



STATE OF ALABAMA ETHICS COMMISSION



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October 5, 2016

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ADVISORY OPINION NO. 2016-30

Mr. Stephen W. Shaw
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Use Of Excess Campaign Funds/Public
Official Using Campaign Funds To Pay
Attorney To Request Advisory Opinion

A candidate may use campaign funds to pay for legal advice sought for compliance with the FCPA, as well as expenses incurred when requesting an Advisory Opinion from the Commission, as a "necessary and ordinary expenditure of the campaign." For officeholders, in order to be reimbursable as "reasonably related to performing the duties of the office held" under Ala. Code § 17-5-7(2) the fees and costs can only be incurred as a result of advice sought to stay in compliance with the Ethics Act and the FCPA (which would include seeking Advisory Opinions from the Commission) or other state or federal laws specifically related to the performance of the officeholder's official duties.

Under Ala. Code § 17-5-7(7), unless the allegations against the officeholder are that he or she committed the act while acting in his or her official capacity, the fees related to those allegations or the investigation of them are not "reasonably related to performing the duties of the office held."

Dear Mr. Shaw:

The Alabama Ethics Commission is in receipt of your request for a formal Advisory Opinion of this Commission, and this opinion is rendered pursuant to that request.

QUESTIONS PRESENTED

- 1) May an elected official use campaign funds to pay the fees of an attorney for advice relating to the Alabama Ethics Law, the Alabama Fair Campaign Practices Act (FCPA) or other federal or state laws as they relate to the administration of the elected official's duties or responsibilities?
- 2) In the event it is necessary to file a request with the Alabama Ethics Commission for an opinion, may the elected official use campaign funds to pay for the fees of their attorney in requesting an Opinion from the Alabama Ethics Commission?
- 3) In the event an Opinion is not requested of the Ethics Commission, or in the event there is not a pending civil, criminal or investigation, may an elected official use campaign funds for legal fees on issues related to the office which they hold regarding civil, criminal, regulatory, campaign finances, or state or federal laws?

FACTS AND ANALYSIS

The facts as have been presented to this Commission are as follows:

Stephen W. Shaw is an attorney in Birmingham, Alabama, who represents public officials in various capacities. He requests an Advisory Opinion concerning the issue of the use of campaign funds for the payment of legal fees incurred as a result of issues related to the Alabama Ethics Law and the Fair Campaign Practices Act (FCPA).

The FCPA came under the Ethics Commission's jurisdiction September 1, 2015. That Act sets out, among other things, what excess campaign funds can be used for. Section 17-5-7 of the Fair Campaign Practices Act sets out that campaign funds may be used for the following purposes:

- (1) Necessary and ordinary expenditures of the campaign.
- (2) Expenditures that are reasonably related to performing the duties of the office held. For purposes of this section, expenditures that are reasonably related to performing the

duties of the office held do not include personal and legislative living expenses, as defined in this chapter.

(3) Donations to the State General Fund, the Education Trust Fund, or equivalent county or municipal funds.

(4) Donations to an organization to which a federal income tax deduction is permitted under subparagraph (A) of paragraph (1) of subsection (b) of Section 170 of the Internal Revenue Code of 1986, as amended, or any other charitable, educational, or eleemosynary cause of Section 501 of Title 26 of the U. S. Code.

(5) Inaugural or transitional expenses.

(6) Donations to a legislative caucus organization registered under this chapter which does not operate as a political action committee.

(7) Legal fees and costs associated with any civil action, criminal prosecution, or investigation related to conduct reasonably related to performing the duties of the office held.”

As a candidate, having an attorney advise you on FCPA issues is customary and is, in fact in most cases, necessary given the complexity of compliance, tax, etc., issues that must be considered with a campaign. Candidates spend campaign money on other professional services (for example, the use of accountants, PR consultants), and the legal compliance issues related to campaign finance are at least as important as those professional expenditures. The language of the Code does not limit the Commission’s ability to determine whether a campaign expense is “necessary and ordinary” but we have previously given the opinion that “the expense may be paid for with campaign funds if it would not exist ‘but for’ the person’s status as a candidate or officeholder.” See Advisory Opinion No. 2016-23 For that reason, candidates may use campaign funds to pay for legal advice sought for compliance with the FCPA, as a “necessary and ordinary expenditure of the campaign” but only insofar as they would not seek that advice but for the fact that they are a candidate. The candidate must maintain the appropriate documentation of any disbursements made to pay these legal fees.

As it relates to officeholders, Subparagraph (2) allows expenses “reasonably related to performing the duties of the office held” to be paid from excess campaign funds. Subparagraph (7) specifically allows for the payment of legal fees and costs. This subsection was placed into Ala. Code § 17-5-7 to codify Advisory Opinion 2000-165 issued on July 12, 2000 from the Office of the Attorney General of Alabama. In that opinion, (which involved an indictment alleging that while serving as Sheriff, Jim Woodward improperly accessed and used the Alabama Criminal Justice Information System) the Attorney General gave several criteria for public

entities to use to determine whether public funds can be used to pay legal fees incurred in the defense of a civil or criminal case brought against an officeholder.¹ The Opinion states, “Thus, if the conduct involved in the criminal prosecution is conduct related to the performance of the duties of the office of the sheriff, excess campaign funds may be used to pay the legal fees incurred.” *Id.* That Opinion did not take into account either the Ethics Act or the FCPA. Afterwards, however, that holding was incorporated into the FCPA which now allows excess campaign funds to be used to pay for legal fees and costs “associated with any civil action, criminal prosecution, or investigation related to conduct reasonably related to performing the duties of the office held.”

In answering all three questions, it makes little sense to allow for the payment of legal fees and costs for criminal defense post-indictment (which the statute and Advisory Opinion 2000-165 allow) and not allow officeholders to use excess campaign funds to pay for legal expenses related to their efforts to stay out trouble in the first place. In order to be reimbursable as “reasonably related to performing the duties of the office held” under subsection (2), however, the fees can only be incurred as a result of advice sought for the purpose of staying in compliance with the Ethics Act or the FCPA (which would include seeking Advisory Opinions from the Commission) or other state or federal laws specifically related to the performance of the officeholder’s official duties.

The questions, as well, require an analysis of subsection (7), and there are limits on what can be paid from campaign funds pursuant to this subsection. Although Ala. Code § 17-5-7(7) allows fees and costs to be paid from excess campaign funds when they are related to civil actions, criminal prosecutions, or investigations, the same statute qualifies that allowance by requiring that these actions, prosecutions or investigations be “reasonably related to performing the duties of the office held.”

The application of subsection (7) can only be made on a case-by-case basis. To provide guidance, however, the Commission states that as a general rule the law should not be interpreted to mean that a candidate or office holder can commit *any* criminal act or intentional act and designate the legal defense of that action as a campaign expense. Moreover, it should not be interpreted to mean that a candidate or officeholder should be allowed to claim that their conviction or liability was “reasonably related to performing the duties of the office held” when they are finally adjudicated guilty of a crime or liable for intentional conduct. Such expenses do

¹ These criteria are: (1) the lawsuit against the officer must be based upon and grow out of the performance of any duty in connection with the office; (2) the suit does not involve a willful or wanton personal tort; (3) the officer was not found guilty of a criminal offense; (4) it is in the proper interest of the county to expend county funds for the purpose of defending the officer because of the risk of future litigation against the county itself arising out of the same or similar circumstances; and (5) the officer, in committing the acts in the discharge of the duties which are the subject of litigation, must have acted honestly and in good faith.

not arise with respect to the candidate's campaign or officeholder status. Rather, they arise out of the candidate's or officeholder's decision to act irrespective of his or her campaign obligations and the law.

Likewise, legal fees and expenses should not be treated as though they are campaign or officeholder-related merely because the underlying proceedings have some impact on the campaign or officeholder's status. For example, legal expenses associated with a civil action such as divorce or fraud, or criminal investigations or charges for driving under the influence, assault, theft and the like should be treated as personal, rather than campaign or officeholder-related, even if they may influence the campaign or affect the officeholder's status.

Ala. Code § 17-5-7(7) allows for the payment of fees for civil actions, criminal prosecutions, and investigations "related to conduct reasonably related to performing the duties of the office held." Unless the allegations against the officeholder are that he or she committed the act while acting in his or her official capacity, the fees related to those allegations or the investigation of them are not "reasonably related to performing the duties of the office held." Upon a final adjudication of guilt in a criminal case or civil liability for intentional or willful conduct, use of excess funds to pay legal fees and costs at that point would be, in fact, a conversion of those funds for personal use in violation of the Ethics Act and the FCPA. Likewise, if the fees and costs are paid from a third-party source (for example, a policy of insurance providing for a defense for official conduct), then the legal fees would not be an expense of the officeholder subject to payment from campaign funds.

An additional but related issue is how to deal with complaints or indictments that contain multiple counts, some of which are related to the office and some of which are not. In cases where a complaint or indictment contains some counts that are related to the office and some that are not, the officeholder should use a ratio to determine how fees may be allocated. For example, if 9 of 20 counts in an indictment are related to performing the duties of the office held, then the candidate may pay 45% (9/20) of the legal expenses incurred in his or her defense of the indictment using campaign funds. The candidate must maintain the appropriate documentation of any disbursements made to pay these legal fees. This approach is consistent with the approach which the Federal Election Commission has taken over time with respect to this issue, and in the Commission's opinion, the application of Ala. Code § 17-5-7(7) should be interpreted in the same manner.

The Commission reminds those whom the FCPA and the Ethics Act affect that there is no requirement that counsel be retained to request an Advisory Opinion. In fact, the majority of opinions requested of the Commission come from public officials or public employees directly and do not involve an attorney. It is the Ethics Commission's statutory responsibility to interpret and advise on the Ethics Act and the FCPA regardless of who asks the question, and that function is freely available to all public officials and employees who request it.

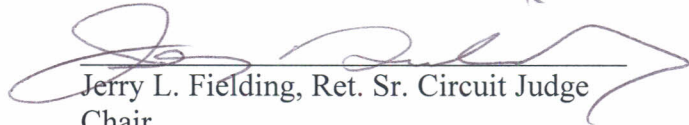
CONCLUSION

A candidate may use campaign funds to pay for legal advice sought for compliance with the FCPA, as well as expenses incurred when requesting an Advisory Opinion from the Commission, as a “necessary and ordinary expenditure of the campaign.” For officeholders, in order to be reimbursable as “reasonably related to performing the duties of the office held” under subsection (2) the fees and costs can only be incurred as a result of advice sought to stay in compliance with the Ethics Act and the FCPA (which would include seeking Advisory Opinions from the Commission) or other state or federal laws specifically related to the performance of the officeholder’s official duties.

Under Ala. Code § 17-5-7(7), unless the allegations against the officeholder are that he or she committed the act while acting in his or her official capacity, the fees related to those allegations or the investigation of them are not “reasonably related to performing the duties of the office held.”

AUTHORITY

By 5-0 vote of the Alabama Ethics Commission on October 5, 2016.



Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair

Alabama Ethics Commission