



CITY OF PHILADELPHIA

BOARD OF ETHICS
One Parkway Building
1515 Arch Street
18th Floor
Philadelphia, PA 19102
(215) 686 – 9450 (t)
(215) 686 – 9453 (f)

Philadelphia Board of Ethics Non-Public Board Opinion No. 2022-003

March 16, 2022

Re: Whether City’s Campaign Contribution Limits Apply to Money Raised to Retire Debt Incurred for Legal Expenses

Dear Attorney:

You have requested a non-public opinion on behalf of the candidate political committee (“the Committee”) of a former candidate for City office. You have asked to what extent the City’s campaign contribution limits apply to money raised by the Committee to pay off debt incurred prior to the General Election to defend itself against a lawsuit brought by an opposing candidate. You also asked whether the limits apply to fees and costs incurred after the General Election and in the future.

As discussed in further detail below, you are advised that the contribution limits apply to any money received by the Committee to pay fees and costs associated with the lawsuit, regardless of whether such fees and costs were incurred before or after the General Election.

I. Jurisdiction

The Board of Ethics has jurisdiction to administer and enforce all Philadelphia Home Rule Charter and City Code provisions pertaining to ethical matters, including the City’s Campaign Finance Law ([Philadelphia Code Chapter 20-1000](#)). [Home Rule Charter Section 4-1100](#) and [Philadelphia Code Chapter 20-600](#) authorize the Board to render advisory opinions concerning a City officer’s proposed future conduct. [Board Regulation No. 4](#) describes the procedures related to seeking an advisory opinion and for requesting reconsideration of an advisory opinion issued by the Board.

II. Background

When the former candidate ran for City office, they used the Committee to raise and spend money to support their candidacy. Before the Primary Election, an opposing candidate filed a lawsuit against the Committee and others.

The Committee retained a private law firm (the “Defense Firm”) to defend against the opposing candidate’s lawsuit.¹ You have stated that no attorney time was recorded prior to the Primary Election, but a substantial sum was invoiced between the Primary Election and the General Election. In addition, thus far, a smaller sum has been invoiced since the General Election. To date, the Committee has not made any payments for these fees and costs, but the Committee has reported the invoiced amounts as debt on the relevant campaign finance reports.

You have stated that, in addition to the debt owed to the Defense Firm, the Committee owes a smaller sum to other vendors for campaign-related expenses incurred prior to the General Election.

III. Relevant Law

The City’s Campaign Finance Law, which is found at Philadelphia Code Chapter 20-1000 has three main components: annual limits on contributions to candidates, electronic filing of campaign finance reports, and rules about how candidates may use political committees and accounts. In Board Regulation No. 1, the Board has provided a detailed explanation and interpretation of the provisions found in Code Chapter 20-1000. This Opinion addresses the application of the contribution limits.

Philadelphia Code Section 10-1002(12) provides, in relevant part: “No candidate, former candidate, candidate's candidate political committee, [or] former candidate's candidate political committee...shall accept any contribution which exceeds the contribution limits set forth in this Chapter.” As set forth at Paragraph 1.2 of Regulation No. 1:

A candidate for City elective office shall not accept total contributions per calendar year of more than \$3,100 from an individual, including contributions made through one or more political committees or other persons. This total includes contributions made post-election to the former candidate’s candidate committee if the committee is carrying debt incurred to influence the outcome of that election.

Paragraph 1.3(a) of Regulation No. 1 uses the same language to apply a limit of \$12,600 to contributions from a political committee, partnership, sole proprietorship, or other form of business organization.

Regulation No. 1 defines “candidate” at Paragraph 1.1(d) to include “a former candidate who receives post-candidacy contributions or makes post-candidacy expenditures.”

¹ The other defendants are represented by counsel other than the Defense Firm.

As defined by Regulation No. 1 at Paragraph 1.1(h), a “contribution” is:

- i. Any money, gifts, loans, forgiveness of debts, or things having a monetary value incurred or received by either a candidate’s campaign for use in advocating or influencing the election of the candidate or by a former candidate to retire debt incurred to influence a covered election or to pay costs related to transition or inauguration to City elective office;
- ii. An in-kind contribution, as defined at Paragraph 1.1(p); or
- iii. Any money, gifts, forgiveness of debts, or loans incurred or received to pay fees and costs incurred in any civil, criminal, or administrative proceeding arising directly out of the conduct of the candidate’s campaign or with respect to a covered election, such as a nomination petition challenge, a recount proceeding, or a Board investigation.

IV. Discussion

As per Regulation No. 1, Paragraph 1.1(h)(i), donations to the Committee will be contributions subject to the annual limits if we find that the debt owed to the Defense Firm was incurred to influence the candidate’s election; or, as per Paragraph 1.1(h)(iii), if we find that the civil action brought by the opposing candidate arose directly out of the conduct of the campaign. We will address the applicability of Paragraphs 1.1(h)(i) and 1.1(h)(iii) in turn.²

Neither Code Chapter 20-1000 nor Regulation No. 1 provides a specific definition of when an action “influences” an election, but the Pennsylvania Supreme Court considered the issue in *Cozen O’Connor vs. City of Philadelphia Board of Ethics*, 105 A.3d 1217 (Pa. 2014). The question before the court in that case was whether the City’s contribution limits would apply if the law firm forgave debt owed to it by 2007 Mayoral candidate Bob Brady where such debt had been incurred in defense of a civil action that sought to remove Mr. Brady from the ballot.

The Court identified two components to the question: “first, whether the contribution limits apply to forgiveness of debt after an election and, second, whether the debt had been incurred ‘for use in advocating or influencing the election.’” *Cozen O’Connor*, 105 A.3d at 1230. With regard to the first component, the Court found “nothing in the express language of the provision to support the Firm’s contention that City Council intended for ‘contributions’ to be limited to exclude post-election contributions to a political campaign. *Id.* The Court observed that, construed otherwise, “the ‘pay to play’ political culture that the Code was enacted to thwart could simply reemerge by delaying significant campaign donations until after the polls have closed and the election results have been announced.” *Id.* at 1231.

² We note that, aside from the money owed to the Defense Firm, the committee is carrying debt it acknowledges was incurred to influence the City election. As such, even leaving aside the debt owed to the Defense Firm, until the committee pays off that campaign debt, all donations to it are subject to the contribution limits.

With regard to the second component, the Court held that the debt to be forgiven was not incurred for use in advocating or influencing the election of the candidate. *Cozen O'Connor*, 105 A.3d at 1231-32. In so holding, the Court found no evidence suggesting that “the Firm agreed to represent Brady in the ballot litigation *pro bono* or at a discounted rate in an effort to promote him as a candidate” or that the candidate “anticipated that the Firm would forgive the debt once the election was over.” *Id.* Rather, “the Firm performed the legal services with the intent of receiving compensation, and...suffered an unanticipated business loss.” *Id.* Accordingly, the Court held that “the Firm's forgiveness of the [Brady's] legal debt, incurred to defend Brady in ballot challenge litigation, would not constitute a “contribution” that is subject to the Code's contribution restrictions.”³ *Id.* at 1234.

As noted above, funds accepted by the Committee to retire the debt owed to the Defense Firm would be a “contribution” pursuant to Paragraph 1.1(h)(i) if the debt was incurred “to influence” the candidate’s election. The Court’s holding in *Cozen O'Connor* would seem to cast significant doubt on that proposition. We need not make a definitive ruling on that question, however, if we find that such donations are covered by Paragraph 1.1(h)(iii).

As per Paragraph 1.1(h)(iii), the term “contribution” includes any “money, gifts, forgiveness of debts, or loans incurred or received to pay fees and costs incurred in any civil, criminal, or administrative proceeding arising directly out of the conduct of the candidate’s campaign.” The question, therefore, is whether the action the opposing candidate filed is a civil proceeding arising directly out of the conduct of the candidate’s campaign. We find that it is.

We do not, of course, make any finding as to the validity of the opposing candidate’s claims. And we are sympathetic to the concern that an opponent could file frivolous and outlandish suits against a candidate and encumber that candidate with the need to engage in extensive fundraising to pay for those fees. With that in mind, we emphasize that our holding today is based on this particular matter. We do not find that a lawsuit filed against a candidate during a campaign *per se* arises out of that campaign. Rather, we find that, based on the circumstances and allegations of the opposing candidate’s suit, we are compelled to conclude that this particular action did arise directly out of the conduct of the candidate’s campaign. Because we find that the suit arose directly out of the conduct of the candidate’s campaign, donations received by the Committee to pay fees or costs incurred in defense of that suit are “contributions” as defined by Paragraph 1.1(h)(iii) of Regulation No. 1.

³ In its opinion, the Court noted that in 2010 the City amended the Campaign Finance Law to allow candidates to establish litigation fund committees. We discuss litigation fund committees in greater detail below.

Paragraph 1.1(h)(iii) does not make any distinction between fees and costs incurred before the General Election and those incurred after. That raises the question of whether the limits apply only to money raised for fees and costs incurred before the General Election or also to fees and costs incurred after the Election when someone is no longer a candidate. Aside from the definitions, the Campaign Finance Law addresses this issue in the provisions regarding litigation fund committees.

While candidates are permitted to use their candidate committees to raise and spend money for litigation costs, such fundraising is, of course, subject to the annual limits. Concerned about litigation exhausting a candidate's campaign funds, as noted above, City Council in 2010 amended the Campaign Finance Law to allow candidates to establish a litigation fund committee, so that they could seek additional funds from donors who had given the maximum to their candidate committees. The law includes several requirements and restrictions to ensure that litigation fund committees are not used to evade the contribution limits. For example, a litigation fund committee may only be used to pay fees and costs incurred *in defense* of litigation arising from the candidate's campaign. Code § 20-1009(2); Reg. 1 ¶ 1.34(c). Also, a candidate or former candidate may not transfer funds to their candidate political committee from a litigation fund committee. Reg. 1 ¶ 1.34(f).

Notably, for our purposes, the law clearly contemplates that litigation may continue after the General Election and that a former candidate may continue to use a litigation fund committee to raise and spend money for that purpose. For example, Regulation No. 1 specifically provides that not only a candidate but also a former candidate may establish and use a litigation fund committee. *See* Reg. 1 ¶ 1.34. In addition, while the law says a committee must be terminated six months after the General Election, it provides for an extension of that deadline if the litigation in question is ongoing. *See* Reg. 1 ¶ 1.36(b); § 20-1010(3).

So long as litigation is ongoing, fees and costs will continue to accrue and a former candidate will need to raise money to pay those fees and costs. If the limits apply to fundraising by a litigation fund committee for a particular purpose, then we must conclude that they also apply to fundraising by a candidate committee for that same purpose. Accordingly, we find that the annual contribution limits apply to money raised to pay all fees and costs associated with the opposing candidate's lawsuit, regardless of whether they were incurred before or after the General Election.

We appreciate that if this litigation continues for an appreciable length of time, our holding will mean that contributions to the Committee would be subject to the annual limits long after the City election. We note, however, that nothing in our Opinion or in the Campaign Finance Law limits the total amount of money the candidate may raise for this purpose. Rather, the law requires that the candidate raise that money from a greater number of donors than they may otherwise wish to.

That said, since we have determined that the opposing candidate's lawsuit arose out of the conduct of the candidate's campaign, the campaign may establish a litigation fund committee to raise money to pay fees and costs.⁴ As discussed above, contributions to such a litigation fund committee would be subject to the annual limits, but that would be in addition to the limits that apply to contributions to the Committee. That is, an individual donor could give \$3,100 to the Committee and \$3,100 to the litigation fund committee. Lastly, please keep in mind that the limits apply to in-kind contributions that would arise if a donor paid the Defense Firm directly instead of donating to the Committee.

V. Conclusion

As explained in more detail above, you are advised that the contribution limits apply to money, gifts, forgiveness of debts, or loans incurred or received by the Committee to pay fees and costs associated with the opposing candidate's lawsuit, regardless of whether such fees and costs were incurred before or after the City General Election.

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Thank you for your concern about compliance with the City's Ethics Code and for seeking advice. Advisory opinions are fact-specific, and this Opinion is predicated on the facts you have provided. Requestors of advisory opinions are entitled to act in reasonable reliance on opinions issued to them and not be subject to penalties under the laws within the Board's jurisdiction, unless they have omitted or misstated material facts in their requests. § 20-606(1)(d)(ii); Board Reg. 4 ¶ 4.12.

Since you requested a non-public opinion, the original Opinion will not be made public. As required by the Ethics Code, a version of the Opinion that has been redacted to conceal facts that are reasonably likely to identify you is being made public. If you have any questions, please contact General Counsel staff.

BY THE PHILADELPHIA BOARD OF ETHICS

/s/Michael H. Reed

Michael H. Reed, Esq., Chair
Judge Phyllis W. Beck, (Ret.), Vice-Chair
Sanjuanita González, Esq., Member
Brian J. McCormick, Jr., Esq., Member
JoAnne A. Epps, Esq., Member

⁴ Our understanding is that the Board's General Counsel advised you in the previous year about the permissibility of using a litigation fund for these purposes.