



OHIO ETHICS COMMISSION

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Advisory Opinion

No. 76-011

June 22, 1976

Syllabus by the Ohio Ethics Commission:

- 1) The name of a corporation which transacts business in Ohio must be disclosed, pursuant to Section 102.02 (A)(3) of the Revised Code, if the corporation is incorporated under Chapter 1701 of the Revised Code or if the corporation holds a certificate of compliance under the provisions of Chapter 1703 of the Revised Code.
- 2) A trust, for purposes of Section 102.02 (A)(3) of the Revised Code, is a relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another.
- 3) A fiduciary relationship, for purposes of Section 102.02 (A)(3) of the Revised Code, includes the relationship of director to a corporation and a trustee to a trust.
- 4) Section 102.02 (A)(3) of the Revised Code requires a candidate for county office to disclose the name of every corporation, incorporated in Ohio or holding a certificate of compliance authorizing it to do business in Ohio, and the name of every trust, which transacts business in Ohio, in which the candidate holds an office or has a fiduciary relationship, along with a brief description of the nature of the office or the relationship.

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Your request for an advisory opinion asks whether a candidate for a county office must disclose "the names of each trust and corporation in which he is a trustee or officer or director when such relationship was established through his private practice of law and from which he received no fees or compensation, as such trustee, director, or officer, except those paid to the law firm." You base your question upon hypothetical facts, and have asked the Ohio Ethics Commission to assume that the hypothetical "candidate for office is also a practicing attorney, but that there is no conflict between the private practice and the office which he seeks." You state that "in the practice of law the candidate had previously entered into relationships with clients in which he became trustee of trusts created by clients as well as an officer or director of corporations formed for clients." You state that no compensation was received for serving as trustee or director, but that "fees were charged for serving as a lawyer for the same organization and fees were paid to the candidate's law firm for that service."

Section 102.02 (A) of the Revised Code established the filing requirement for candidates for county office:

"Every person who is . . . a candidate for a . . . county

. . . office . . . shall file with the appropriate ethics commission . . . a statement . . ."

That statement must include certain information about the candidate, his sources of income, real estate and investments which he has and a list of his debtors and creditors. Specifically, Section 102.02 (A)(3) of the Revised Code requires a candidate to disclose the name of corporations and trusts in which he holds an office or has a fiduciary relationship and a description of that office or relationship:

"The name of every corporation on file with the Secretary of State which is incorporated in Ohio or holds a certificate of compliance authorizing it to do business in this state, trust, business trust, partnership, or association which transacts business in Ohio in which the person or any other person for his use and benefit has an investment of over one thousand dollars at fair market value as of the date of the statement, or in which the person holds any office or has a fiduciary relationship, and a description of the nature of the investment, office or relationship. . . ." (Emphasis added.)

In order to apply this section of the law to the facts presented it is necessary to set out definitions for several terms.

The names of corporations which are incorporated in Ohio or which hold a certificate of compliance to do business in Ohio must be disclosed on the financial disclosure statement pursuant to Section 102.02 of the Revised Code. Section 1701.04 of the Revised Code sets out the incorporation procedure used for a corporation for profit in Ohio:

"(A) Any person, singly or jointly with others, and without regard to residence, domicile, or state of incorporation, may form a corporation by signing and filing with the secretary of state articles of incorporation which shall set forth:

- 1) The name of the corporation, which shall end with or include 'Company,' 'Co.,' 'Corporation,' 'Corp.,' 'Incorporated,' or 'Inc.' . . .

(D) The legal existence of the corporation shall begin upon the filing of the articles and, unless the articles otherwise provide, its period of existence shall be perpetual."

Thus, a corporation for profit "which is incorporated in Ohio" is one which meets the requirements of Section 1701.04 of the revised Code. The Federal District Court held, in United States v. Kessler, 61 Ohio Op. 2d 359, 362 (1972), that "the legal existence of an Ohio corporation commences at the time of the filing of the articles of incorporation in accordance with the Revised Code Section 1701.04."

Therefore, pursuant to Section 102.02 (A)(3) of the Revised Code, the requirement to disclose the name of every corporation on file with the Secretary of State "which is incorporated in Ohio" means that corporations required to be disclosed are those formed in accordance with the requirements of Section 1701.04 of the Revised Code.

The phrase "holds a certificate of compliance authorizing it to do business in this state," when referring to a corporation, means that a foreign corporation is licensed to transact business in this state. Section 1703.05 of the Revised Code specifically directs the Secretary of State to issue to such foreign corporation a license certificate authorizing it to transact business in Ohio:

"When the application of a foreign corporation for a license to transact business in this state has been accepted for filing and the filing fee has been paid, the secretary of state shall issue to such a corporation a license certificate authorizing it to transact business in this state, subject to expiration or cancellation of such license as provided by law, until it fails to pay the installments of the license fee as required by Section 1703.11 of the Revised Code." (Emphasis added.)

Thus, in addition to corporations incorporated in Ohio, foreign corporations which have received license certificates authorizing them to transact business in Ohio are the types of corporations the names of which are required to be disclosed by Section 102.02 of the Revised Code.

Your request also asks whether a candidate must disclose the names of those trusts of which the candidate is a trustee. Section 102.02 (A)(3) of the Revised Code, quoted above, requires the disclosure of the name of every trust which transacts business in Ohio in which the candidate has a fiduciary relationship, and a description of the nature of the relationship.

The Supreme Court of Ohio in Hill v. Irons, 160 Ohio St. 21, 26, (1953), while discussing whether a deed which was transferred, together with the execution of a written contract concerning the transfer, amounted to a transfer in trust, discussed, in general, the characteristics of a trust.

"It is appropriate to first consider the inherent characteristics of a trust.

In Restatement of the Law of Trusts, Chapter 1, page 6, the following is stated as the definition of trusts:

'A trust, as the term is used in the Restatement of of this subject . . . is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.'

That definition is cited and approved in 1 Scott on Trusts, 34, Section 2.3.

The definition in 1 Bogert on Trusts and Trustees, 1, Section 1, is:

'A trust may be defined as a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest

for the benefit of another.'

The foregoing definitions are generally accepted."

Since "trusts", for purposes of Section 102.02 (A)(3) of the Revised Code is not statutorily defined, the general definition set out by the Court above is an appropriate one. However, only those trusts or corporations, as defined above, which "transact business in Ohio" and in which the candidate holds an office or with which he has a "fiduciary relationship" or in which a person filing a financial disclosure statement has an investment of over one thousand dollars must be disclosed.

The term "transacts business in Ohio" is not defined statutorily. In Advisory Opinion No. 76-008, the Ohio Ethics Commission held that the rules of statutory construction provide that in the absence of a statutory definition, words of a statute are given a plain, commonly understood meaning. That opinion cited *Kocsorak v. Cleveland Trust Co.*, 151 Ohio St. 212, 216 (1949), ". . . words of a statute must be given their common, ordinary and accepted meaning in the connection in which they are used . . ." The Second College Edition of Webster's New World Dictionary defines "transact", in reference to business, as meaning "to carry on, to perform, conduct, or complete." For tax purposes "business" is defined in Section 5701.08 (B) of the Revised Code as follows:

"Business includes all enterprises, except agriculture, conducted for gain, profit, or income and extends to personal service occupations."

For purposes of Section 102.03 (A)(3) of the Revised Code the phrase "transacts business" means to carry on an enterprise for gain, profit or income. A candidate filing a financial disclosure statement must disclose the name of every trust or corporation which carries on an enterprise for gain, profit or income. Such an interpretation necessarily excludes from the disclosure filing requirement the names of corporations not for profit which are established under Chapter 1702 of the Revised Code.

Ohio courts have long held that a non-profit corporation does not transact business. In *City Hospital of Akron v. Lewis*, 47 Ohio App. 465, 469-470 (1934), the Court of Appeals explained that "the word 'business,' used in describing a corporation, connotes a commercial or industrial enterprise, or signifies mercantile transactions." The court went on to state:

"A corporation not for profit . . . is . . . one not engaged in conducting business . . ."

The second qualification which must be met before the names of a corporation or trust must be disclosed by a candidate, is that the corporation or trust is one in which the candidate holds an office or has a fiduciary relationship. Section 1701.64 sets forth who shall be considered officers of corporations:

"(A) The officers of a corporation shall consist of a president, a secretary, a treasurer, and, if desired, a chairman of the board, one or more vice presidents, and such other officers and assistant officers as may be deemed necessary. The officers shall be elected by the directors. The chairman of the board shall be a director. Unless the articles or the regulations otherwise provide, none of the other officers need be a director. Any two or more offices may be held by the same person, but no officer shall execute, acknowledge, or verify any instrument in more than one capacity if such instrument is required by law or by the articles, the regulations, or the bylaws to be executed, acknowledged, or verified by two or more officers. Unless the articles or the regulations otherwise provide, all officers shall be elected annually. . . ."

Therefore, an officer of a corporation is a person who holds an office listed in the above quoted Section.

The next issue to be addressed requires a definition for the term "fiduciary" as used in the phrase "fiduciary relationship." Section 1339.01 (A) of the Revised Code, in the chapter which deals with fiduciary law, defines fiduciary as:

"'Fiduciary' includes a trustee under any trust, expressed, implied, resulting, or constructive; an executor, public administrator, administrator, guardian, committee, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a public or private corporation, or public officer; or any other person acting in a fiduciary capacity for any person, trust, or estate. . . ."

Section 2109.01 of the Revised Code, within the Probate chapter of the Revised Code, defines fiduciary as:

"'Fiduciary' as used in Chapters 2101. to 2131., inclusive, of the Revised Code, means any person, association, or corporation, other than an assignee or trustee for any solvent debtor or a guardian under Sections 5905.01 to 5905.19, inclusive, of the Revised Code, appointed by and accountable to the probate court and acting in a fiduciary capacity for any person, association, or corporation, or charged with duties in relation to any property, interest, trust or estate for the benefit of another; . . ."

Therefore, there appears to be two kinds of fiduciary, probate and non-probate.

Recognizing this distinction does not, however, aid in establishing the appropriate definition of the term as used in Section 102.02 (A)(3) of the Revised Code. One conclusion is evident from the above statutory and encyclopedia definitions -- beyond the very general definition of a relationship of trust and confidence in regard to another, the term "fiduciary relationship" is described, rather than defined. For instance, in Section 1339.01 (A) of the Revised Code, an "executor, administrator or trustee" is a fiduciary.

In regard to a "fiduciary relationship" within a trust, the Ohio case of Hill v. Irons, supra at page 26, states that "a trust may be defined as a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another." (Emphasis added.) Ulmer v. Fulton, 129 Ohio St. 323, 339, (1935), holds that he, to whom the property is given in trust and in whom the legal title vests, is named the trustee.

Thus, a candidate for a county office who is a trustee for a trust, is in a fiduciary relationship with that trust and is required to disclose his fiduciary relationship of trustee on his financial disclosure statement, pursuant to Section 102.02 (A)(3) of the Revised Code.

Your request also specifically asks if the position of director of a corporation must be disclosed. In Selama-Dindings Plantations, Ltd. v. Durham, 24 Ohio Op. 2d 80, 88 (1963), the District Court restated the long established law in Ohio that "(E)ach of the directors of a corporation stands in a fiduciary relationship to the corporation . . ." Thus, the relationship of a director to a corporation is a fiduciary one. Therefore, a candidate for county office who is also a director of a corporation incorporated in Ohio, or holding a certificate of compliance authorizing it to transact business in Ohio must disclose the name of the corporation and his relationship of director with the corporation pursuant to Section 102.02 (A)(3) of the Revised Code.

It should be pointed out that although the candidate for county office who is a director of a corporation may not be an officer of that corporation under the provisions of Section 1701.64 of the Revised Code, set out above, he would nonetheless, be required to disclose his position as a director since, as such, he serves in a fiduciary relationship with the corporation.

Thus, a candidate for a county office is required to disclose the names of any corporation or trust in which he holds a position as officer or director or has a fiduciary relationship as well as describing that office or relationship.

Therefore, it is the opinion of the Ohio Ethics Commission and you are so advised that: the name of a corporation must be disclosed, pursuant to Section 102.02 (A) (3) of the Revised Code, if the corporation is incorporated under Chapter 1701 of the Revised Code or if the corporation holds a certificate of compliance under the provisions of Chapter 1703 of the Revised Code; a trust, for purposes of Section 102.02 (A)(3) of the Revised Code is a relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another; a fiduciary relationship for purposes of Section 102.02 (A)(3) of the Revised Code includes the relationship of director to a corporation and a trustee to a trust; and that Section 102.02 (A)(3) of the Revised Code requires a candidate for county office to disclose the name of every corporation, incorporated in Ohio or holding a certificate of compliance authorizing it to do business in Ohio, and the name of every trust, which transacts business in Ohio, in which the candidate holds an office or has a fiduciary relationship, along with a brief description of the nature of the office or the relationship.

Merom Brachman