

Legislative Analysis



CAMPAIGN FINANCE: PROHIBIT PAYMENT OF OFFICEHOLDER'S LEGAL COSTS

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House Bill 5058 (reported without amendment)

Sponsor: Rep. Marty Knollenberg

Committee: Redistricting and Elections

First Analysis (3-12-12)

BRIEF SUMMARY: The bill would prohibit a candidate committee from spending campaign funds to defend an elected or appointed official in a civil or criminal lawsuit.

FISCAL IMPACT: The bill will not have a fiscal impact on the Secretary of State. The bill creates new misdemeanors. Any fine revenue collected would benefit public libraries. To the extent that the bill's provisions result in a greater number of misdemeanor convictions under the new causes of action, it could increase local costs related to local jail incarceration and/or misdemeanor probation supervision. These costs vary by jurisdiction.

THE APPARENT PROBLEM:

Now under the law, a candidate committee of a candidate who is elected or appointed to an elective office can make an expenditure for an "incidental expense" for that elective office. The Michigan Campaign Finance Act defines "incidental expense" to mean an expenditure that is an ordinary and necessary expense, *as described in Section 162 of the Internal Revenue Code of 1986, 26 U.S.C. 162*, paid or incurred in carrying out the business of an elective office. The act also describes 13 separate transactions that constitute an "incidental expense." See *Content of the Bill* below.

On December 15, 2009, then-Attorney General Mike Cox issued Opinion No. 7240, in response to a question posed by then state senator Gilda Jacobs who asked: "*Does the Michigan Campaign Finance Act permit an elected officeholder to use campaign finance funds from his or her candidate committee to pay for legal fees and expenses incurred in defending against criminal charges brought against the officeholder?*"

In his 11-page response, the Attorney General wrote: *Under Sections 9(1) and 21a of the Michigan Campaign Finance Act, MCL 169.209(1) and 169.221a, the candidate committee of an elected official is permitted to make an expenditure for an incidental expense to pay for legal fees incurred by the officeholder to defend against criminal charges, but only if the expense is an ordinary and necessary business expense of the elected official as described under section 162 of the Internal Revenue code, 26 USC 162, and is paid or incurred in carrying out the business of an elective office. To qualify as such an ordinary and necessary business expense, the source of the charge or the character of the conduct from which the charge stems must arise in the course of carrying out the business of being a public official. Expenses incurred to defend against*

charges that originate from personal activity unrelated to performing the functions of the public official's office will not so qualify. To read AG Opinion 7240 of 2009 in its entirety, see <http://www.ag.state.mi.us/opinion/datafiles/2000s/op10317.htm>

A bill has been introduced to prohibit a candidate committee from using campaign funds to defend an official in a civil or criminal lawsuit. Further, the bill would substantially revise the definition of "incidental expense" now found in the Michigan Campaign Finance Law, by eliminating the reference to Section 162 of the federal Internal Revenue Code.

THE CONTENT OF THE BILL:

House Bill 5058 would amend the Michigan Campaign Finance Law (MCL 169.209 et al.) to prohibit a candidate committee from spending campaign funds to defend an elected or appointed official in a civil or criminal lawsuit. A detailed description of the bill follows.

Legal Costs

House Bill 5058 would prohibit a candidate committee of a candidate who is elected or appointed to an elective office from making an expenditure in order to defend that public official in a civil or criminal action, or to pay legal costs, unless the action or legal costs related to a recall election; a vote recount; compliance with the Campaign Finance Act or the Michigan Election Law; or tangibly benefited the nomination or election of a candidate. To this end, House Bill 5058 would require that the campaign statement of a candidate committee contain the purpose of any expenditure for legal costs made by the committee.

Legal Defense Fund

Further, House Bill 5058 specifies that any legal costs not authorized above would have to be paid from a legal defense fund, as provided in the Legal Defense Fund Act, 2009 PA 288, MCL 15.521 to 15.539.

Personal Benefit

Also under the bill, a candidate committee of a candidate who is elected or appointed to office could only make an expenditure as defined by the Campaign Finance Act, and no expenditure could be made for the personal benefit of the candidate or any other individual.

Penalties

House Bill 5058 sets a penalty for a violation of these requirements, specifying that an individual who made a disbursement from candidate committee funds that did not qualify as an expenditure or incidental expense or as a transfer under Section 45 would be guilty of a misdemeanor, punishable by a fine of not more than \$1,000, or imprisonment for not more than 90 days, or both.

Incidental Expense

Now under the law, a candidate committee of a candidate who is elected or appointed to an elective office can make an expenditure for an "incidental expense" for that elective office. Michigan law currently defines "incidental expense" to mean an expenditure that is an ordinary and necessary expense, *as described in Section 162 of the Internal Revenue Code of 1986, 26 U.S.C. 162*, paid or incurred in carrying out the business of an elective office. House Bill 5058 would eliminate the reference to the federal Internal Revenue Code (in italics, above).

House Bill 5058 would retain the remainder of the definition for "incidental expense." Under that definition, an "incidental expense" includes, but is not limited to, any of the following:

- (a) A disbursement necessary to assist, serve, or communicate with a constituent.
- (b) A disbursement for equipment, furnishings, or supplies for the office of the public official.
- (c) A disbursement for a district office if the district office is not used for campaign-related activity.
- (d) A disbursement for the public official or staff, or both, to attend a conference, meeting, reception, or other similar event.
- (e) A disbursement to maintain a publicly owned residence or a temporary residence at the seat of government.
- (f) An unreimbursed disbursement for travel, lodging, meals, or other expenses incurred by the public official, a member of the public official's immediate family, or a member of the public official's staff in carrying out the business of the elective office.
- (g) A donation to a tax-exempt charitable organization, including the purchase of tickets to charitable or civic events.
- (h) A disbursement to a ballot question committee.
- (i) A purchase of tickets for use by that public official and family members and staff to a fund-raising event sponsored by a candidate committee, independent committee, political party committee, or a political committee that does not exceed \$100.00 per committee in any calendar year.
- (j) A disbursement for an educational course or seminar that maintains or improves skills employed by the public official in carrying out the business of the elective office.
- (k) A purchase of advertisements in testimonials, program books, souvenir books, or other publications if the advertisement does not support or oppose the nomination or election of a candidate.
- (l) A disbursement for consultation, research, polling, and photographic services not related to a campaign.
- (m) A fee paid to a fraternal, veteran, or other service organization.
- (n) A payment of a tax liability incurred as a result of authorized transactions by the candidate committee of the public official.
- (o) A fee for accounting, professional, or administrative services for the candidate committee of the public official.

(p) A debt or obligation incurred by the candidate committee of a public official for a disbursement authorized by subdivisions (a) to (o), if the debt or obligation was reported in the candidate committee report filed for the year in which the debt or obligation arose.

BACKGROUND INFORMATION:

To read the Michigan Code of Judicial Conduct which, among other things, sets strict fundraising limits for judges and judicial candidates, visit the following website:
<http://coa.courts.mi.gov/rules/documetns/8michigancodeofjudicialconduct.pdf>

ARGUMENTS:

For:

This bill imposes new restrictions for legal defense spending, by prohibiting the use of campaign funds for personal legal battles. Instead of using campaign funds to defend against lawsuits, the bill says separate legal defense funds—formed for precisely that purpose and no other—would more appropriately serve that purpose. Proponents of the bill, including the Michigan League of Women Voters, note that the bill clarifies the occasions when campaign expenditures cannot be used for certain legal expenses, yet allows them to be used when appropriate, such as for a recall campaign. Supporters of the legislation say that this reform is "consistent with a position in support of open and accountable government."

Against:

Some argue that House Bill 5058 should be amended to narrow its scope, in order to exempt the campaign committees of elected judges. As written, the bill says elected officials who are sued should pay their attorney costs from separate legal defense funds, rather than from their campaign funds. This poses a problem for judges who are frequently the object of lawsuits brought by those whom they have ruled against. Customarily, these plaintiffs sue the judge's campaign committee, to avoid suing the judges directly. Under the Judicial Code of Conduct—sometimes called the Judicial Canon of Ethics—Michigan judges are prohibited from forming legal defense funds. See ***Background Information***. Opponents of the bill argue that because judges' candidate campaign committees are the direct object of lawsuits, judges and their campaign committees must be able to defend against these suits using funds that are raised during their campaigns.

POSITIONS:

The Secretary of State supports the bill. (1-24-12)

The Michigan Association of County Clerks supports the bill. (1-24-12)

The League of Women Voters supports the bill. (1-24-12)

The American Civil Liberties Union supports the bill. (1-24-12)

The Michigan Probate Judges Association is neutral on the bill. (3-6-12)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.