



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

JERRY FITZGERALD ENGLISH
Chair

PETER J. TOBER
Vice Chair

ALBERT BURSTEIN
Commissioner

Respond to:
P.O. Box 185
Trenton, New Jersey 08625-0185

(609) 292-8700 or Toll Free Within NJ 1-888-313-ELEC (3532)

Website: <http://www.elec.state.nj.us/>

FREDERICK M. HERRMANN, Ph.D.
Executive Director

JEFFREY M. BRINDLE
Deputy Director

CAROL L. HOEKJE
Legal Director

EVELYN FORD
Compliance Director

JAMES P. WYSE
Legal Counsel

January 25, 2008

Richard K. Weinroth, Esq.
Sterns & Weinroth, P.C.
50 West State Street Suite 1400
P.O. Box 1298
Trenton, NJ 08607-1298

Advisory Opinion No. 01-2008

Dear Mr. Weinroth:

The Commission considered your request for an advisory opinion at its meeting of January 15, 2008, and at its meeting of January 23, 2008. At its meeting of January 23, 2008, the Commission directed me to issue this response. Your request is made on behalf of former Senator Wayne Bryant (5th Legislative District). You have asked whether or not Senator Bryant may use candidate committee funds to pay legal fees and expenses in connection with criminal proceedings. You submitted the request also with co-counsel Joseph E. Sandler, Esq., of Sandler, Reiff & Young, P.C. in Washington, D.C..

Question Presented

May an elected officeholder use campaign funds from his single candidate committee to pay for legal expenses incurred in defense of a criminal indictment issued by the United States Attorney's office?

Commission Response

The Commission hereby advises you that use of Mr. Bryant's campaign funds for legal fees and other expenses in connection with his defense of the criminal indictment, is not an "ordinary and necessary expense" of an officeholder and therefore is not a permissible use of campaign funds.

Submitted Facts

You write that Mr. Bryant was indicted on thirteen counts on March 29, 2007, by a federal grand jury, see United States v. Bryant, Crim No. 07-267 (D.N.J., filed March 29, 2007). You further write that Mr. Bryant has denied all of the charges, has entered a plea of not guilty to all charges, and intends to mount a vigorous defense. Mr. Bryant has retained counsel in connection with the criminal proceeding, has incurred substantial charges for legal fees and expenses in connection with his defense, and anticipates incurring considerable additional fees and expenses in the future in connection with his representation. He wishes to use contributions received by his candidate committee to do so.

Senator Bryant started serving in the State Senate in 1995. He did not run for reelection in the 2007 primary election, and his term of office expired on January 8, 2008. You write that he may run for office in the future.

The indictment alleges that a co-defendant, R. Michael Gallagher, who served as Dean of University of Medicine and Dentistry of New Jersey's School of Osteopathic Medicine (SOM), put Senator Bryant on the SOM payroll in exchange for Senator Bryant's using his official position as a State Senator to advocate on behalf of SOM in the Legislature. The indictment charges Mr. Bryant and his co-defendant with mail and wire fraud based on a scheme or artifice to deprive the State of New Jersey and its citizens of the "honest services" of the Senator, in violation of 18 U.S.C. §§1341, 1343 and 2; with solicitation and acceptance of a corrupt thing of value involving an organization receiving federal funds, in violation of 18 U.S.C. §661(a)[sic]; and with mail and wire fraud based on a scheme to obtain money or property by false pretenses in violation of 18 U.S.C. §1341.

Commission records indicate that Mr. Bryant, a successful candidate in the 2003 general election for the office of State Senate (5th Legislative District), filed a Form D-1 (Single Candidate Committee – Certificate of Organization and Designation of Campaign Treasurer and Depository) on November 24, 2003, to designate "Friends of Senator Wayne R. Bryant" as his single candidate committee for the 2007 primary election for the office of State Senate (5th Legislative District). He designated a campaign treasurer, Allen S. Zeller, and two campaign depository accounts, account 1016658 (savings), and account 7185243 (checking) at Equity National Bank. Commission records indicate that the Friends of Wayne Bryant filed preelection quarterly reports and postelection quarterly reports relevant to the 2007 primary election. Senator Bryant did not file a nominating petition for the 2007 primary election.

Commission records as of January 23, 2008, indicate that single candidate committee's last report filed was the 2007 fourth quarter report, filed timely on January 15, 2008, and indicating a closing balance of \$640,221.18 in the campaign depositories at Equity Bank, n/k/a Susquehanna Patriot Bank.

Applicable Law

The Commission notes preliminarily that as a candidate having sought election to State office, Mr. Bryant remains subject to reporting provisions, as long as his single candidate committee continues to control funds and until his single candidate committee has wound up its business and filed a final report with a final accounting of the election fund, or transferred a balance to another election; see definition of candidate at N.J.S.A. 19:44A-3, and reporting provisions set forth at N.J.S.A. 19:44A-9, N.J.S.A. 19:44A-16, and N.J.A.C. 19:25-8.3 and N.J.A.C. 19:25-8.7.

Statutory provisions. N.J.S.A. 19:44A-11.2 provides that candidate committee funds shall be used for only six purposes. One of these statutory purposes is the “payment of ordinary and necessary expenses of holding public office,” see N.J.S.A. 19:44A-11.2a (6).

Section 11.2 was enacted during the 1993 Amendments to the New Jersey Campaign Contributions and Expenditures Reporting Act (the “Reporting Act,” N.J.S.A. 19:44A-1 et seq.); see L. 1993, c.65, §27 (approved March 8, 1993). The statute also contains a prohibition against personal use of candidate committee funds; it excludes from the “payment of campaign expenses” at N.J.S.A. 19:44A-11.2a(1), expenditures for “those items or services which may reasonably be considered to be for the personal use of the candidate” The statute also prohibits the use of candidate committee funds for the payment of expenses arising from the furnishing, staffing or operation of an office used in connection with officeholding duties.

Regulatory provisions. N.J.A.C. 19:25-6.5 through 6.10 are the Commission regulations which concern use of candidate committee funds. In 1994, the Commission adopted the provisions on permissible use of funds found at N.J.A.C. 19:25-6.5 through 6.8; see 26 N.J.R. 2753 and 26 N.J.R. 4214 (October 17, 1994). N.J.A.C. 19:25-6.5(a) 6 mirrors the statutory provisions and provides that campaign funds may be used for the “payment of ordinary and necessary expenses of holding public office, as provided in N.J.A.C. 19:25-6.7.” N.J.A.C. 19:25-6.7 defines “ordinary and necessary expenses of holding public office” as “any expense that reasonably promotes or carries out the responsibilities of a person holding elective public office” (except for expenses of furnishing, staffing or operation of the legislative office). The regulations provide examples of ordinary and necessary officeholding expenses such as costs of communication to constituents, cost of dues for membership in an educational organization, and attendance at conferences, and certain costs of travel.

N.J.A.C. 19:25-6.10 (“Use of funds for legal fees”) was adopted by the Commission in 1998, see 29 N.J.R. 5056(a) and 30 N.J.R. 862 (March 2, 1998). This regulation contains two subsections. N.J.A.C. 19:25-6.10(a) provides that candidate committee funds may be used for reasonable fees and expenses of legal representation, the “need for which arises directly from and is related to the campaign for public office or from the duties of holding public office.” This subsection provides four specific permissible examples of such use: 1) fees for litigation directly related to a recount proceeding, 2) defense of a defamation action arising directly from the candidate’s campaign for public office, or from activities of the officeholder directly related to the existence of the duties of holding public office, 3) defense of an action alleging violation of the Reporting Act; and 4) defense of an action before the Joint Legislative Committee on Ethical Standards “or similar public body having authority to hear such action or proceeding and to impose sanctions against the officeholder by reason of his or her status as a holder of public office.”

N.J.A.C. 19:25-6.10(b) provides that permissible use of funds for legal fees and expenses shall not include such fees and expenses incurred in connection with the candidate or officeholder’s personal or business affairs, or which would otherwise qualify as “personal use” under N.J.A.C. 19:25-6.5(c) .

N.J.A.C. 19:25-6.5(c) defines as “personal use” any use of contributions to pay or fulfill a commitment, obligation or expense ... that would arise or exist... “irrespective of the candidate’s campaign” or “irrespective of the candidate’s ordinary and necessary expense of holding public office.” This regulation was adopted by the Commission in 1994; see 26 N.J.R. 4214 referred to above.

Discussion

The Commission has not previously considered the question presented, concerning the use of candidate committee funds for legal fees for criminal defense by an officeholder. In considering this question, the Commission must determine not only whether or not the proposed use of funds is a permissible use under the statutory and regulatory provisions of its jurisdiction, but also whether or not the proposed use falls within the prohibition on personal use also found within those provisions.

In enacting the 1993 Amendments, the Legislature sought to improve public confidence in the political process with restrictions on personal use of campaign funds. In proposing the rules and amendments on the permissible uses of candidate funds, which rules included the definition of “personal use” at N.J.A.C. 19:25-6.5(c) and definition of “ordinary and necessary expenses of holding public office” at N.J.A.C. 19:25-6.7, the Commission wrote in its proposal notice that the rules “will promote public confidence in the integrity of the electoral system and its financing.” 26 N.J.R. 2754 (July 5, 1994).

Three years later in proposing the rule on the use of funds for legal fees at N.J.A.C. 19:25-6.10, the Commission wrote that the proposed rule would “promote public confidence that contributed campaign funds are being expended in accordance with campaign and officeholding purposes,” see 29 N.J.R. 5057 (December 1, 1997). In its adoption notice, see 30 N.J.R. 863 (March 2, 1998), the Commission wrote, in response to a request to include in the rule a number of additional specific examples of permissible uses of legal fees, that “categorically permitting payment of legal fees...” may “overinflate the scope of the permissible uses the Commission intends.” The Commission noted its concern that an overly broad application would produce a result that would be contrary to the restrictions against personal use of campaign funds, see also 30 N.J.R. 863. In adopting the regulation regarding permissible use of campaign funds for legal fees, therefore, the Commission carefully chose to limit its examples of permissible use in subsection (a) and to expressly include a restriction on personal use in subsection (b).

The Commission finds that it must be guided in this question by the overriding emphasis on the “ordinary and necessary” test contained in its own statute and regulations. The Commission does not believe that expenditures for criminal defense of an indictment are “ordinary and necessary” expenses of holding public office, see N.J.S.A. 19:44A-11.2a(6), N.J.A.C. 19:25-6.5(a)6, N.J.A.C. 19:25-6.5(c), N.J.A.C. 19:25-6.7, and N.J.A.C. 19:25-6.10. The Commission does not find that the proposed expenditure falls within the meaning of an expense that “reasonably promotes” or “carries out the responsibilities” of a person holding elective public office, see definition of “ordinary and necessary” at N.J.A.C. 19:25-6.7. The Commission further does not believe that the expenses for defense of a criminal indictment are “ordinary” in the sense that they are normally incurred by an officeholder, or that such expenses are “necessary” to an officeholder’s carrying out of his or her duties to his or her constituents. The Commission furthermore does not believe that a contributor would view a possible criminal defense scenario as an expense that “reasonably promotes” an officeholding purpose.

If the proposed expense does not fall within the meaning of “ordinary and necessary” for the purpose of N.J.A.C. 19:25-6.7, the Commission believes that the proposed expense is also impermissible as “personal use” under the provisions of N.J.A.C. 19:25-6.10(b) and N.J.A.C. 19:25-6.5(c). If an expenditure for criminal defense is not an ordinary and necessary expense of an officeholder, the Commission finds that it exists or arises irrespective of the officeholder’s ordinary

and necessary expenses of officeholding duties, N.J.A.C. 19:25-6.10(b) and N.J.A.C. 19:25-6.5(c), and therefore is a prohibited personal use.

The Commission further believes that a defense of a criminal indictment poses a different use than the specific examples set forth in N.J.A.C. 19:25-6.10(a). As indicated in the adoption notice, 29 N.J.R. 5056, three of these examples were drawn from Advisory Opinions that the Commission had issued prior to proposing the regulation. The permissible use for a recount proceeding had been addressed in Advisory Opinion 10-1994 and for an election contest in Advisory Opinion No. 01-1992. The defense of a defamation action against the candidate or officeholder had been addressed in Advisory Opinion No. 12-1980; and the defense of an action by the Joint Legislative Committee on Ethical Standards had been addressed in Advisory Opinion No. 13-1995, which was the last Advisory Opinion on the use of legal fees prior to adoption of the regulation. In Advisory Opinion 13-1995, the Commission wrote that because of his or her status as an elected officeholder, a member can in the ordinary course of carrying out his or her duties be required to demonstrate that the member has fully complied with the Rules/Code of Ethics. Since candidate committee funds may be used to achieve election to office, the Commission wrote that it appears consistent that paragraph (6) of the statute be understood to permit use of those same funds for an officeholder to defend his fitness for office before the very body that has specific statutory authority to adjudicate that fitness.

The Commission does not find that the specific examples set forth in N.J.A.C. 19:25-6.10(a) compel the expansion of the use of legal fees to the proposed use for legal representation in connection with a criminal indictment. For the reasons discussed above, the Commission finds that such use is not an ordinary and necessary expense of holding public office and is a personal use of campaign funds for legal fees, and therefore impermissible under the provisions of N.J.A.C. 19:25-6.10(b). The Commission finds that its determination in this Advisory Opinion is consistent with its prior stated approach to limit and consider carefully the expansion of permissible use of campaign funds, including the expansion of permissible use for legal fees. To allow the use of officeholding funds for a criminal defense purpose would be an expansion and distortion of the “ordinary and necessary” standard that is overriding in the statute and regulations, see N.J.S.A. 19:44A-11.2a(6), N.J.A.C. 19:25-6.5(a)6, N.J.A.C. 19:25-6.5(c), N.J.A.C. 19:25-6.7, and N.J.A.C. 19:25-6.10.

Discussion of Federal law. You have cited the federal jurisdiction of the Federal Election Commission (FEC). The FEC has permitted the use of campaign funds by an officeholder for legal fees and expenses incurred in defending federal criminal charges that the officeholder received unlawful gifts from a defense contractor in exchange for assisting the contractor in obtaining contracts from the United States Department of Defense; see FEC Advisory Opinion 2005-11. This Advisory Opinion, and others which you have cited in your brief, is based upon the FEC regulation which is similar, but not identical, to N.J.A.C. 19:25-6.5 (c) in defining “personal use” of campaign funds. Pursuant to 11 C.F.R.113.1(g), “personal use” of federal campaign funds means any use of funds to fulfill a commitment, obligation or expense that would exist “irrespective of the candidate’s campaign or duties as a Federal officeholder.” FEC regulation 11 C.F.R. 113.1(1)(g)(ii), further requires that the FEC will determine, on a case-by-case basis, whether or not other uses of funds in a campaign account, including legal expenses, fulfill an obligation that “would exist irrespective of the ...duties as a Federal officeholder, and therefore are personal use.” Under this approach, if the obligation would not exist irrespective of the officeholding duties, or if not for the status as an officeholder, it is not personal use, and therefore is a permissible use of funds. The FEC also examines specific counts of an indictment to determine their relationship to an officeholder’s duties. The “irrespective” language has also been codified in the federal statute, see 2 USCS §439a(b)(2),

which provides that “personal use” occurs if funds are used to fulfill an obligation “that would exist irrespective of the ...individual’s duties as a holder of Federal office....”

The Commission notes first that the FEC opinions interpret federal statutes and are not controlling over New Jersey’s regulation of campaign finance activity for State elections. Even more compelling however is the contrast between the FEC regulation which you cite and the Commission’s own regulation which it must apply to this question. This Commission has adopted a regulation that provides that personal use means an expense that would exist “irrespective of the candidate’s **ordinary and necessary** expense of holding public office” [emphasis added], N.J.A.C. 19:25-6.5(c). This regulation is in fact not identical to the FEC regulation cited above, 11 C.F.R.113.1(g), because it includes the statutory language of “ordinary and necessary;” see N.J.S.A. 19:44A-11.2a(6). Therefore this regulation defining personal use is more restrictive than its federal counterpart. The Commission finds as instructive and determinative that the “ordinary and necessary” standard was included in its own regulatory definition of “personal use,” N.J.A.C. 19:25-6.5 (c), and was also included as a restriction in its regulation concerning legal fees, N.J.A.C. 19:25-6.10 (b).

Conclusion. The Commission finds that it must be guided in this question by the overriding emphasis on the “ordinary and necessary” test of the New Jersey statutes and regulations. The Commission advises you that the proposed expenditures are not “ordinary and necessary” expenses of holding public office, that they are not a permissible use of funds by an officeholder, and that they constitute personal use. N.J.S.A. 19:44A-11.2, N.J.A.C.19:25-6.5(a)6, N.J.A.C. 19:25-6.5(c), N.J.A.C. 19:25-6.7, and N.J.A.C. 19:25-6.10.

The Election Law Revision Commission, in its Interim Report to the Governor and Legislature (September 1, 1970), referred to the “[e]limination of public cynicism about political finance” as its objective in recommending the establishment of an Election Law Enforcement Commission. To permit the use of campaign funds by an officeholder to defend criminal charges would undermine public confidence in the Commission as well as the public policy and purpose of the Reporting Act.

After consideration of the applicable statutory and regulatory provisions, the Commission believes that to allow the proposed expenditures as a permissible use of campaign funds would strain the intent and purpose of the meaning of “ordinary and necessary,” would cause a severe erosion of the statutory and regulatory provisions governing use of campaign funds, and would not “promote public confidence in the integrity of the electoral system and its financing,” 26 N.J.R. 2754 (July 5, 1994).

The Commission wishes to thank Mr. Bryant and you for your inquiry.

Very truly yours,

Election Law Enforcement Commission

By: _____
Carol L. Hoekje, Esq.

c: Joseph E. Sandler, Esq.



Advisory Opinion Request
For Candidates and Committees

NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION
P.O. Box 185, Trenton, NJ 08625-0185
(609) 292-8700 or Toll Free Within NJ 1-888-313-ELEC (3532)
Web site: http://www.elec.state.nj.us/

FOR STATE USE ONLY

RECEIVED
2007 DEC 21 A 11:05

N.J. ELECTION
LAW ENFORCEMENT
COMMISSION

PLEASE PROVIDE THE INFORMATION REQUESTED BELOW

A person, committee or entity subject to, or reasonably believing he, she or it may be subject to, any provision or requirement of the Campaign Reporting Act may request that the Commission provide an advisory opinion pursuant to N.J.S.A. 19:44A-6. Such request must include the following:

1. This request for an Advisory Opinion is being submitted on behalf of:

Full name of Person, Committee, or Entity:
Friends of Senator Wayne R. Bryant

Mailing Address:
P.O. Box 526

*Day Telephone Number:

*Evening Telephone Number:

Camden, NJ 08102

2. Indicate if the above named person, committee, or entity currently files reports with the Commission:

Yes [checked] No []

a. If yes, indicate in what capacity it is filing:

- Candidate committee [checked]
Joint candidates committee []
Political committee []
Continuing political committee []
Political party committee []
Legislative leadership committee []
Recall committee []
Recall defense committee []
Personal financial disclosure statement []
Other (please describe): []

b. If no, indicate if the above named person, committee, or entity has in the past filed reports with the Commission, giving elections (i.e., 2005 general election) or calendar years, and identify filing capacity:

[Blank lines for past filing information]

c. If reports are or were filed under a different name than that appearing in Question #1 above, provide that name:

[Blank lines for alternate name]

3. Please provide below a statement of the cognizable question of law arising under the Campaign Reporting Act, including specific citations to pertinent sections of the Campaign Reporting Act and Commission regulations (if known).

Whether Senator Wayne R. Bryant may use contributions received by his candidate committee fund to defray the substantial legal fees and expenses incurred in connection with his defense in United States v. Bryant, Crim No. 07-267 (D.N.J., filed March 29, 2007).

STERNS & WEINROTH

A PROFESSIONAL CORPORATION

COUNSELORS AT LAW

50 WEST STATE STREET

SUITE 1400

P.O. BOX 1298

TRENTON, NEW JERSEY 08607-1298

(609) 392-2100

FACSIMILE

(609) 392-7956

WWW.STERNSLAW.COM

Writer's Direct Line: (609) 989-5032

e-mail: rweinroth@sternslaw.com

File No.: 53486-1

December 21, 2007

VIA HAND-DELIVERY

The Honorable Jerry Fitzgerald English, Chair
New Jersey Election Law Enforcement Commission
P.O. Box 185
Trenton, NJ 08625-0185

Re: Advisory Opinion Request on behalf of Senator Wayne Bryant

Dear Ms. English:

The undersigned represent State Senator Wayne Bryant. By this letter, we request an opinion from the Election Law Enforcement Commission ("ELEC") with respect to the use of campaign funds of Senator Bryant's candidate committee.

Senator Bryant has served in the State Senate since 1995. He did not run for re-election this year (2007), but may run for office in the future. His term of office expires on January 8, 2008.

On March 29, 2007, Sen. Bryant was indicted by a federal grand jury on thirteen counts. *United States v. Bryant*, Crim No. 07-267 (D.N.J., filed March 29, 2007). The indictment alleges that a co-defendant, R. Michael Gallagher, who served as Dean of University of Medicine and Dentistry of New Jersey's School of Osteopathic Medicine ("SOM"), put Senator Bryant on the SOM payroll in exchange for Senator Bryant's using his official position as State Senator to advocate on behalf on SOM in the Legislature. The

indictment charges Senator Bryant and his co-defendant with mail and wire fraud based on a scheme or artifice to deprive the State and its citizens of the honest services of the Senator, in violation of 18 U.S.C. §§1341, 1343 and 2; with solicitation and acceptance of a corrupt thing of value involving an organization receiving federal funds, in violation of 18 U.S.C. §661(a); and with mail and wire fraud based on a scheme to obtain money or property by false pretenses in violation of 18 U.S.C. §1341.

QUESTION PRESENTED

Senator Bryant has denied all of these charges, has entered a plea of not guilty to all of them and intends to mount a vigorous defense. He has retained counsel in connection with the criminal proceeding; has incurred substantial charges for legal fees and expenses in connection with his defense; and anticipates incurring considerable additional fees and expenses in the future in connection with his representation during pre-trial proceedings and ultimately, a trial. The Senator wishes to use contributions received by his candidate committee to defray these fees and expenses. The issue is whether he may do so.

DISCUSSION

There are two provisions in our election laws, one of them generally authorizing the usage of funds Senator Bryant requests (N.J.S.A. 19:44A-11.2(a)(6)); the other authorization addresses the expenditure more specifically. N.J.A.C. 19:25-6.10.

A. The Expenditure is an "Ordinance and Necessary Expense of Holding Public Office."

The Campaign Contribution and Reporting Act, N.J.S.A. 19:44A-1 *et seq.* (the "Act") broadly authorizes contributions received by a candidate committee for "the payment of ordinary and necessary expenses of holding public office." N.J.S.A. 19:44A-11.2(a)(6). The same section contains a number of other permissible uses which are not applicable here.

Generally, by enumerating permissible uses, N.J.S.A. 19:44A-11.2(a), added to the Act by amendment in 1993 (L.1993, c.65, §17), is designed to ensure that campaign funds are not diverted for the personal use of the candidate. Prior to the amendment, the Act contained reporting provisions that referred to the ordinary and necessary expenses of officeholders, but not a specific authorization for use of candidate committee funds to defray such expenses. This section was recently amended effective November 1, 2007, but subsection (6) was not changed in any way. L. 2007, c. 202, §51.

The purpose of this amendment to the Act was to clarify that an officeholder can use campaign funds to pay for expenses that are related to the holding of office. All pertinent authority, developed mainly under the federal election law scheme upon which N.J.S.A. 19:41A-11.2 (a)(6) is based, demonstrates that legal fees incurred in connection with the holding of public office are "ordinary and necessary" expenses.

In Advisory Opinion 13-1995, the Election Law Enforcement Commission ("ELEC") considered application of this provision to use of candidate committee funds to defray expenses of a State Senator in defending himself in proceedings before the Joint Legislative

Ethics Committee. ELEC held that such use was permissible, but specifically noted that it was not ruling on "the use of candidate committee funds for the legal defense of an officeholder facing any civil or criminal charge in any court of law or other forum." Senator Bryant's request therefore projects the closely related question which ELEC reserved.

In 1993, when subsection (6) was added to N.J.S.A. 19:44A-11.2(a), the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§431 *et seq.* ("FECA"), contained a provision which also permitted the broad usage of campaign contributions for the "ordinary and necessary expenses" of office holding and which was the evident basis for subsection (6). That provision, 2 U.S.C. § 439a, provided in pertinent part:

Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and any other amounts contributed for the purpose of supporting his or her activities as a holder of Federal office, may be used by such candidate or individual, as the case may be, *to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office.....*; except that no such amounts may be converted by any person to any *personal use*, other than to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office. [2 U.S.C. § 439a (emphasis added).]¹

¹ This FECA provision was subsequently amended and reorganized by the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 101-155, but the substantive provision regarding the use of campaign funds for expenses incurred in connection with the duties of an officeholder was re-enacted without change. The current provision reads as follows:

(a) *Permitted uses.* A contribution accepted by a candidate, and any other donation received by an individual as support for activities of the individual as a holder of Federal office, may be used by the candidate or individual –

.....

(2) for ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office. ... [2 U.S.C. § 439a(a) as amended by Section 301 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155].

In several advisory opinions issued prior to 1993, the FEC had ruled that the language of Section 439a should be interpreted to cover expenses that would not exist "regardless of an individual's" election to or holding of federal office. See FEC Advisory Opinions 1980-138 and 1981-2.

In 1993, the FEC initiated a rulemaking to promulgate regulations to implement and interpret Section 439a. In the original notice of proposed rulemaking issued in 1993, the FEC proposed a definition of the term "personal use" in Section 439a which prohibited utilization of the funds in a campaign account from fulfilling an obligation or expense "that would exist *irrespective of the candidate's campaign or responsibilities as a federal officeholder*" (emphasis supplied). That definition was ultimately adopted in the final regulations, issued in 1995. 11 C.F.R. §113.1(g), added by FEC, Final Rules, Expenditures: Personal Use of Campaign Funds, 60 *Fed. Reg.* 7862, 7863-64 (Feb. 9, 1995).

Significantly, ELEC later adopted this "irrespective of" test in its own regulations. ELEC's regulations promulgated under the Act now define the term "personal use" to mean:

"any use of contributions to pay or fulfill a commitment, obligation or expense of any person that would arise or exist *irrespective of the candidate's campaign or irrespective of the candidate's ordinary and necessary expense of holding public office.* [N.J.A.C. 19:25-6.5(c) (emphasis added)].

The "irrespective of" language of N.J.A.C. 19:25-6.5(c) has never been interpreted by ELEC. However, FRC has consistently construed the identical language of its regulation, under section 439a of the FECA to mean that federal campaign funds may be used to defray the legal expenses of defending federal criminal charges based on allegations of corruption.

The federal precedent is persuasive. In New Jersey, it is well established that, where the Legislature was aware of federal law and borrowed operative terminology from the federal provisions similar to those in State law, New Jersey courts should look to analogous federal statutes and regulations for guidance. Indeed, federal law and federal authorities construing it are the starting point for New Jersey's analysis of the parallel provisions. Town Tobacconist v. Kimmelman, 94 N.J. 85, 99 (1983); GATX Terminals Corp. v. New Jersey Dep't of Environmental Protection, 86 N.J. 46, 53 (1981). Here, New Jersey's language is not just similar, it is identical to its federal counterparts. Federal administrative precedent construing that language uniformly permits expenditure of campaign funds on legal fees in a criminal action related to an officeholder's official responsibility.

In Advisory Opinion 2005-11, the FEC ruled that United States Representative Randall ("Duke") Cunningham (R-CA) could use campaign funds to defray legal fees and expenses incurred in defending federal criminal charges that he received unlawful gifts from a defense contractor in exchange for assisting the contractor in obtaining contracts from the United States Department of Defense. The gifts included the purchase of real property from Representative Cunningham at an inflated price and the provision of free rent to Representative Cunningham for 13 months. The FEC reasoned that:

[T]he investigation concerns allegations that are related to Representative Cunningham's campaign activities or his duties as a federal officeholder, or both, and the legal fees and expenses would not exist irrespective of Representative Cunningham's campaign or duties as a Federal officeholder. . . .

The Commission has previously concluded that any legal fees and expenses incurred in legal proceedings involving allegations concerning the candidate's campaign activities or duties as a Federal officeholder would not exist irrespective of the candidate's campaign or duties as a Federal officeholder and therefore may be paid for with campaign funds. . . .

[T]he grand jury investigation appears to focus on allegations that Representative Cunningham obtained benefits...from Mr. Wade [the defense contractor] because of his status as a U.S. Representative and his position on the Permanent Select Committee on Intelligence and the House Appropriations Defense Subcommittee. Thus, based on the representations made in your request and the submitted news articles, the Commission concludes that the legal fees and expenses associated with the grand jury investigation would not exist irrespective of Representative Cunningham's campaign or duties as Federal officeholder. Accordingly, the Committee may use campaign funds to pay for legal fees and expenses incurred in connection with the grand jury investigation and legal proceedings that may arise from this investigation. [FEC Advisory Opinion 2005-11, at 2-3].

The FEC has concluded in several other instances that funds could be used for similar purposes under the "irrespective of" test. See FEC Advisory Opinions 2006-35, 2003-17, 1998-1, 1997-12, and 1995-23.

The case of Senator Bryant is indistinguishable, and the federal precedent should govern his expenditures. The criminal charges against him would not exist "irrespective of" his duties as an officeholder. In fact, all of the allegations set forth in the indictment against Senator Bryant arise solely because of and in connection with his role as a State Senator, and there would be no criminal case if he had not held office as a State Senator.

Specifically, the indictment alleges that Senator Bryant arranged, in his capacity as Co-Chairman of the Senate Budget and Appropriations Committee, for funding for UMDMJ

and other institutions, in exchange for various benefits and things of value. See Counts 1 to 6 of Indictment, pp. 1 – 14. Again, none of the allegations made in the indictment are based on any of the Senator's conduct as a private citizen; all of those allegations could only exist because of the Senator's position as a State Senator and his alleged misuse of that position.

Accordingly, ELEC should find that the legal fees and expenses which Senator Bryant has incurred and will incur in defending himself against these charges would not exist "irrespective of" his holding state office and, therefore, that funds from Senator Bryant's candidate committee can be used to defray such expenses. The general authorization of N.J.S.A. 19:44A-11.2(a)(6) permits Senator Bryant's usage of contributions to pay legal fees as "ordinary and necessary expenses of holding office."

B. Senator Bryant May Use Contributions for Legal Fees for Matters Arising From His Official Duties.

Regulations promulgated pursuant to the Act specifically authorize officeholders to utilize contributions received by a candidate committee for legal fees that arise from the duties of their office. N.J.A.C. 19:25-6.10(a) provides in pertinent part:

Contributions received by a candidate committee, joint candidates committee or legislative leadership committee may be used for reasonable fees and expenses of legal representation, *the need for which arises directly from and is related to the campaign for public office or from the duties of holding public office.* (emphasis supplied).

N.J.A.C. 19:25-6.10(a) was promulgated in 1998. See 29 N.J.R. 5056(a), 30 N.J.R. 862(a), effective March 2, 1998. Long before it took effect, however, ELEC had ruled that, under the Act an officeholder was permitted to expend campaign contributions for legal fees

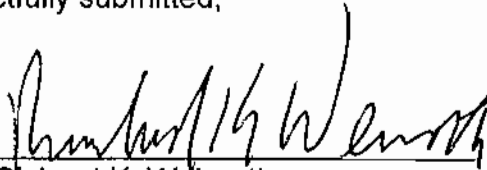
necessitated by the threat of the suit for defamation, and the ultimate settlement of the claim, arising out of the candidate's advertisements in the campaign. ELEC found that, because of the relationship of the threat of litigation to the campaign, there was "nothing in the Act or the regulations of the Commission [to] prevent the use of campaign funds for the payment of the attorneys fees incurred in respect to the federal litigation." ELEC, Opinion No. 0-12-80 (April 3, 1980).

In other words, even before promulgation of N.J.A.C. 19:25-6.10(e), which specifically enumerates legal fees as a permitted use of campaign contributions, the mere relationship between litigation and the campaign justified utilization of legal fees. There is no principled difference between an official's defense of allegations that his untrue statements damaged the reputation of another and the defense allegation that acts committed in the course of discharging the duties of his office expose him to criminal liability.

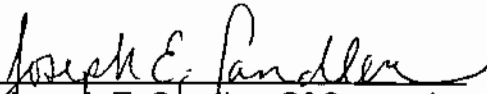
Accordingly, the regulations promulgated pursuant to the Act specifically authorize Senator Bryant's expenditure of contributions to his candidate committee for legal fees to fund the defense of the criminal charges against him.

Please do not hesitate to contact us if you have any questions about the matter.

Respectfully submitted,

By: 

Richard K. Weinroth
Sterns & Weinroth, P.C.
50 West State Street
Trenton, NJ 08607
Tel: (609) 392-2100
Fax: (609) 392-7956

By: 

Joseph E. Sandler, Of Counsel
Sandler, Reiff & Young, P.C.
50 E Street, S.E. # 300
Washington, D.C. 20003
Tel: (202) 479-1111