GEORGIA GOVERNMENT TRANSPARENCY AND CAMPAIGN FINANCE COMMISSION

ADVISORY OPINION
C.F.C. 2012-03 AND C.F.C 2012-05

The Georgia Government Transparency and Campaign Finance Commission (the "Commission") has received the following requests for advisory opinion from the Commission staff (Request No. 2012-03) and McKenna Long & Aldridge (Request No. 2012-05). Because these requests cover the same issues, the Commission has combined them into one advisory opinion.

QUESTION PRESENTED – C.F.C. 2012-03

Whether a candidate for a Georgia elected office may expend campaign funds from the Georgia campaign for legal fees arising from a federal investigation of conduct that occurred when the candidate was in federal office.

QUESTION PRESENTED – C.F.C. 2012-05

What is the appropriate methodology for evaluating the acceptability of attorney fee expenditures by the state campaign committee of a current or past federal office holder when such costs are clearly made in connection with the candidate's active campaign for state office, but also bear some relationship to the candidate's current or past federal position? How should a state campaign committee assess the treatment of particular attorney fee expenditures in factual scenarios where the legal services provided fundamentally relate to the candidate's run for state elective office, but cannot be cast in a light that is wholly segregated from the candidate's present or former federal office?

ADVISORY OPINION

The Georgia Government Transparency and Campaign Finance Act (the "Act") provides that

> Contributions to a candidate…shall be utilized only to defray ordinary and necessary expenses...incurred in connection with such candidate's campaign for elective office….

See O.C.G.A. § 21-5-33(a).

Under Article 1, the Act defines "ordinary and necessary expenses" as including, but not limited to

> Expenditures made during the reporting period for office costs and rent, lodging, equipment, travel, advertising, postage, staff salaries, consultants, file storage, polling, special events, volunteers, reimbursements to volunteers, repayment of any loans received except as restricted under subsection (i) of Code Section 21-5-41, contributions to nonprofit organizations, and flowers for special occasions, which shall include, but are not limited to, birthdays and funerals, and all other expenditures contemplated in Code Section 21-5-33.

See O.C.G.A. § 21-5-3(18).

While legal fees are not explicitly listed in the Act's definition of ordinary and necessary expenses, there are instances where such expenditures could be an "ordinary and necessary expense" in connection with a candidate's campaign for office. There may also be instances where legal fees would not be an "ordinary and necessary expense" in connection with a candidate's campaign for office.

The Commission finds that the acceptability of attorney fee expenditures by a state campaign committee of a current or past federal office holder is a fact-specific inquiry that must be determined on a case-by-case basis. The Commission, however, holds that such attorney fee expenditures must be connected to and in furtherance of the campaign. If a complaint is made regarding the acceptability of attorney fee expenditures, a candidate must make a full disclosure to the Commission so that an appropriate decision can be made after a full investigation of the facts.

The Commission recognizes that any such investigation may implicate the attorney-client privilege. If this privilege is raised, it is the Commission's opinion that those portions of the investigation should be performed by an Article VI court of law. But given the Commission's statutory mandate, the Commission would make this request understanding its decision can be appealed to Superior Court. *See* Ga. Const. 1983, Art. VI, 4, 1; *Skrine v. Jackson*, 73 Ga. 377 (1884).

Prepared by Jonathan Hawkins
November 16, 2012

Georgia Government Transparency and Campaign Finance Commission

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June 14, 2012

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RE: ADVISORY OPINION REQUEST
LEGAL FEES

Dear Commissioners:

This correspondence represents a formal request to the Georgia Government Transparency and Campaign Finance Commission (the "Commission") for the issuance of an advisory opinion in accordance with O.C.G.A. § 21-5-6(b)(13). This request seeks clarification regarding the proper application of the Georgia Government Transparency and Campaign Finance Act ("The Act") to factual situations involving campaign expenditures for attorney's fees associated with the defense of a candidate for statewide office.

Specifically, we seek additional guidance from the Commission regarding the treatment of legal fees paid from a campaign for a Georgia candidate for legal fees from a federal investigation that arose from conduct that occurred when the candidate was in federal office.

The Commission staff has been investigating a complaint based on the above fact pattern. The Commission staff has come to the conclusion that this case cannot be disposed of without clarification of whether the current Georgia Government Transparency and Campaign Finance Act and or Commission Rules allows campaign funds to be expended in this manner.

Should you have any questions, please contact us at your convenience.

Respectfully,

Holly LaBerge
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Re: Advisory Opinion Request—Legal Fees

Dear Ms. LaBerge and Ms. Murray-Obertein:

This correspondence represents a formal request to the Georgia Government Transparency and Campaign Finance Commission (the "Commission") for the issuance of an advisory opinion in accordance with O.C.G.A. § 21-5-6(b)(13). This request seeks clarification regarding the proper application of the Georgia Government Transparency and Campaign Finance Act (the "Act") to factual situations involving campaign committee expenditures on attorneys fees for the legal defense of a candidate for statewide office. In general, we seek additional guidance from the Commission regarding the treatment of campaign committee expenditures for attorneys fees associated with the defense of a state candidate from legal and ethical accusations wholly affecting his or her campaign for state office, but also bearing some relationship to his or her present position as a federal officeholder. Given the ambiguous and unsettled state of the law concerning this specific subject matter, and the lack of controlling precedent for same, we ask the Commission to consider the formal requests set forth herein and provide advice regarding the relevant subjects discussed.

Discussion

As set forth in O.C.G.A. § 21-5-33, a candidate for elective office in the State of Georgia may utilize contributions made to his campaign committee, and any proceeds from investing such contributions, to "defray the ordinary and necessary expenses which are incurred in connection with the candidate's campaign." In the language of O.C.G.A. § 21-5-3, the term "ordinary and necessary expenses" is characterized to include, but NOT be limited to, expenditures made in connection with a wide range of campaign costs, including staff salaries,

advertising, postage, file storage, "special events", and even "flowers for special occasions". While this section of the state code does provide some guidance on what should be considered "ordinary and necessary" expenditures made in relation to a candidate's campaign, it is by no means an exhaustive list of all the permissible uses of contributions under the Act. A number of common campaign expenditures, such as those related to recordkeeping and compliance services, information technology support services, canvassing and grassroots organizing, event security and planning, and ***legal counseling***, are not included in O.C.G.A. § 21-5-3's laundry list. Nevertheless, all of these expenses are widely accepted as ordinary, necessary and intrinsically campaign-related at the federal, state and local levels.

With regard to legal fees, the Commission and its staff have routinely accepted, reviewed and analyzed periodic campaign contribution disclosure reports ("CCDRs") that evidence the use of political contributions to defray campaign-related legal costs. In this setting, the Commission has never drawn into question the permissibility of such expenditures or indicated that the practice of paying campaign-related legal expenses with contributions would be outside the scope of the Act. In light of these facts, there is little reason under the Act to question the general permissibility of utilizing campaign committee contributions to defray the costs of ordinary and necessary legal fees connected to a campaign for state office. However, given the ambiguity of the Act's language and the unsettled nature of state law on the details of this subject, determining the limits of proper attorney fee expenditures is extremely difficult.

This is particularly the case in situations that test the "connectedness" aspect of legal fee expenditures. For example, it is extremely difficult for a state campaign committee to discern how to treat a legal expenditure under the Act when such expenditure is made "in connection with the candidate's campaign", but is also related to events, accusations, happenings, or occurrences that have a more attenuated relationship to the candidate's pursuit of state office. In choosing the language "in connection with the candidate's campaign" rather than "arising out of" or "because of", the Georgia General Assembly provided campaigns with broad leeway to make expenditures from campaign funds. In light of this fact, the Commission has historically permitted state candidates to expend campaign funds on a wide variety of legal activities, including the following: giving advice regarding compliance with ethics laws (both federal and state); defending against complaints with the Commission (for acts involving official and personal conduct); threatening legal action against third parties (such as the media, opposing candidates, and others); and other legal services performed in connection with the pursuit or retention of elective office. Generally, from the evidence available, if an attorney fee expenditure is incurred in furtherance of a candidate's campaign for state office, then the Commission has deemed it permissible for the purposes of "connectedness". However, given that the present legal authority is silent as to the issue set forth above, the Commission's tacit endorsement of most legal fee expenditures by state campaign committees provides little comfort to candidates seeking to pay their attorneys.

With this fact in mind, we seek addition guidance from the Commission regarding the correct application of the "connectedness" aspect of the legal fee analysis under O.C.G.A.

O.C.G.A. §§ 21-5-33 and 21-5-3. In particular, for the purposes of this particular advisory opinion request, we seek supplemental advice from the Commission regarding the correct application of the Act's legal fee framework in scenarios involving expenditures by state candidates who simultaneously hold federal office. Under such circumstances, the language of the Act is clearly applicable in only two highly unlikely scenarios: (1) in a situation where the expenditure of campaign contributions on legal costs is solely linked to the state campaign and has absolutely no discernible connection or relationship to the candidate's position as a federal officeholder; and (2) in the opposite scenario where the expenditure of campaign contributions on legal costs is solely linked to the candidate's position as a federal officeholder and has no discernible connection or relationship to the candidate's state campaign. In the first such scenario, the Act would undoubtedly permit the payment of legal fees from campaign contributions. In the second scenario, however, the Act would undoubtedly bar such payments.

The statutes and relevant legal authority concerning the subject at issue are unhelpful, however, in the vast majority of situations that lie somewhere between the first and second set of circumstances discussed above. Thus, at present, when a state candidate who is also a federal office holder is asked to pay attorneys fees for legal activities that lie somewhere between scenarios one and two, he or she faces a game of political "gotcha" where an ethics complaint at either the federal or state level is virtually guaranteed. In order to rectify this problem and provide state candidates with a roadmap for acceptable future action, we seek additional guidance from the Commission in evaluating how to assess attorney fee expenditures by a state campaign committee where a candidate's current or past position as a federal office holder cannot be wholly divorced from the costs at issue.

Formal Request

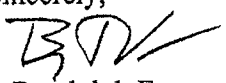
Given the unsettled nature of the legal authority contained within the Act, Commission Rules and Commission advisory opinions for the purposes of assessing the treatment of attorney fee expenditures in a wide range of factual scenarios, it is our desire to clarify how legal fee expenditures should be evaluated by state campaign committees in situations involving legal defense activities wholly associated with a candidate's run for state office, but also bearing some connection to the candidate's position as a current or past federal officeholder. Thus, in order to provide proper legal counsel to our clients and to promote optimal compliance with the Act and Commission Rules among present and future state campaign committees, we hereby submit the following formal request for Commission consideration.

Request: Taking into account the ambiguous and unsettled nature of the analytical framework set forth in O.C.G.A. §§ 21-5-33 and 21-5-3 for assessing the treatment of campaign committee expenditures on campaign-related legal fees, what is the appropriate methodology for evaluating the acceptability of attorney fee expenditures by the state campaign committee of a current or past federal office holder when such costs are clearly made in connection with the candidate's active campaign for state office, but also bear some relationship to the candidate's current or past federal position? In other words, how should a state campaign committee assess

the treatment of particular attorney fee expenditures in factual scenarios where the legal services provided fundamentally relate to the candidate's run for state elective office, but cannot be cast in a light that is wholly segregated from the candidate's present or former federal office? For the purposes of the above inquiries, please assume that the candidate at issue is a present or former federal office holder currently seeking state office, but no longer seeking re-election at the federal level. Likewise, please assume that the legal fees at issue would not have accrued *but for* the particular candidate's pursuit of state office. Also, to the extent possible, please provide guidance on how the analysis changes under the Act (if at all) in the following scenarios: (1) where the candidate at issue has only one active principal campaign committee operating at the state level; and (2) where the candidate at issue has separate principal campaign committees operating at both the federal and state levels.

We appreciate your thoughtful consideration of the above inquiry and this advisory opinion request as a whole. Should you have any questions, please do not hesitate to contact me.

Sincerely,



J. Randolph Evans
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JRE