

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



Office of Government Ethics

February 13, 2013

VIA EMAIL TO:

Hon. David Catania, Chair, Committee on Education
c/o V. David Zvenyach, General Counsel
Office of the General Counsel
Council of the District of Columbia
vzvenyach@dccouncil.us

Dear Councilmember Catania:

This responds to the letter dated February 6, 2013, sent to us on your behalf by V. David Zvenyach, General Counsel to the Council of the District of Columbia, in which you seek guidance pursuant to section 219 of the Government Ethics Act of 2011.¹ The letter states that you recently were named Chair of the Council's Committee on Education and, since assuming that role, have been in communication with a private philanthropist concerning a legislative proposal that would be within the Committee's purview. The letter states that the private philanthropist has offered to arrange to retain counsel, at private expense, to help prepare a legislative proposal for use by you, in your capacity as Chair of the Council Committee on Education, and the Committee. The letter also states that no pecuniary or fiduciary relationship exists between you and the private parties at issue.

The offer to provide paid legal services to the Council by a private individual is, in fact, a donation and should be viewed as such. As you may be aware, Congress has enacted legislation that permits any entity of the District Government to accept and use a gift or donation from an outside source. D.C. Official Code § 1-329.01. The gift or donation must be used to carry out an authorized function or duty of the government entity. D.C. Official Code § 1-329.01(a)(1)(B). There is also the requirement that the Mayor approve the acceptance and use of the gift, although that requirement does not apply in the case of either the Council or the District's courts. There is, however, a requirement that accurate and detailed records be kept by the entity and that such records be made available for audit and public inspection. D.C. Official Code § 1-329.01(b).

Notwithstanding the exception to Mayoral approval for the Council, I note that the Executive has in place an advanced system for considering, accepting, approving and

¹ Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012, D.C. Law 19-124, D.C. Official Code § 1-1161.01 *et seq.*

tracking donations. This is embodied in a Mayor's Memorandum (Mayor's Memorandum 2012-3, May 16, 2012), which provides detailed guidelines for processing donations and includes circumstances under which a donation would not be appropriate in light of prevailing government ethics rules. I do not believe that the Council currently has a similar system in place.

In the absence of a system for reviewing and accepting donations, I suggest that the Committee at least follow some of the Executive's practices not only to comply with the Donation statute, but to avoid government ethics pitfalls as well. For instance, the Executive requires that a donor execute a Donation Agreement. That agreement, among other things, requires the parties to acknowledge that there is neither litigation pending before the District, nor any transactions pending before the District Government involving the Donor. In its application, the Donor must also certify that there is no expectation of special treatment from the District as a result of the donation, also known as a quid pro quo, and that the donation will not be used by the donor to state or imply the endorsement by the District government of a product, service, or entity. Most important, the donation must not create an apparent or actual conflict of interest, which might be the case if the donor had some interest over which the Committee or the Council has authority. This would certainly be true if either the Donor or the attorney were a registered and active lobbyist.

As long as these concerns are satisfied, the only remaining question is whether the donation is consistent with the authorized functions and duties of the Committee. The letter states that the attorney would be used to help prepare a legislative proposal. Insofar as Council Committees and their members are tasked with drafting, creating and considering legislation and legislative proposals, I see nothing problematic with accepting the services of an outside attorney to accomplish those very tasks.

There is another factor you should be aware of as well. Because this is a donation of the services of an attorney, it must also be clear that the attorney is answerable to the Committee, not to the Donor, and that the attorney will neither take direction from the Donor nor share confidential information with the Donor. It must be understood by all that the Committee is the client. Although there are separate ethics rules for attorneys who engage in this type of third-party financial arrangement,² these provisions should also be set out in any donation agreement.

Accordingly, as long as accurate and detailed records of the donation of services are maintained and available for audit and public inspection, and the aforementioned government ethics concerns are satisfied, the Council Committee on Education is permitted to accept such services, paid for by a private donor, to assist it in performing its official functions.

Please be advised that this advice is provided to you pursuant to section 219 of the Government Ethics Act of 2011, which empowers me to provide such guidance. As a result, no enforcement action for violation of the District's Code of Conduct may be taken against you in this context, provided that you have made full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion.

² See Rule 1.8(e), District of Columbia Rules of Professional Conduct.

