

# ARKANSAS ETHICS COMMISSION

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## ADVISORY OPINION NO. 2020-EC-003 Issued December 17, 2020

The Arkansas Ethics Commission (the “Commission”) has received a written advisory opinion request from the Honorable Alan Clark, State Senator – District 13. Therein, Senator Clark provides the following information:

*Eighteen legislators and a few citizens are named plaintiffs in a lawsuit that was filed in Pulaski County Circuit Court on September 3, 2020<sup>1</sup>. I am one of the eighteen legislators. None of the 18 legislators are paying for this lawsuit, and there is no personal gain for this group of legislators. In my recent conversation with Director Graham Sloan, I asked the direct question as to whether he thought this violated state ethics laws. He advised me that he did not think it was in violation of the ethics laws. Mr. Sloan also advised that he could not speak for the entire Commission. Mr. Sloan and I also discussed the fact that if a legislator was not financially well off, if it was an illegal gift, that legislator would not have the benefit of using the judiciary. There is obviously a vast difference between a lawsuit filed in a legislative capacity for the public good and a personal lawsuit. In the case of a personal lawsuit or a personal business lawsuit, it would be considered a gift.*

Senator Clark posed the following questions:

- 1. If an individual is paying the fees associated with the aforementioned lawsuit, is this an illegal contribution or an improper gift to a member or members of the Arkansas General Assembly?*

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<sup>1</sup> The lawsuit, styled *Representative/Senator-elect Dan Sullivan, in his official capacity, et al. v. Jose Romero M.D., Secretary of the Department of Health, in his official capacity* and assigned case number 60CV-20-4915, was dismissed by Pulaski County Circuit Judge Wendell Griffen on October 23, 2020. Travis Story, attorney for the plaintiffs, filed a Notice of Appeal on November 4, 2020.

2. *If it were considered a gift for a legislator, is it also considered a gift for any other citizen who has attached their name to this lawsuit?*
3. *If it were considered a gift, would everyone have to legally pay the exact same amount or is there any such requirement in law for those who participate in a class lawsuit for the good of the whole?*
4. *If not, what would the minimum that one could pay, legislator or not, and not be charged with taking a gift?*

It should be noted at the outset that the advisory opinion process is not a vehicle designed to make factual findings regarding events that have already occurred. An advisory opinion, by its very nature, is intended to provide guidance related to future conduct—not past events—and is prospective in its application. Accordingly, the Commission refrains from opining about the permissibility of a specific past event. While this opinion is not applicable to the lawsuit Senator Clark has asked about, his questions present an opportunity for the Commission to highlight issues that legislators could face in future situations.

It would not be advisable to accept payment for legal fees without knowing who was making the payment. Members of the General Assembly are subject to constitutional provisions restricting them from accepting certain gifts. Article 19, § 30(a) of the Arkansas Constitution<sup>2</sup> provides, in pertinent part, as follows:

Persons elected or appointed to the following offices shall not knowingly or willfully solicit or accept a gift from a lobbyist<sup>3</sup>, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist:

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<sup>2</sup> During the 2013 Regular Session, the Arkansas General Assembly enacted House Joint Resolution 1009, which was entitled the Arkansas Elected Officials Ethics, Transparency, and Financial Reform Amendment of 2014. The passage by the General Assembly placed the measure on the November 4, 2014, election ballot, where it was passed by voters and became Amendment 94 to the Arkansas Constitution. Amendment 94 added §§ 29 through 31 to Article 19 of the Constitution. Act 1280 of 2015 amended those sections, including adding to the list of elected officials that the provisions applied to and adding exceptions to the definition of the term “gift”.

<sup>3</sup> Article 19, § 30(b)(8) defines a “lobbyist” as a person who: (i) Receives income or reimbursement in a combined amount of four hundred dollars (\$400) or more in a calendar quarter for lobbying one (1) or more governmental bodies; (ii) Expends four hundred dollars (\$400) or more in a calendar quarter for lobbying one (1) or more governmental bodies, excluding the cost of personal travel, lodging, meals, or dues; or (iii) Expends four hundred dollars (\$400) or more in a calendar quarter, including postage, for the express purpose of soliciting others to communicate with a public servant to influence any legislative action or administrative action of one (1) or more governmental bodies unless the communication has been filed with the Secretary of State or the communication has been published in the news media. If the communication is filed with the Secretary of State, the filing shall include the approximate number of recipients.

- (1) Governor;
- (2) Lieutenant Governor;
- (3) Secretary of State;
- (4) Treasurer of State;
- (5) Auditor of State;
- (6) Attorney General;
- (7) Commissioner of State Lands;
- (8) Member of the General Assembly;
- (9) Chief Justice of the Supreme Court;
- (10) Justice of the Supreme Court;
- (11) Chief Judge of the Court of Appeals;
- (12) Judge of the Court of Appeals;
- (13) Circuit court judge;
- (14) District court judge;
- (15) Prosecuting attorney; and
- (16) Member of the independent citizens commission for the purpose of setting salaries of elected constitutional officers of the executive department, members of the General Assembly, justices, and judges under Article 19, § 31, of this Constitution.

Article 19, § 30(b)(2) defines the term “gift” to mean (i) any payment, entertainment, service, or anything of value, unless consideration of equal or greater value has been given therefor; or (ii) any advance or loan. While the provision lists several exceptions, none seem applicable to the situation described by Senator Clark. Unlike Ark. Code Ann. § 21-8-801, the prohibition does not center on the intent of the person(s) giving the gift and there is no exemption for gifts with a value of one hundred dollars (\$100.00) or less. Accordingly, legislators involved in lawsuits like the matter described by Senator Clark are prohibited from allowing any legal fees to be paid by lobbyists, persons acting on behalf of a lobbyist, or persons employing or contracting with a lobbyist. Accordingly, legislators should not allow unknown persons to pay legal fees.

The payment of legal fees for public servants was previously addressed by the Commission in Advisory Opinion No. 2010-EC-002. However, that opinion request was focused on contributions to legal defense funds. The question answered in that opinion was whether or not a legal defense fund for an elected official, and specifically the donations to it, amount to a prohibited gift or compensation under Arkansas Code Ann. § 21-8-801. While Senator Clark’s questions pertain to a situation clearly distinguishable from funds collected for a legal defense fund, Ark. Code Ann. § 21-8-801 is potentially applicable.

Arkansas Code Ann. § 21-8-801 provides, in pertinent part, as follows:

No public servant<sup>4</sup> shall...receive 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.

Ark. Code Ann. § 21-8-402(5)(A) defines the term “gift” to mean any payment, entertainment, advance, services, or anything of value, unless consideration of equal or greater value has been given therefor. Ark. Code Ann. § 21-8-402(5)(B) sets forth a number of exceptions to the term “gift”. The only pertinent exception to Senator Clark’s questions about legal fees 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).

While the payment of legal fees associated with such a lawsuit may not seem like what people traditionally think of as a gift, payments of more than \$100.00 meet the definition. The legal fees for such a lawsuit could be reported on a pro-rata share for each plaintiff, even if not all plaintiffs are required to disclose information on a SFI. For example, if the suit has eighteen (18) legislator plaintiffs and seven (7) non-legislator plaintiffs and the total legal fees were \$10,000, each plaintiff would have received a \$400 gift if a third party paid the legal fees.

Ark. Code Ann. § 21-8-402(7)(A) defines the terms “income” or “compensation” to mean any money or anything of value received or to be received as a claim for future services, whether in the form of a retainer, fee, salary, expense, allowance, forbearance, forgiveness, interest, dividend, royalty, rent, or any other form of recompense or any combination thereof. It includes a payment made under obligation for services or other value received. In Advisory Opinion No. 99-EC-007, the Commission addressed prohibited compensation in the form of supplementing a public servant’s salary. In that opinion, the Commission noted that if a public servant were allowed to accept compensation from outside sources for performing the duties and responsibilities of his or her position, such practice could lead to divided loyalties. Even if corruption were not intended, the recipient could tend to provide preferential treatment, albeit subconsciously, to those persons supplementing his or her salary.

In Advisory Opinion No. 2010-EC-002, the Commission noted 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.”

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<sup>4</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.

Thus, Ark. Code Ann. § 21-8-801 prohibits the receipt of a gift or compensation intended to reward a public servant for doing his or her job.

In summary, a legislator could not legally allow a lobbyist, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist to pay legal fees on that legislator's behalf. For this reason, a legislator (or any other public servant subject to the prohibitions set forth in Article 19, Section 30 of the Arkansas Constitution) should identify the donor before allowing someone to pay his or her legal fees. The legislator could allow someone other than a lobbyist, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist to pay legal fees if the payment did not exceed \$100.00. If the payment exceeds \$100.00, the payment would be considered a gift and the subjective intent of the donor would determine whether or not the payment would violate Ark. Code Ann. § 21-8-801.

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

**ARKANSAS ETHICS COMMISSION**

By:   
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