

OHIO ETHICS COMMISSION

Dr. Herb Asher, *Chair*
Merom Brachman, *Vice Chair*



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368

David E. Freel, *Executive Director*

Web Site: <http://www.ethics.state.oh.us>

September 23, 2003

Informal Opinion 2003-INF-0923-2

Ned Portune


Dear Mr. Portune:

In a letter that was received by the Ohio Ethics Commission on May 28, 2003, you asked whether the Ohio Ethics Law and related statutes prohibit your brother, Todd Portune, who is a Hamilton County Commissioner, from accepting contributions to a fund you wish to establish for him. You have explained that your brother has recently undergone spinal surgery for treatment of an illness. You wish to establish a fund to which the County Commissioner's family members and friends, as well as citizens in the community, could make contributions in order to help your brother with his medical expenses (fund). You have stated that your brother is aware of your efforts, and is concerned that any fund established by his family and friends comport with the Ohio Ethics Law and that you are waiting for the Commission's guidance before proceeding any further.

The Commission recognizes that this may be a difficult situation for the County Commissioner and his family. Under the circumstances you present, it is to be commended that you and your brother wish to comply with protections to the public contained in the Ethics Law.

At the outset, it is necessary to explain that the Ohio Ethics Law and related statutes contain no specific provisions with respect to the establishment of funds of the kind you describe. There may be laws, rules, or other guidelines, outside the Ohio Ethics Law, including federal tax laws, that control or have a bearing on the solicitation for, and accumulation and distribution of, a fund of the kind you describe. For more information about any such provisions, you and the County Commissioner should consult with the Hamilton County Prosecuting Attorney and a private attorney.

Brief Answer

As explained more fully below, you are not prohibited from soliciting and accepting contributions for the fund you describe, and the County Commissioner is not prohibited from accepting payments from the fund, if:

- All contributions to the fund are voluntary; and
- You, and any other people administering the fund, ensure that no party interested in matters before, regulated by, or doing or seeking to do business with the County is solicited by or makes contributions to the fund, or solicits any contributions on behalf of the fund.

As is also described in detail in this opinion, if the Commissioner receives payments from the fund in any year, he is required to disclose, on his financial disclosure statement for that year, the following parties, where appropriate, as the sources of the gift:

- The fund; and
- Any person or entity that contributed more than seventy-five dollars to the fund, during the year, even if that amount is reduced because of credit card transaction fees.

The Commissioner is not required to disclose, as the source of a gift, any person who contributed seventy-five dollars or less to the fund.

Facts

In a conversation with Commission staff regarding your request, which you followed with additional information requested and contained in a fax, you have explained that the Commissioner's medical needs are likely to continue for the foreseeable future. You have stated that you have opened a nonprofit checking account, at a bank in Cincinnati, to which interested individuals will be able to make contributions for this fund. You have explained that you are the only person with access to that account.

You state that you anticipate that the fund will be used for a variety of purposes, including: (1) helping to defray your brother's ongoing medical expenses (such as therapy, medications, and medical procedures) that are not covered by insurance; (2) modifications to a vehicle, or purchase of a modified vehicle, for your brother to drive; and (3) repairs and modifications to your brother's home in order to make it accessible. You have stated that, for the most part, expenditures from the fund will be made to third-party providers of services, rather than directly to the County Commissioner. However, you stated that, where the County Commissioner and his wife have already incurred loans to make modifications to their home, for example, the money may be provided directly to the Commissioner in order for him to repay those loans.

Informal Advisory Opinion Regarding a Legal Defense Fund

Our office has provided you with a copy of an Ethics Commission's informal advisory opinion written to Frank Lordi regarding legal defense funds. Your questions regarding a medical fund present substantially similar issues. For that reason, your brother, who is a County Commissioner subject to all of the restrictions discussed in the opinion to Mr. Lordi, can rely on the guidance provided in the opinion.

In that informal opinion, the Commission explained that R.C. 102.03(D) and (E) would prohibit a County Commissioner from soliciting or using his position to secure contributions to a legal defense fund from any individual, company, or partnership that is interested in matters before, regulated by, or doing or seeking to do business with the County, and from the principals and owners of those companies or partnerships. The Commission also concluded that the County Commissioner was prohibited from accepting or using contributions to the legal defense fund from any of these parties, because the contributions would be for his use or benefit, even if someone else solicited the contributions on his behalf. (While it was not discussed in the earlier advisory opinion, the law would also prohibit any person who is barred from contributing to the fund from soliciting contributions from any other person, particularly a subordinate.)

In the earlier advisory opinion, the Commission further concluded that R.C. 102.03(D) and (E) would not prohibit the County Commissioner accepting contributions to a legal defense fund from parties who are not interested in matters before, regulated by, or doing or seeking to do business with the County, where there was no reasonable foreseeability that an action will come before, or that they will seek to do business with, the County. See generally Adv. Op. No. 89-002. The County Commissioner was not prohibited from accepting a contribution from members of his family, his personal friends, or others with whom he has a personal relationship where the person providing the gift was not among those restricted parties described above.

The prior advisory opinion regarding a legal defense fund also explained that the County Commissioner was required to disclose the sources of contributions to the legal defense fund on his financial disclosure statement (FDS), whether the contributions were made directly to him or to a third-party for his use and benefit. The County Commissioner was directed to determine whether these sources of contributions to the fund are making contributions as income or gifts.

In the prior opinion, the Commission explained that, if the contributions that were given to the fund were not intended to be consideration for services or compensation, or to fulfill any obligations, the contributions are likely to be gifts. If a contributions were gifts, and if the amount received during the year from any person or entity was greater than seventy-five dollars, then R.C. 102.02(A)(7) required that the County Commissioner identify that person or entity as the source of a gift on his FDS. Finally, the Commission explained that, regardless of whether the contributions were considered income or gifts, the County Commissioner was required to disclose contributions made directly to him, and contributions made to a separate entity or person, if the contributions were for his use or benefit.

Application of the Opinion

As noted above, your brother, who is also a County Commissioner, can rely on the more complete discussion of the restrictions, set forth in the October 1998 informal opinion, which is briefly summarized above. One important point that the Commission emphasized was that all contributions must be voluntary, and can never be solicited or given to influence the County Commissioner. Adv. Ops. No. 86-003. It must be clear that the persons who contribute to the gift do so willingly, without any use of authority by the Commissioner, his office, or any of his subordinates on his behalf, to solicit contributions. Any person who is approached to contribute to the gift must be advised that there is no obligation and that the person is free to decline without suffering any consequence. See Adv. Op. No. 2002-01.

Contributions from Employees and Union Members

You have also asked several specific questions that are not answered in the earlier opinion. First, you have asked whether the County Commissioner could accept contributions made by the employees of a company that is interested in matters before, regulated by, or doing or seeking to do business with the County. The Ohio Ethics Law would not prohibit the County Commissioner from accepting voluntary contributions made to a fund for his benefit by employees of a company that is interested in matters before, regulated by, or doing or seeking to do business with the County, as long as the employees are not owners, officers, or other fiduciaries of the company and are not otherwise within the prohibited categories described.

You have also asked whether the County Commissioner could accept contributions from the members and leaders of any union or other organization in Hamilton County, as long as the union and its members have "no direct business" with the County. The County Commissioner is prohibited from accepting contributions from any corporation, or from the principals or owners of the corporation, that is interested in matters before, regulated by, or doing or seeking to do business with the County, including a union that is regulated by or interested in matters before the County. This would include a union or other organization that is regulated or interested in matters before the County, even if the union does not have any direct business with the County. However, the County Commissioner would not be prohibited from accepting voluntary contributions from rank-and-file members of the union in the same fashion as described above regarding employees.

Disclosure of Contributions

From your letter, it appears that you have concluded that contributions to the fund will be gifts. As such, the County Commissioner will be required to disclose, as the source of a gift any person or entity who contributes over seventy-five dollars. With respect to disclosure of these gifts, you have asked two specific questions: (1) how the County Commissioner should disclose anonymous contributions; and (2) how the County Commissioner should disclose contributions made by credit card.

Anonymous Contributions

R.C. 102.02(A)(7) requires that the County Commissioner disclose the source of all gifts valued at over seventy-five dollars. This includes any group source of a gift valued at over seventy-five dollars, where members of the group do not individually contribute more than seventy-five dollars. Adv. Op. No. 2002-01. Therefore, the County Commissioner must disclose the fund as the source of a gift.

You have stated that citizens will be able to make credit card, check, or cash contributions to the fund. Cash contributions would be anonymous contributions. You have stated that the fund will publicize, in its literature and communications, that it will not accept anonymous contributions in excess of seventy-five dollars. The fund will propose credit card and check alternatives for individuals who wish to contribute more than seventy-five dollars. If the controls you have described are not sufficient, and the fund accepts an anonymous contribution in excess of seventy-five dollars, you ask how the County Commissioner should disclose the contribution.

Because of the requirement that the County Commissioner must disclose the source of all gifts valued at over seventy-five dollars, the fund must be established and fund-raising efforts managed in such a manner that the fund cannot accept anonymous contributions in excess of seventy-five dollars. Acceptance of anonymous contributions over the threshold disclosure amount would negate the protections to the public interest provided by the disclosure requirements of R.C. 102.02(A)(7). Because the fund does not accept anonymous contributions in excess of seventy-five dollars, there will be no need for the County Commissioner to disclose these contributions.

Finally, the Commission notes that a party who is prohibited from contributing to the fund you describe would also be prohibited from making an anonymous contribution, in the manner you have described, in an attempt to bypass the restrictions in the Ohio Ethics Law.

Disclosure of Credit Card Contributions

You have explained that, when a credit card contribution is made, the credit card company will charge a transaction fee, which will lower the amount of the contribution actually received. You ask whether the County Commissioner should disclose the sources of contributions that are reduced to seventy-five dollars or less as a result of transaction fees.

Because a contributor likely intends that the whole amount of the contribution would go to the fund for the County Commissioner, the County Commissioner must disclose the source of any contribution in excess of seventy-five dollars, made using a credit card, regardless of how much is deducted as a transaction fee.¹

¹It is likely that only a few contributions would fall within this category. Only contributions between \$75.01 and approximately \$78.00 will be reduced to \$75.00 or less as a result of transaction fees.

Conclusion

As explained more fully above, you are not prohibited from soliciting and accepting contributions for the fund you describe, and the County Commissioner is not prohibited from accepting payments from the fund, if:

- All contributions to the fund are voluntary; and
- You, and any other people administering the fund, ensure that no party interested in matters before, regulated by, or doing or seeking to do business with the County is solicited by or makes contributions to the fund, or solicits any contributions on behalf of the fund.

As is also described in detail in this opinion, if the Commissioner receives payments from the fund in any year, he is required to disclose, on his financial disclosure statement for that year, the following parties, where appropriate, as the sources of the gift:

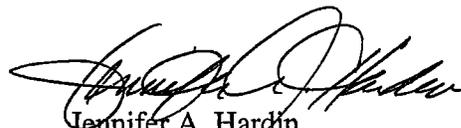
- The fund; and
- Any person or entity that contributed more than seventy-five dollars to the fund, during the year, even if that amount is reduced because of credit card transaction fees.

The Commissioner is not required to disclose, as the source of a gift, any person who contributed seventy-five dollars or less to the fund.

Finally, the conclusions of this opinion apply only if the funds are used for the purpose you have described in your request. The use of funds for any other purpose, including cash payments to the Commissioner that are not provided for specified expenditures or as reimbursement for specific expenditures of the kind you have described, may raise additional issues under the Ohio Ethics Law and related statutes. This opinion does not provide immunity for the use of funds in any way other than the one you have set forth.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 10, 2003. The 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. If you have any questions or desire additional information, please contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

Enclosure: Informal Advisory Opinion to Frank Lordi (October 8, 1998)