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## ADVISORY OPINION NO. 2010-EC-002

Issued June 18, 2010

The Arkansas Ethics Commission has received a written advisory opinion request from Duane A. Kees, an attorney with the Asa Hutchinson Law Group, PLC (“AHLG”) in Rogers, Arkansas. In his request, Mr. Kees seeks advice from the Ethics Commission concerning “the formation and use of a legal defense fund for an elected government official.”

In his letter, Mr. Kees states that the AHLG represents an elected county official who has been charged with certain misdemeanors in Circuit Court and also faces removal from office for the alleged conduct. The request letter describes the firm’s intent to set up an irrevocable trust for the purpose of the legal defense fund, with the trustee having complete control over the fund. As described, the client would have no control over the funds nor receive any benefit from them except for the payment of his legal fees.

Additionally, the request states that the contributions to the fund would be unlimited and open to the public. The trust would also provide for donations to charities of the trustee’s choosing in the event any funds remain after the conclusion of the proceedings.

In determining the propriety of such an arrangement, the initial question to be answered is whether or not the legal defense fund, and specifically the donations to it, amount to a prohibited gift or compensation under Arkansas Code Ann. § 21-8-801. That statute provides, in pertinent part, as follows:

[n]o public servant<sup>1</sup> shall...[r]eceive a gift or compensation as defined in subchapter 4 of this chapter, other than income and benefits from the governmental body to which he or she is duly entitled, for the performance of the duties and responsibilities of his or her office or position.

The Commission has previously specifically addressed the scope and meaning of Ark. Code Ann. § 21-8-801 in Advisory Opinion 99-EC-007. Therein, the Commission determined that a gift is prohibited by Ark. Code Ann. § 21-8-801 if there is a unidirectional relationship between the gift and the action – i.e., the gift is for or because of the action.

<sup>1</sup> The term “public servant” is defined in Ark. Code Ann. § 21-8-402(18) to include any person holding an elective office of any governmental body.

The Commission went on to note that the statute does not speak in terms of a public servant performing a specific act or duty. Instead, it uses the language "for the performance of the duties and responsibilities of his or her office or position." The Commission interpreted that language to mean "for doing his or her job." Thus, Ark. Code Ann. § 21-8-801 prohibits the receipt of a gift intended to reward a public servant for doing his or her job.

The Commission subsequently promulgated a set of Rules on Gifts and the statutory prohibition in question is encompassed within § 303 of those rules. The definition of "gift," as set forth in Ark. Code Ann. § 21-8-402(5) and in § 300 (b) of the Rules on Gifts, specifically excludes anything with a value of one hundred dollars (\$100.00) or less. Accordingly, a public servant may receive an item conferred to show appreciation for the public servant's job performance so long as the item is not worth more than one hundred dollars (\$100.00).

After due consideration of the foregoing provisions, the Commission concludes that the legal defense fund would directly benefit the public servant and is related to the official's conduct in office. Accordingly, such a fund would be permissible only so long as no person donates more than one hundred dollars (\$100.00). Although the fund itself would exceed \$100 in value, because the definition of "gift" excludes anything with a value of \$100 or less, it would be permissible for a trustee to receive such funds for the elected official's defense provided *each such* donation does not exceed \$100.

In reaching this conclusion, the Commission is of the opinion that the proposed legal defense fund presents a unique arrangement under which the potential for improper influence is unlikely. Although collective gifts are generally not permissible, the Commission finds that having a trustee receive and distribute the funds is merely an additional safeguard. Donations to the fund would still be attributable to the original donor and, therefore, any donation in excess of \$100 would be a prohibited gift under Ark. Code Ann. § 21-8-801.

With respect to the proposed donation to charities of any funds remaining after the conclusion of the proceedings, the Commission previously opined on this subject in Advisory Opinion No. 2000-EC-007. The issue raised by this question is whether the making of a donation to a charity in the name of a public servant constitutes a "gift" to the public servant. The Commission concluded that the answer to that question depends upon whether or not the public servant exercises any control in regard to the charitable contribution.

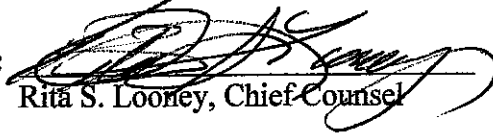
In situations where a public servant is allowed to name or approve the recipient of a charitable contribution, the Commission opined that the public servant has received the equivalent of a gift certificate, something which can be dispensed according to his or her own interests. If, on the other hand, a public servant exercises no control in regard to a charitable contribution but is merely named as an honoree in connection therewith, then he or she may feel flattered but would not have received anything of value to dispense or use.

On the facts presented, the trustee of the fund trust would make the decision concerning the recipient of the proposed charitable contribution. Accordingly, it is the Commission's opinion that the balance of the proceeds from the event may be donated to a charity of the trustee's choosing—not that of the public servant—which is exempt from taxation under § 501(c)(3) of the Internal Revenue Code.

This advisory opinion is issued by the Commission pursuant to Ark. Code Ann. § 7-6-217(g)(2).

**ARKANSAS ETHICS COMMISSION**

By:

  
Rita S. Looney, Chief Counsel