

## **ADVISORY NO. 2008-10**

July 18, 2008

To: All County Boards of Elections Members, Directors and Deputy Directors

Re: Reporting Facts of Investigations under R.C. 3501.11(J); Issuing and Serving Subpoenas

### **Report of Investigation Facts**

Under R.C. 3501.11(J), each county board of elections is vested with the authority and the duty to investigate irregularities, nonperformance of duties, and other violations of Title XXXV of the Ohio Revised Code by election officers and other persons. Last year, Amended Substitute House Bill No. 119 amended this statute to provide a board of elections the option of reporting the facts adduced in an investigation conducted pursuant to R.C. 3501.11(J) to the secretary of state, instead of the county prosecutor.

A county board of elections that chooses to report the facts of its investigation to the secretary of state shall do so in writing. The report should provide a historical summary of the matter and a list of the board's factual findings. The board may attach relevant exhibits or other documents to its report. If a board opts to report facts of its investigation to the secretary of state rather than the county prosecutor, the report and any attachments must be submitted to the secretary of state's director of elections. However, as a general rule, a board is also encouraged to report the facts of an investigation to its county prosecutor.

### **Issuing and Serving Subpoenas**

R.C. 3501.11(J) provides that a board of elections shall "administer oaths, issue subpoenas, summon witnesses, and compel the production of books, papers, records, and other evidence in connection with any such investigation." However, nothing in Ohio's election laws prescribes either the form of the subpoena or a procedure for serving subpoenas.

A subpoena is more than a mere notice to appear before the board. A subpoena carries with it the weight of law, commanding the appearance of a person and/or compelling the production of documents. Failure to obey a subpoena carries the potential of criminal sanctions. Therefore, it is important that a subpoena sufficiently identify the person and/or documents to be produced. It is also important that appropriate procedures are followed to ensure the timely delivery of a subpoena with adequate notice of the board proceeding.

Absent a statute that expressly provides otherwise, subpoenas issued in connection with non-criminal proceedings are governed generally by the Rule 45 of the Rules of Civil Procedure (cited as "Civ. R. 45"). It is, and has been, the position of the secretary of state's office that a subpoena issued by a board of elections acting in its capacity as a quasi-judicial body must satisfy the provisions of Civ. R. 45(A), as follows:

**(A) Form; issuance; notice**

(1) Every subpoena shall do all of the following:

(a) state the name of the [board of elections, when it is acting in a quasi-judicial capacity] from which it is issued, the title of the action, and the case number;

(b) command each person to whom it is directed, at a time and place specified in the subpoena, to:

(i) attend and give testimony at a trial, hearing, or deposition;

(ii) produce documents or tangible things at a trial, hearing, or deposition;

(iii) produce and permit inspection and copying of any designated documents that are in the possession, custody, or control of the person;

(iv) produce and permit inspection and copying, testing, or sampling of any tangible things that are in the possession, custody, or control of the person; or

(v) permit entry upon designated land or other property that is in the possession or control of the person for the purposes described in Civ. R. 34(A)(3).

(c) set forth the text of divisions (C) and (D) of this rule.

A command to produce and permit inspection may be joined with a command to attend and give testimony, or may be issued separately.

A subpoena may not be used to obtain the attendance of a party or the production of documents by a party in discovery. Rather, a party's attendance at a deposition may be obtained only by notice under Civ. R. 30, and documents may be obtained from a party in discovery only pursuant to Civ. R. 34.

(2) The clerk [in the case of the board of elections, the director and deputy director jointly] shall issue a subpoena, signed, but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney who has filed an appearance on behalf of a party in an action may also sign and issue a subpoena on behalf of the [the board of elections, when it is acting in a quasi-judicial capacity] in which the action is pending.

(3) A party on whose behalf a subpoena is issued under division (A)(1)(b)(ii), (iii), (iv), or (v) of this rule shall serve prompt written notice, including a copy of the subpoena, on all other parties as provided in Civ. R. 5. If the issuing attorney modifies a subpoena issued under division (A)(1)(b)(ii), (iii), (iv), or (v) of this rule in any way, the issuing attorney shall give prompt written notice of the modification, including a copy of the subpoena as modified, to all other parties.

Under Civ. R. 45, your board of elections will need to have a subpoena form available for its own use and for use by attorneys who request them for matters before the board in its quasi-judicial capacity. Your prosecutor may assist in the development of a subpoena form if you do not have one already. It will likely be based on or similar to what your county court of common pleas uses for subpoenas in its own matters.

Further, it continues to be the position of the secretary of state's office that service of a board-issued subpoena shall be governed by the provisions of Civ. R. 45(B), which requires personal service of a subpoena, as follows:

A subpoena may be served by a sheriff, bailiff, coroner, clerk of court, constable, or a deputy of any, by an attorney at law, or by any other person designated by order of court who is not a party and is not less than eighteen years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy of the subpoena to the person, by reading it to him or her in person, or by leaving it at the person's usual place of residence, and by tendering to the person upon demand the fees for one day's attendance and the mileage allowed by law. The person serving the subpoena shall file a return of the subpoena with the clerk. \*\*\* The return may be forwarded through the postal service or otherwise.

A person who ignores a lawfully issued and served subpoena may be subject to criminal penalties or sanctions by a court. With respect to a subpoena issued by a board of elections, R.C. 3599.37 provides in pertinent part as follows:

(A) No person having been subpoenaed or ordered to appear before a ... board ... in a proceeding ... upon a complaint ... for an offense under an election law shall do either of the following:

- (1) Fail to appear or, having appeared, refuse to answer a question pertinent to the matter under inquiry or investigation;
- (2) Refuse to produce, upon reasonable notice, any material, books, papers, documents, or records in that person's possession or under that person's control.

(B) Whoever violates division (A) of this section, unless the violator personally appears before the grand jury, court, board, or officer and asserts the protection of the violator's constitutional rights, is guilty of a misdemeanor of the first degree.

A person to whom a board of elections issues a subpoena may assert his or her right not to testify or produce documents as demanded on the basis that such testimony or document production would tend to violate that person's Fifth Amendment right under the U.S. Constitution against self-incrimination in a criminal matter. However, the person named in the subpoena must appear before the board of elections at the time and place stated in the subpoena and personally assert his or her constitutional rights.

Every board of elections should work with the office of its county prosecutor on the crafting and service of subpoenas issued by the board pursuant to its statutory authority.

Thank you for your cooperation in this important matter. If you have questions about this Advisory, please contact the elections division or your assigned elections counsel at 614-466-2585.

Sincerely,

Jennifer Brunner