

ELECTION LAW ENFORCEMENT COMMISSION

ELECTION LAW ENFORCEMENT COMMISSION REGULATIONS USE OF FUNDS FOR LEGAL FEES

Proposed Amendment: N.J.A.C. 19:25-6.10.

Authorized By: Election Law Enforcement Commission, Frederick M. Herrmann, Ph.D.,
Executive Director

Authority: N.J.S.A. 19:44A-6

Proposed Number: PRN 2008 –

The sitting New Jersey Election Law Enforcement Commission (hereafter, Commission) will conduct a **public hearing** concerning this proposal on **Tuesday, March 17, 2009** at 10:15 a.m. at:

Election Law Enforcement Commission
Edward J. Farrell Memorial Conference Room
28 West State Street, 12th Floor
Trenton, New Jersey

Persons wishing to testify are requested to reserve time to speak by contacting Administrative Assistant Elbia L. Zeppetelli at (609) 292-8700 no later than Friday, March 13, 2009.

Submit written comments by March 23, 2009 to:

Michelle R. Levy, Esq., Associate Legal Director
Election Law Enforcement Commission
P.O. Box 185
Trenton, New Jersey 08625-0185

The agency proposal follows:

Summary

The Commission proposes to amend N.J.A.C. 19:25-6.10 Use of funds for legal fees, to prohibit the use of candidate committee funds for legal fees or expenses for purposes of criminal defense of a candidate or officeholder, including defense in a criminal inquiry or criminal investigation, and defense of a criminal indictment or other criminal proceeding.

The New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 et seq., (hereafter, “the Act”) provides that candidate committee funds shall be used for only six purposes; see N.J.S.A. 19:44A-11.2. 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).

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 Commission proposes to make three amendments to the current regulation, N.J.A.C. 19:25-6.10, “Use of funds for legal fees,” to clarify permissible uses of campaign funds.

In its Advisory Opinion 01-2008, the Commission determined that use of an officeholder’s campaign funds for legal fees and other expenses in connection with his defense of a criminal indictment, is not an “ordinary and necessary expense” of an officeholder and therefore is not a permissible use of campaign funds. This Advisory Opinion was affirmed by the Appellate Division on December 4, 2008, see In Re Election Law Enforcement Commission Advisory Opinion No. 01-2008 (A-2816-07T1).

At this time, N.J.A.C. 19:25-6.10 “Use of funds for legal fees,” contains two subsections. N.J.A.C. 19:25-6.10(a) sets forth four specific examples under which such use is permitted. This subsection provides as the test for permissible use, that the need for legal fees must arise “directly from and is related to the campaign for public office or from the duties of holding public office.” The Commission proposes an amendment to N.J.A.C. 19:25-6.10(a) to reflect its holding in Advisory Opinion 01-2008 that found as paramount the statutory requirement of “ordinary and necessary” concerning the use of campaign funds by an officeholder. This proposed amendment reflects the Commission’s long held belief that the proper use of campaign funds for legal fees must derive directly from the ordinary and necessary duties of holding public office; see also the prohibition on “personal use” currently at N.J.A.C. 19:26-6.10(b).

N.J.A.C. 19:25-6.10(a)3 provides that campaign funds may be used for legal fees in connection with defense of an action or proceeding alleging a violation of the Act and naming the candidate or officeholder as a “respondent” or “defendant.” The Commission notes that the Act also contains provisions for criminal prosecution which are not under the Commission’s jurisdiction; see N.J.S.A. 19:44A-20.1, N.J.S.A. 19:44A-21, N.J.S.A. 19:44A-22.3g, and N.J.S.A. 19:44A-40. The Commission believes that the use of campaign funds for criminal defense of such statutory provisions is not an “ordinary and necessary” use of campaign funds and proposes to amend N.J.A.C. 19:25-6.10(a)3 to provide that campaign funds may be used for legal fees in defense of an alleged violation of the Act in a civil action or administrative proceeding only.

The Commission proposes to amend N.J.A.C. 19:25-6.10 to add a new subsection (b) that would specifically prohibit the use of campaign funds for legal fees and expenses in connection with criminal defense of a candidate or officeholder. The proposed prohibition includes all stages of a criminal proceeding, including a criminal inquiry and criminal investigation. The Commission believes that once a criminal inquiry commences an officeholder or candidate has crossed the line from “ordinary and necessary.” Under this proposal, the current text in subsection (b) would become new subsection (c).

Social Impact

The proposed amendments underscore the Commission's position that campaign funds may not be used for legal fees unless the proceeding derives directly from the ordinary and necessary duties of holding public office. As the Commission made clear in Advisory Opinion 01-2008, candidate committee funds may not be used for legal fees or expenses for any criminal proceedings. The Commission believes that the amendments have a positive social impact in plainly stating that the expenses for defense of a criminal investigation, indictment, or other criminal proceeding are neither "ordinary" in the sense that they are normally incurred by an officeholder or "necessary" to an officeholder's carrying out of his or her duties to his or her constituents. An expenditure for defense of a criminal case does not fall 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. These rules further benefit the public by affirming that contributions to a candidate committee, joint candidates committee, or legislative leadership committee cannot be used to pay for criminal defense expenses, as the Commission does not believe that a contributor would view a possible criminal defense scenario as an expense that "reasonably promotes" an officeholding purpose.

Economic Impact

The Commission anticipates that these amendments will have an economic impact upon an officeholder or candidate who is the subject of a criminal investigation or has pending criminal charges, as that individual may not use campaign funds to pay for legal fees relating to the criminal case. The Commission believes that such effect is outweighed by the beneficial social impact of restricting the use of campaign funds for delineated permissible uses which reasonably promote the candidacy or 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 the ordinary and necessary duties of holding public office.

The subject of criminal proceedings has several options for financing legal fees. He or she may pay for legal defense costs out of personal funds. An officeholder or candidate who is faced with legal fees for criminal defense may have the option of forming a legal defense fund. Contributors to such a fund would know and choose from the outset that their contributions would be used for a criminal defense. If the defendant is indigent, an attorney will be provided at no cost to represent him or her. The Commission believes that the amendments prohibiting the use of campaign funds to pay for legal fees or expenses for any criminal proceedings promotes suitable and reasonable permissible uses of money contributed to a candidate committee, joint candidates committee, or legislative leadership committee.

Federal Standards Statement

A federal standards analysis is not required because the proposed amendments concern New Jersey candidates, candidate committees, joint candidates committees, and legislative

leadership committees. The amendments are not subject to any Federal requirements or standards.

Jobs Impact

The proposed amendments are not expected to have any measurable impact upon the number of persons employed by candidates, candidate committees, joint candidates committees, political committees, continuing political committees, political party committees, and legislative leadership committees.

Regulatory Flexibility Statement

The Commission's proposed amendments do not impose any recordkeeping or reporting requirement on small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 *et seq.*

Agriculture Industry Impact

The proposed new rules are not expected to have any impact on the agriculture industry.

Regulatory Flexibility Statement

The proposed new rules do not impose recordkeeping, reporting or other compliance requirements on small businesses as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 *et seq.*

Smart Growth Impact

The proposed new rules are not expected to have any impact on the achievement of smart growth and implementation of the State Development and Redevelopment Plan.

Housing Affordability Impact

The proposed new rules are not expected to have any impact on affordable housing in New Jersey and it is unlikely that the rules would evoke a change in the average costs associated with housing because the proposed rules concern the permissible uses of contributions to a candidate committee, joint candidates committee or legislative leadership committee.

Smart Growth Development Impact

The proposed new rules are not expected to have any impact on smart growth and it is unlikely that the rules would evoke a change in housing production in Planning Areas 1 or 2 or within designated centers under the State Development and Redevelopment Plan in New Jersey because the proposed rules concern reporting under the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 *et seq.*

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

19:25-6.10 Use of funds for legal fees

(a) 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 **ordinary and necessary** duties of holding public office. Examples of permissible uses of contributions, that is campaign funds, to pay legal fees and expenses shall include, but not be limited to, legal fees and expenses arising in connection with the following:

1. Litigation directly related to a recount proceeding pursuant to N.J.S.A. 19:28-1 or an election contest pursuant to N.J.S.A. 19:29-1, which proceeding or action will determine the election or nonelection of the candidate whose campaign funds are to be used to pay such expenses;
2. The defense of a defamation action against the candidate or officeholder whose campaign funds are to be used to pay such expenses, arising directly from the candidate's campaign for public office or from activities of the officeholder directly related to the discharge of the duties of holding public office;
3. The defense of [an] **a civil** action or **administrative** proceeding alleging a violation of the Act and naming as a respondent or defendant the candidate or officeholder whose campaign funds are to be used to pay such expenses; and
4. The defense of an action or proceeding 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.

(b) Permissible use of funds for legal fees and expenses shall not include legal fees and expenses for criminal defense of a candidate or officeholder, including defense in a criminal inquiry or criminal investigation, and defense of a criminal indictment or other criminal proceeding.

[(b)]

(c) 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).

ELECTION LAW ENFORCEMENT COMMISSION

By: _____s/_____

FREDERICK M. HERRMANN, PH. D.

Executive Director