

ADVISORY OPINION NO. 2005-20

Issued on December 1, 2005 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Elected County Assessor asks**: (1) Whether there is any prohibition in the Ethics Act against the establishment of a legal defense fund; (2) Whether a general announcement about the existence of the fund is permissible or constitutes a solicitation; and, (3) What limitations exist in regards to persons who may contribute.

FACTS RELIED UPON BY THE COMMISSION

The requestor is an elected county assessor. He has incurred significant legal fees to defend himself against a pending criminal indictment.

To defray his legal costs, he seeks to establish a legal defense fund. According to the requestor, the legal defense fund will be subject to the following terms and conditions:

- (1) The Legal Defense Trust Fund will be governed by a written trust agreement;
- (2) The trustee of the Legal Defense Trust Fund will be an unrelated, independent third party who is not controlled by or under the supervision or influence of the requestor;
- (3) The Legal Defense Trust Fund will only accept contributions from individuals. It will maintain a list of contributors containing the name, address, and amount contributed for each individual making a contribution to the Legal Defense Trust Fund. The trustee will be prohibited from disclosing this list to the requestor but will be directed to make this list available to the West Virginia Ethics Commission or its designee upon request.
- (4) Prior to accepting a contribution to the Legal Defense Trust Fund in excess of \$1,000, the trustee of the Legal Defense Trust Fund will require that any individual making a contribution to the Legal Defense Trust Fund in excess of \$1,000 sign an affidavit stating that the individual is not an individual described in West Virginia Code Section 6B-2-5(c)(1)(A), (B), or (C).
- (5) The trustee of the Legal Defense Trust Fund shall keep records of all expenditures from the Legal Defense Trust Fund. The trustee will only be permitted to utilize the amounts contributed to the Legal Defense Trust Fund for administrative expenses of the trust and for the legal fees and expenses incurred in connection with the requestor's legal defense.

(6) In the event any funds remain in the Legal Defense Trust Fund following the conclusion of the criminal proceedings, the trustee of the Legal Defense Trust Fund will be directed to distribute the excess funds to one or more charitable organizations located in the county where the requestor is an elected official.

The requestor states that the fund will not accept funds from the following individuals:

- (a) Lobbyists;
- (b) Persons doing or seeking to do business with the Assessor's Office as vendors or suppliers;
- (c) Persons who are regulated, controlled, or supervised by the Assessor's office; or
- (d) Persons who have a financial interest which may be substantially or materially affected, in a manner distinguishable from the public generally, by the performance or non-performance of the duties of the County Assessor. For purposes of this category, only persons who own real or personal property in the County who have a pending dispute concerning the assessed value or tax classification of real or personal property located in the County would be deemed to have a financial interest that is substantially and materially affected, in a manner distinguishable from the public generally, by the performance or non-performance of the Assessor's duties.

The requestor intends to issue general notices about the existence of the Legal Defense Trust Fund. He requests permission to publicize the existence of the Legal Defense Trust Fund by any means, provided the purpose of the communication is to give notice to the public of the existence of the Legal Defense Trust Fund and the person or persons providing this notice do not request or solicit contributions to the Legal Defense Trust Fund. He asserts that to prohibit him from issuing a general notice about the existence of the fund would infringe upon his First Amendment Rights.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(c)(1) states in relevant part:

(c) Gifts. -- (1) A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family: Provided, That no public official or public employee may solicit for a charitable purpose any gift from any person who is also an official or employee of the state and whose position as such is subordinate to the soliciting official or employee:....No official or employee may knowingly accept any gift, directly or indirectly, from a lobbyist or from any person whom the official or employee knows or has reason to know:

- (A) Is doing or seeking to do business of any kind with his or her agency;
- (B) Is engaged in activities which are regulated or controlled by his or her agency; or
- (C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his official duties.

ADVISORY OPINION

Establishment of fund - There is no prohibition in the Ethics Act against the establishment of a legal defense fund. However the fund must be operated in a manner which complies with the significant limitations in the Ethics Act against the solicitation and acceptance of gifts.

Restrictions on publicizing the existence of the fund - The Ethics Act prohibits public officials from soliciting gifts from any person, not just an "interested person," unless the gift is for a charitable purpose. The Commission previously ruled in Advisory opinions 93-11 that a defense fund established to defray legal costs does not constitute a charitable purpose. Since the purpose of a legal defense fund is not charitable, the requestor may not solicit donations.

The requestor inquires whether a general notice announcing the existence of the fund and the restrictions on contributing constitutes a prohibited solicitation under the Ethics Act. The Commission finds that issuing a general notice about the existence of the fund, and setting forth the restrictions on contributing, is permissible, provided there is no request for contributions. This conclusion appears to balance the spirit and intent of the Ethics Act with any arguable First Amendment Right that the requestor has in disclosing the existence of the fund. The Commission does caution that citizens may not on their own initiative solicit on behalf of the requestor. (AO 93-11).

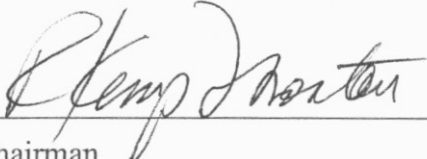
Restrictions on acceptance of gifts - The Ethics Act and rules of the Commission governing gifts prohibit the acceptance of a gift in excess of \$ 25.00 from a lobbyist or an interested party. (W.Va. C.S.R. §158-7-4). An interested party is any person who: (A) Is doing or seeking to do business of any kind with his or her agency;(B) Is engaged in activities which are regulated or controlled by his or her agency; or (C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his official duties.

The requestor indicates that his interpretation of paragraph C is that he can accept contributions in excess of \$ 25.00 as long as the contribution is from a person who does not have a pending dispute concerning the assessed value or tax classification of real or personal property. The Commission disagrees with the requestor's interpretation of who constitutes an interested party in regards to an elected assessor.

In a past opinion, the Commission held that a County Prosecuting Attorney had authority to regulate or control every citizen in the county and as such he could not accept gifts in excess of \$25.00 from any person in his county. (A.O. 91-13). Likewise in this case the Commission finds that any person who either resides in the Assessor's County, or owns real or personal property in the County, is an

interested person. Therefore the Assessor is prohibited from accepting any contribution or gift in excess of \$ 25.00 from this class of individuals. An unsolicited contribution in excess of \$ 25.00 may only be accepted from individuals who do not reside in the county, do not own real or personal property in the county, nor have any other financial interest which may be substantially and materially affected by the performance or nonperformance of the requestor's duties.

This opinion is limited to the facts and circumstances of this particular case and may not be relied upon as a precedent by other persons.


Chairman