

2013-GAB-02
CAMPAIGN FINANCE – LEGAL FEES

Facts

You represent a candidate's personal campaign committee. You have said that the committee is currently subject to an investigation which could expose the committee to both civil and criminal penalties for alleged violations of Wis. Stats. Ch. 11. You have asked whether, and in what circumstances, campaign funds may be used to defend that committee in that investigation and in subsequent cases if civil or criminal penalties are sought.

Analysis

As a general matter, campaign funds may be used only for a "political purpose." Wis. Stat. §11.25 (2). A political purpose generally does not include expenditures made to support or defend a person being investigated for, or charged with, a criminal violation of state law. Wis. Stat. §11.01 (16) (b). However, Wis. Stat. §11.64 (1) provides:

Any candidate or public official who is being investigated for, charged with or convicted of a criminal violation of this chapter or ch. 12, or whose agent is so investigated, charged or convicted, may establish a defense fund for expenditures supporting or defending the candidate or agent, or any dependent of the candidate or agent, while that person is being investigated for, or while the person is charged with or convicted of a criminal violation of this chapter or ch.12.

The questions you have presented involve an analysis of whether there are distinctions between using campaign funds directly or using a defense fund and whether there are distinctions between the committee itself and its agents. We are aware of no court decisions or opinions of the Elections Board or Government Accountability Board that elucidate these questions.

The Committee

Because the committee is being investigated for alleged activities that could result in civil as well as criminal penalties, it may use campaign funds directly to pay for legal representation for the alleged civil violations unless and until it becomes clear that the matter is purely a criminal one. The definition of "political purpose" does not exclude use of campaign funds in civil matters. The only question is whether defending the committee in a civil proceeding serves a political purpose; that is, in circumstances in which successfully defending civil charges could be said to potentially influence the election of the committee's candidate. Here, the investigation apparently relates to alleged activities that, presumably, helped elect the candidate and the legal fees would be used to defend those activities thereby potentially influencing the next election. This is a political purpose. A campaign committee may use its resources to defend itself against civil charges that it may have violated campaign finance laws.¹

¹ You have suggested that the prohibition on making expenditures to support or defend a person being investigated for, or charged with, a criminal violation of state law in §11.01 (16) (b) does not apply when the committee itself is being investigated. You base this on the argument that a campaign committee is not a person because Wis. Stat. §11.60, which creates civil penalties for violating ch. 11, speaks of "[a]ny person, including any committee or group," thereby suggesting that a committee is not a person. This conclusion is misplaced. Significantly, Wis. Stat. §11.01 (4) defines a "committee" as *any person* which makes or accepts political contributions or makes

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political disbursements. Thus, a committee is a person by definition in campaign finance laws. If it were not, campaign finance laws would not apply to it at all. Your suggestion also ignores Wis. Stat. §990.01 (26)'s definition of a person to include all associations and bodies corporate.

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As an alternative, the candidate could establish a defense fund because the investigation apparently could also result in criminal charges. You correctly point out that the committee is not a “candidate or public official” covered by Wis. Stat. §11.64 (1). However, it is the candidate who would be opening the defense fund to defend his personal campaign committee. A personal campaign committee is clearly an agent of the candidate. The committee is a vehicle for obtaining political contributions and making political disbursements. A defense fund permits acquiring financial support apart from campaign contributions, subject to the constraints of the Ethics Code for State Public Officials (Wis. Stats. Subch. III, Ch.19) and the lobbying law (Wis. Stats. Subch. III, Ch. 13) and the requirement that campaign contributors authorize such use. Wis. Stats. §§11.64 (2), 13.625 (3), 19.45 (2). See GAB Guideline 1281.

Payment of legal fees directly from the committee’s campaign account or through a legal defense fund both appear to be appropriate because the investigation and defense activities cannot currently be parsed between what may be civil and what may be criminal. If that changes, then the committee may only pay for costs incurred in a civil context and a defense fund may be used only to pay costs in a criminal context.

In answer to the question you posed in your follow-up e-mail, appropriate expenses could include payment to an expert on campaign finance laws.

The Committee’s Agents

The committee or a legal defense fund may pay to represent those of its agents who are either being investigated themselves or who are being questioned as part of an investigation of the committee. The committee or a legal defense fund may do so in the same manner, and to the same extent, that they may do so in defense of the committee for the reasons discussed above.

If Charges Are Brought

The above analysis could be affected by whether criminal or civil charges, or both, are ultimately brought. If only civil charges are brought against the committee, it may pay the costs of defense but a legal defense fund would not be authorized. If only criminal charges are brought, then funds must come from a defense fund. If both criminal and civil charges are brought, then the committee may pay the costs of defending the civil charges and a defense fund may pay the costs of defending the criminal charges.

Conclusion

The Government Accountability Board advises:

1. A personal campaign committee or a legal defense fund may pay a law firm for representation in an investigation potentially involving both civil and criminal charges.
2. The defense of a committee in a criminal matter can be paid for by a defense fund established by a candidate. A committee may pay a law firm and other related expenses in a civil matter. Payment to a law firm from either a personal campaign committee directly or from a candidate’s legal defense fund can be made in reasonable proportion to the types of claims being investigated, and subject to changing circumstances identifying specific civil versus criminal conduct.
3. A personal campaign committee or a legal defense fund may also pay a law firm to represent the committee’s agents during an investigation subject to any constraints under the Attorney’s Code of Professional Responsibility.

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4. If criminal charges are brought against a committee's agents, a legal defense fund may pay for their defense. A personal campaign committee may pay the costs of defending its agents in connection with civil complaints only if it can establish a political purpose for doing so.

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