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STATE OF NEVADA
STANDING COMMITTEE ON
JUDICIAL ETHICS AND ELECTION PRACTICES

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OPINION: JE06-020

PROPRIETY OF A JUDGE USING
UNSPENT CAMPAIGN
CONTRIBUTIONS (THOSE NOT
SPENT OR COMMITTED FOR
EXPENDITURE AS A RESULT OF A
CAMPAIGN) TO PAY ATTORNEY
FEES RELATED TO THE DEFENSE OF
AN ETHICS COMPLAINT AGAINST
THE JUDGE.

ISSUE

May a judge use campaign contributions to pay attorney fees associated with the defense of an ethics complaint against the judge?

ANSWER

Yes, if the ethics complaint arises out of the judge's campaign or out of the judge's performance of judicial duties.

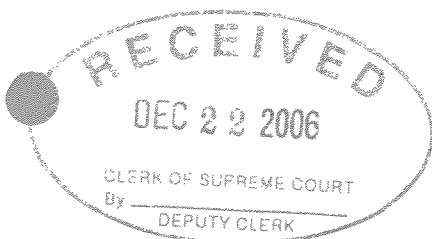
FACTS

A judge asks whether it is permissible to use unspent campaign contributions (contributions not spent or committed for expenditure as the result of a campaign) to pay attorney fees associated with the defense of an ethics complaint against the judge.

DISCUSSION

This precise question whether an elected judge may use unspent campaign contributions to pay attorney fees incurred in the defense of an ethics complaint against the judge is a matter of first impression in Nevada and, apparently, in other states. Because of its significance and importance, it was considered by all of the judicial and attorney members of the Standing Committee, with the exception of one judge and one attorney member, each of whom were unable to participate. This question arises at a time when what once seemed to be accepted differences between the campaign activities of judicial candidates and candidates seeking political office have been blurred by judicial rulings involving First Amendment issues. It also arises at a time when the manner in which funds are raised for judicial campaigns is under scrutiny. The answer to the question has the potential to further complicate these issues. Nevertheless, it is the Committee's obligation to consider the relevant provisions of the Code, and render an advisory opinion based upon their express language.

Although Canon 5C(2) allows a judicial candidate to solicit and accept campaign contributions, it expressly prohibits the use of such contributions "for the private benefit of the candidate or



others.” That prohibition provides limited help here, because it is Canon 5C(3) which controls the disposition of campaign contributions that were not spent or committed for expenditure as a result of a judicial campaign. That Canon authorizes the disposition of such unspent campaign funds in any combination as provided in subsections (a) through (d) of the Canon. It also provides that “any other disposition of the money is prohibited.” Therefore, the use of unspent campaign funds to pay attorney fees incurred in the defense of an ethics complaint must be authorized within one or more of the alternatives in subsections (a) through (d), or it is prohibited. Only one of the four alternatives is relevant to the question. In applicable part, Canon 5C(3)(c) provides that a judge may “use the money...for the payment of other expenses related to the judge’s public office or the judge’s campaigns.” [Emphasis added].

From December 1991 through 1999, Canon 5C(3)(c) provided that a candidate may “use the money for the payment of expenses directly related to the candidate’s public office other than campaigning, including attendance at public, civic, and charitable functions.” Although the present language in Canon 5C(3)(c) appears somewhat broader than that language, the changes were not significant to the conclusions reached in this Advisory Opinion.

The Commentary to Canon 5C(3) “encourages” candidates “to be responsive to the desires of the contributors concerning the disposition of such funds with the available 5C(3) options, to the extent such desires are known to the candidate or the candidate’s campaign committees.” The Committee strongly

recommends that that “encouragement” be followed here. The Committee is of the general view that contributors do not expect that their contributions will be used to pay attorney fees incurred in defending an ethics complaint, particularly one which is later found to be valid and to involve a breach of the Code of Judicial Conduct. However, in spite of that “encouragement,” the Commentary states that “it is entirely ethical to use or dispose of such funds in accordance with the provisions of Section 5C(3).”

The Commentary to Canon 5C(3) also states:

The 1999 amendments to Section 5C(3) conform the Code more closely to N.R.S. 294A.160. Because a judge’s position in society is unique compared to other office holders, the Code is more restrictive than the statutes governing candidates for other offices.

A comparison of the relevant provisions of N.R.S. 294A.160 to Canon 5C(3)(a) through (d) provides an understanding of what is meant in connection with a judge’s unique position, and how the Code is more restrictive than the provisions of that statute. The Code is more restrictive because it does not permit the contribution of such funds to the campaigns of other candidates for public office, or for the payment of debts related to other candidate’s campaigns, or to a political party, or to a person or group of persons advocating the passage or defeat of a question or group of questions on the ballot, as does N.R.S. 294A.160(2)(c). The omission of those provisions is also indicative that judges are to be

independent, impartial and substantially removed from many political activities.

However, the Code uses language in subsection (c) which is nearly identical to the language in N.R.S. 294A.160(2)(b). The relevant part of that portion of the statute provides that the official may “use the money...for the payment of other expenses related to public office or his campaign...” Because that provision in N.R.S. 294A.160(2)(b) is nearly identical to the relevant provision in the Code, and because the Code was revised in 1999 to “conform more closely to N.R.S. 294A.160,” the Committee assumed that the Nevada Supreme Court intended the Code to be interpreted and applied in a manner similar, if not identical, to the manner in which N.R.S. 294A.160(2)(b) is applied. Therefore, the Committee examined a Nevada Attorney General Opinion interpreting that statute.

Nevada Attorney General Opinion No. 2002-23 considered whether the personal use of campaign funds, which is prohibited by N.R.S. 294.160(1), includes the payment of attorney fees associated with defending a public officer against an ethics charge. The question was apparently posed in that fashion because N.R.S. 294A.160(1), similar to Canon 5C(2), prohibits the personal use of campaign funds. The Nevada Attorney General first considered the scope of the phrase “personal use of campaign funds” as used in N.R.S. 294A.160, and determined that it provided “limited assistance in determining what the Legislature intended would constitute the personal use of campaign funds.” The Attorney General also undertook an extensive review of the issue at the federal level and among the states. As a result of that extensive review, the Attorney

General concluded that the Nevada Legislature intended to enact a standard which prohibited the use of campaign funds under the so-called federal “irrespective test.” Under that test, if the use of funds fulfills a commitment, obligation or expense that would exist “irrespective” of a person’s duties as an office holder, the use is a “personal use” of the funds.

The Attorney General next considered whether “the use of campaign funds to pay attorney fees for defending a public officer against an ethics charge [is] considered ‘personal use’ or ‘the payment of other expenses related to public office or his campaign’?” In answering that question, the Attorney General again considered federal advisory opinions and attorney general opinions from other states. As a result of that survey, the Attorney General concluded that “the federal government and most states are likely to find on a case-by-case basis, campaign funds used to pay attorney fees for defending against an ethics charge are expenses related to the public office or campaign.”

In the end, however, the Attorney General, applying the “irrespective test” concluded: “it is the opinion of this office that the use of campaign funds to pay attorney fees to defend against ethics violations would not constitute the personal use of campaign funds in violation of N.R.S. 294A.160.” Presumably, implicit in that conclusion is also the conclusion that the use of campaign funds to pay attorney fees to defend against ethics violations constitutes “payment of other expenses related to public office or his campaign.”

In connection with this advisory opinion, the Committee also considered two cases, one from Ohio, and one from Colorado. In *State v. Ferguson*, 709 N.E. 2d 887 (Ohio App. 1998), the payment of attorney fees with campaign funds in connection with a dismissed indictment was found allowable under Ohio law. The relevant statute allowed campaign funds to be used for “legitimate and verifiable, ordinary, and necessary prior expenses incurred...in connection with duties as the holder of a public office...” The Ohio Election Commission, in prior advisory opinions, had determined that an expenditure for legal fees to defend against criminal charges was an inappropriate use of such funds. The Ohio Election Commission concluded that an expense must be related, according to recognized principles or accepted standards, to a duty of the public office. It concluded that the office holder’s duties do not include defending himself against charges of criminal conduct. On the other hand, the Ohio Election Commission had determined that the statute allowed the payment of attorney fees with campaign funds for representation against charges brought before the Ohio Election Commission itself, and in connection with criminal charges which had been dropped before trial.

In *Williams v. Teck*, 113 P.3d 1255 (Colo. App. 2005), the Colorado court construed a Colorado statute that allowed unexpended campaign contributions to be used to pay expenses that are directly related to such person’s official duties as an elected official. In that case, the issue was whether it was appropriate for a senator to use unexpended campaign funds to pay legal fees associated with the defense of a complaint before the Colorado Secretary of State alleging

violations of the Colorado Fair Campaign Practices Act. In that case, Colorado court said:

The activities involved in complying with [the Fair Campaign Practices Act] are particularly public activities brought about by the legal requirement that candidates for public office act in accordance with these laws. The filing of a complaint against a candidate or committee is the primary mechanism to enforce the campaign finance and disclosure laws. [Citation] A candidate and a candidate committee that are charged with violating these laws may not be able to establish their compliance with legal requirements without participating in a hearing of the complaint.

* * *

Here, the legal fees properly may be characterized as directly related to Teck’s official duties. Teck’s duties include filing periodic reports with the Secretary of State, and the fees were reasonably necessary to demonstrate that Teck and his committee had properly performed this duty.

113 P.3d at 1258-59.

The precise language of Canon 5C(3)(c) allows the use of unexpended campaign funds for the payment of other expenses “related to the judge’s public office or the judge’s campaign.” Here, the Advisory Committee considered the plain and ordinary meaning of “related.” The other expenses must be “connected” to or “associated” with the judge’s office or the judge’s campaigns.

Although the “irrespective test” used by the Nevada Attorney General in Opinion No. 2002-23 is helpful in identifying prohibited “personal use” of campaign funds, the Committee determined that it was not helpful in determining whether the use of such funds was “related to the judge’s public office or the judge’s campaigns.” In that context, the “irrespective test” sweeps too broadly. It would allow for the use of such excess campaign funds to pay legal expenses associated with all ethics complaints simply because persons who are not judges are not subject to such judicial ethics complaints and, therefore, the expense could not exist “irrespective” of their position as a judicial office holder.

Although the precise words construed in *Ferguson* and *Teck* are arguably more restrictive than those in Canon 5C(3)(c), it is the Committee’s view that the expenses must be “related” or connected to the judge’s campaign, and for such expenses to be “related to the judge’s public office,” they must be connected to the performance of judicial duties. For that connection to be established, there must be some nexus between the alleged ethics violation and either the judge’s official duties or the judge’s election campaign. Indeed, some members of the Committee were of the view that there could never be such a

connection unless the ethics violation was ultimately determined to be unfounded. To an extent, there is a logical inconsistency in concluding that a successful defense of an ethics complaint is “related” to the judge’s public office, while an unsuccessful defense is not. Although a majority of the Committee could not read that limitation into the words of Canon 5C(3)(c) the entire Committee is very aware of, and concerned about, the perception which is created by such use of unspent campaign funds on the public’s confidence in the integrity of the judiciary. However, if such a limitation is to be imposed, it must come from an amendment to Canon 5C(3)(c), and not from this Committee.

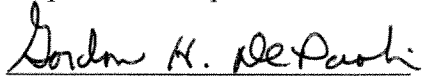
CONCLUSION

Canon 5C(3)(c) allows a judge to use unspent campaign contributions to pay attorney fees associated with the defense of an ethics complaint, if the ethics complaint arises out of the judge’s election campaign or out of the judge’s performance of judicial duties. Before using unspent campaign funds for such a purpose, judges would be prudent to consider the desires of the contributors concerning such use.

REFERENCES

Nevada Code of Judicial Conduct, Canon 4; Canon 5C(2); Canon 5C(3); Canon 5C(3)(a) through (d); N.R.S. 294A.160; N.R.S. 294A.160(1); N.R.S. 294A.160(2)(b); N.R.S. 294A.160(2)(c); Senate Daily Journal, February 7, 1991, pgs. 6 and 7; Nevada Attorney General Opinion No. 2002-23; *State v. Ferguson*, 709 N.E. 2d 887, Ohio App. 1998; *Williams v. Teck*, 113 P.3d 1255-1259, Col. App. 2005

This opinion is issued by the Standing Committee on Judicial Ethics and Election Practices. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, the Nevada Commission on Judicial Discipline, any person or tribunal charged with regulatory responsibilities, any member of the Nevada judiciary, or any person or entity which requested the opinion.



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