

OHIO ETHICS COMMISSION

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INFORMATION SHEET: OPINION NO. 2006-03 **LEGAL DEFENSE FUNDS**

What is the question addressed in the opinion?

Does the Ethics Law prohibit a public official or employee from soliciting or accepting contributions to a fund established for his or her legal defense in a criminal case?

What is the answer in the opinion?

While all contributions are not prohibited, there are significant limits on the solicitation or acceptance of contributions for a legal defense fund in a criminal case.

The public official or employee is prohibited from soliciting or accepting contributions to a fund for his or her legal defense in a criminal case from any individual, corporation, partnership, non-profit entity, or other person that is doing or seeking to do business with, regulated by, or interested in matters before the public agency he or she serves. This restriction also prohibits any other person from soliciting contributions to a public official's legal defense fund from any of these sources.

Further, if the official or employee is required to file a financial disclosure statement, he or she must disclose contributors to the legal defense fund as sources of gifts.

To whom does this opinion apply?

This opinion applies to any public official or employee.

How and when did the opinion become effective?

The opinion became effective upon acceptance by the Commission.

For More Information, Please Contact:

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IT IS NOT AN ETHICS COMMISSION ADVISORY OPINION.
ADVISORY OPINION NO. 2006-03 IS ATTACHED.**

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Advisory Opinion
Number 2006-03
June 29, 2006

Syllabus by the Ohio Ethics Commission:

- (1) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his or her public office to secure contributions to a fund for his or her legal defense in a criminal case from any person including individuals, labor organizations, companies, or partnerships that are “improper sources,” because they are interested in matters before, regulated by, or doing or seeking to do business with the public agency that the official or employee serves, and from the principals and owners of those organizations, companies, or partnerships;
- (2) Divisions (D) and (E) of Section 102.03 of the Revised Code do not prohibit a public official or employee from accepting voluntary contributions to a legal defense fund from parties that are not improper sources;
- (3) Division (F) of Section 102.03 of the Revised Code prohibits improper sources from giving a contribution to a public official’s or employee’s legal defense fund;
- (4) Pursuant to the financial disclosure provisions contained in Section 102.02 of the Revised Code, a public official or employee who is required to file a financial disclosure statement, and who accepts contributions to a legal defense fund, must disclose the sources of contributions as sources of gifts regardless of whether the contributions were made directly to the official or employee or to a third-party for his or her use and benefit.

* * * * *

The Commission has been asked on several occasions whether the Ohio Ethics Law and related statutes prohibit a public official or employee, such as a city council member, from accepting contributions to a fund established for his or her legal defense in a criminal case from employees of the public agency he or she serves, vendors of the agency, and other persons that may be regulated by or interested in matters before the agency.

Brief Answer

As explained more fully below, the Ohio Ethics Law and related statutes prohibit a public official or employee from accepting contributions to a fund for his or her legal defense in a criminal case¹ from any person or organization that is interested in matters before, regulated by, or doing or seeking to do business with the public agency he or she serves. However, the law does not prohibit a public official or employee from accepting voluntary contributions to a legal defense fund individuals that are not improper sources.

A public official or employee who is otherwise required to file a financial disclosure statement must disclose, as sources of gifts, any sources of contributions to a fund established for his or her legal defense in a criminal case.

Conflict of Interest Prohibitions—R.C. 102.03(D), (E), and (F)

The conflict of interest provisions in R.C. 102.03(D) and (E) state:

- (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;
- (F) No person shall promise or give to a public official or employee 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 term "public official or employee" is defined as any person elected or appointed to any office with, or employed by, any agency of the state and any political subdivision. R.C. 102.01(B) and (C). The term "person" is defined to include any individual, corporation, partnership, association, or other similar entity. See R.C. 1.59.

¹This opinion considers only the question of funds raised for legal defense in a criminal matter. Because circumstances may differ, the opinion does not address the application of the Ethics Law to a defense fund related to purely civil litigation.

The term “anything of value” is defined, for purposes of R.C. 102.03, to include money and every other thing of value. R.C. 102.01(G); 1.03. Gifts, gratuities, promissory notes, warrants, and checks constitute things of value for purposes of R.C. 102.03. Adv. Ops. No. 86-011 and 90-001. R.C. 102.01(G) and 1.03.

R.C. 102.03(D) and (E) prohibit a public official from accepting, soliciting, or using the authority or influence of his or her office to secure anything of substantial value from a person or entity 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. Adv. Ops. No. 84-010 and 92-015. The Ethics Commission has explained that if a public official or employee receives a thing of value from a prohibited source, then his or her objectivity or independence of judgment could be impaired and thus, be of such a character as to improperly influence him or her with respect to his or her duties. Adv. Ops. No. 79-008, 87-004, and 88-005. A contribution to a legal defense fund, provided to a public official or employee, would help the individual defray his or her legal fees and reduce the expense the individual would have to incur personally. Such a contribution is a thing of value that could have a substantial and improper influence on the official or employee. R.C. 102.03(F) also imposes a prohibition and criminal penalty upon the person or entity that improperly promises or gives a thing of value to a public official or employee. Adv. Op. No. 90-001.

Therefore, R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting or accepting a contribution to his or her legal defense fund from any person that is regulated by, doing or seeking to do business with, or interested in any matter before the public agency he or she serves. This prohibition applies to parties located within and outside the geographical boundaries of the public agency. R.C. 102.03(F) prohibits these improper sources from promising or giving a contribution to the public official’s or employee’s legal defense fund.

Employees of a public agency the official or employee serves would be, by virtue of their employment, interested in matters before the public agency. As a result, these employees are improper sources of contributions to a legal defense fund for an official or employee of the agency. Private companies and consultants, labor organizations, and attorneys and law firms located within or outside the public agency would be prohibited sources of contributions to the public official’s or employee’s legal defense fund if they are regulated by, doing or seeking to do business with, or have interests in any matter before the public agency. Likewise, these prohibitions extend to the officers, principals, and owners of these organizations, companies, and partnerships. The public official or employee is also prohibited from accepting or using contributions to a legal defense fund from any of these parties, even if the contributions are solicited for his or her use or benefit by someone other than the official or employee.

Because of the significant circumstances of the question, and to avoid any potential of favoritism or impropriety, the public official or employee must also refrain from soliciting or accepting a contribution to his or her legal defense fund from any person that has done business with, or has been involved in a matter with the public agency in the recent past, even if there are no interactions between the person and the agency at the specific time the contribution is solicited or made. Furthermore, any person who is barred from contributing to the official’s or employee’s

legal defense fund, such as a employee who reports to the official or employee, is also prohibited from soliciting contributions for the fund from any other person.

However, the Commission is constrained to determine that the provisions of the Ethics Law do not absolutely prohibit a public official or employee from soliciting or accepting contributions to a fund his or her legal defense in a criminal case from parties who are not doing or seeking to do business with, regulated by, or interested in matters pending before the agency where there is no reasonable anticipation that the person will be regulated by, or will seek to do business with, the agency. See generally Adv. Op. No. 89-002. While these contributions are not absolutely prohibited, there are further limits on the contributions to protect against improper use of public position and conflicts of interest.

For example, donations must be solicited in an open and clear manner, and it must be clear that all donations are voluntary. Any person approached to contribute to the legal defense fund must be advised that there is no obligation to contribute and that the person is free to decline without suffering any consequence. See Adv. Op. No. 2002-01. In addition, the official or employee is prohibited from soliciting or accepting contributions given with an intent to improperly influence him or her with respect to the discharge of official duties, and from basing any official decisions in the future on a person's contributions or failure to contribute. Such conduct would violate R.C. 102.03(D) and (E), and possibly criminal statutes that are outside the scope of the Ethics Commission's jurisdiction. See, e.g., R.C. 2921.02.

Disclosure of Contributions—R.C. 102.02 and 102.022

Financial disclosure provisions contained in R.C. 102.02 require some public officials and employees to file annual financial disclosure statements (FDS) disclosing financial information for the preceding calendar year. The financial disclosure requirement is designed to remind public officials and employees of their sources of income and financial interests that may present conflicts of interest, and to allow the public to be aware of those interests. Adv. Op. No. 89-001.

Among other things, filers are required to disclose sources of income and sources of gifts. R.C. 102.002(A)(2)(a) and (A)(7); 102.022 (A) and (B). Most financial disclosure filers are required to disclose every source of income, regardless of amount, received in his or her own name or by any other person for the filer's use or benefit. R.C. 102.02(A)(2)(a). The filer must include a brief description of the nature of the services for which the income was received. R.C. 102.02(A)(7) requires most filers to disclose the source of each gift of over seventy-five dollars, received by the filer or by any other person for the filer's use or benefit, excluding gifts received by inheritance, trust, and from most family members.²

² A small number of public officials who serve a local political subdivision and receive less than sixteen thousand dollars a year for their public service have different disclosure thresholds. Any of these filers is required to disclose every source of income over five hundred dollars received by the official or by any other person for his or her use or benefit and the source of each gift valued at over five hundred dollars received by the official or any other person for his or her use or benefit. R.C. 102.022(B).

If any contribution to his or her legal defense fund exceeds these thresholds, a financial disclosure filer would be required to disclose the sources of contributions, whether the contributions are made directly to him or her, or to a third-party for his or her use and benefit. The question is whether these sources of contributions to the legal defense fund must be identified as sources of income or as sources of 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 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.³

The word “gift” is not statutorily defined for purposes of the Ohio Ethics Law. In Advisory Opinion No. 94-003, the Ethics 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.

The intent of individuals who provide a thing of value to a public official or employee control the issue of whether the thing of value should be disclosed as income or a gift. Because a contribution is intended to aid in the official’s legal defense against a criminal prosecution, it is not “compensation.” See also R.C. 2921.43(A)(1) (R.C. 2921.42(A)(3) prohibits a public servant from soliciting or accepting any compensation, other than as allowed by law, for the performance of his or her public duties. A contribution to the public official’s legal defense fund is also not “compensation” prohibited by R.C. 2921.43(A)(1). Therefore, a financial disclosure filer is not required to disclose the item as income.

However, because the contributions are not intended to be consideration for services, they are “gifts” for purposes of the financial disclosure law. The Ethics Law requires the public official or employee to identify any person or entity who contributed more than the threshold amount to his or her legal defense fund as the source of a gift on his or her disclosure statement.

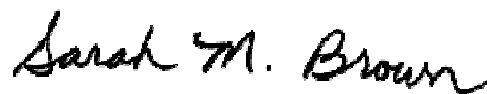
³ It should be noted that, to date, the Internal Revenue Service does not have any guidelines on whether free or pro bono legal services, or contributions to a legal defense fund, are income.

Because the law requires that filers disclose the source of all gifts valued at the threshold amounts, any legal defense fund must be established and fund-raising efforts managed in such a manner that the fund cannot accept anonymous contributions in amounts that exceed the threshold for disclosure. Acceptance of anonymous contributions would negate the disclosure requirements of R.C. 102.02(A)(7) and 102.022. See generally Adv. Op. No. 89-001. In addition, as set forth above, the public official is prohibited from accepting any contribution, regardless of amount, from a prohibited source. Therefore, a person who is prohibited from contributing to the fund is prohibited from making an anonymous contribution in any amount. See City of Parma Heights v. Schroeder, 26 Ohio Op. 2d 119, 122 (C.P. Cuyahoga County 1963) (a public official cannot do indirectly what he cannot do directly).

Finally, a public official's use of funds raised for legal defense for any other purpose may raise additional issues under the Ohio Ethics Law and related statutes, as well as other provisions of the Revised Code. This opinion does not provide immunity for the use, in any other way, of money raised for a legal defense fund.

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.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his or her public office to secure contributions to a fund for his or her legal defense in a criminal case from any person including individuals, labor organizations, companies, or partnerships that are "improper sources," because they are interested in matters before, regulated by, or doing or seeking to do business with the public agency that the official or employee serves, and from the principals and owners of those organizations, companies, or partnerships; (2) Divisions (D) and (E) of Section 102.03 of the Revised Code do not prohibit a public official or employee from accepting voluntary contributions to a legal defense fund from parties that are not improper sources; (3) Division (F) of Section 102.03 of the Revised Code prohibits improper sources from giving a contribution to a public official's or employee's legal defense fund; and (4) Because of financial disclosure provisions in the Ethics Law, a public official or employee who is required to file a financial disclosure statement, and who accepts contributions to a legal defense fund, must disclose the sources of contributions as sources of gifts regardless of whether the contributions were made directly to the official or employee or to a third-party for his or her use and benefit.



Sarah M. Brown, Chairman
Ohio Ethics Commission