as: "[a] voluntary transfer of property to another without consideration . . . [e]ssential requisites of "gift" are capacity of donor, intention of donor to make gift, completed delivery to or for donee, and acceptance of gift by donee." The Commission noted that Ohio courts have relied upon this definition to conclude that a gift is a voluntary transfer of property by one to another without any consideration or compensation therefor. Adv. Op. No. 94-003.

In the situation that you have presented, the intent of the individuals who make contributions to your legal defense fund may control the issue of whether the money contributed to you should be disclosed as income or a gift. If the contributions are given to you and are not intended to be consideration for services or compensation, or to fulfill moral or other obligations, then they may be gifts. If the contributions are gifts, and if the amount received during the year from any person or entity is greater than seventy-five dollars, then R.C. 102.02(A)(7) requires that you identify that person or entity as the source of the gifts on your FDS. Although it would be advisable to do so to alleviate any questions involving the sources in these circumstances, you are not required to disclose the actual value of a gift or the nature of a gift.

To summarize, if the contributions to your legal defense fund are considered income to you, all sources of contributions, regardless of the amount of the contribution made by the source, must be disclosed. If the contributions to your legal defense fund are considered gifts to you, all sources of contributions valued at over \$75 must be disclosed on your financial disclosure statement. You must disclose any source that provides a total of over \$75 at any time during the calendar year, whether the contribution is made in one lump sum, or in several smaller payments. Adv. Op. No. 94-003. Regardless of whether the contributions are considered income or gifts, you will be required to disclose contributions made directly to you, and contributions made to a separate entity or person, if the contributions are for your use or benefit.

Summary

As explained more fully above, you are prohibited from soliciting or accepting a contribution for your legal defense fund from any party who is regulated by, doing or seeking to do business with, or interested in any matter before, the office of the County Commissioners. Payments or donations from these persons could affect your objectivity or independence of judgment, and thus, be of such a character as to improperly influence you with respect to your duties. You are required to disclose the contributions made to your legal defense fund, as either income or gifts. There may also be other statutes or legal provisions, outside the Ohio Ethics Law, that condition the solicitation for, and acceptance of, legal defense funds in Ohio. For more information about any provisions that condition legal defense funds, and for guidance regarding the application of the Internal Revenue Code, you should contact the county prosecutor for Mahoning County or a private attorney.

This informal advisory opinion was approved by the Ethics Commission at its meeting on September 25, 1998. The opinion is based on the facts presented and 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. If you have any further questions, please feel free to contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer A. Hardin". The signature is fluid and cursive, with a large initial "J" and "H".

Jennifer A. Hardin
Chief Advisory Attorney