

February 9, 2006

**Ohio Elections Commission
Advisory Opinion
2006ELC-01**

SYLLABUS: The use of campaign funds pursuant to R.C. §3517.13(O)(2) is denied for any payments for legal fees in connection with all of the lawsuits identified in the advisory opinion request letter as there is no plausible "... connection with [any] duties as the holder of a public office ..."

To: Michael K. Allen
Former Hamilton County Prosecutor

You have requested an advisory opinion on the following question:

Can a former county prosecutor use funds from his campaign committee to pay legal fees relating to four (4) separate civil lawsuits stemming from events that occurred during his tenure as the county prosecutor?

The situation at issue in this advisory opinion request involved certain activity of the then incumbent prosecutor in Hamilton County, Ohio. While the holder of the office of prosecuting attorney, a statutory county office defined in Ohio Revised Code chapter 309, Michael K. Allen admitted to having an intimate relationship with an assistant prosecutor in that office. This assistant prosecutor is the complainant in the first lawsuit identified in the advisory opinion request letter. This lawsuit alleged that Mr. Allen engaged in sexual harassment. Mr. Allen denied this allegation and asserted that the relationship was consensual. After the details of this relationship became public, the other lawsuits identified in the advisory opinion request resulted. These lawsuits relied on certain of the facts and circumstances that occurred and sought the respective remedies outlined in each of those complaints.

In this instance, it can be unequivocally stated that the conduct of the requester of this advisory opinion cannot be identified as campaign activity. It would not be proper, therefore, to use a candidate's campaign funds for any legal expense related to this conduct as a legitimate and verifiable campaign activity as defined in R.C. §3517.13(O). The only possible basis for allowing the use of campaign funds for legal expenses in this circumstances occurs if such activity can be identified as occurring "in connection with [his] duties as the holder of a public office," as stated in Ohio's campaign finance laws.

As previously stated, R. C. Chapter 309 establishes and defines a county prosecuting attorney. The respective sections of this chapter outline the qualifications, the powers and duties, the responsibilities, and the authority of the position, among other things. R.C. §309.08 empowers the prosecuting attorney to "inquire into the commission of crimes within the county" and to "prosecute ... all complaints, suits, and controversies in which the state is a party ..." R.C. §309.09 appoints the prosecutor as the "legal adviser" to the "... county commissioners, (the) board of elections, ... all other county officers ..., all township officers, boards, and commissions ..." and empowers the prosecuting attorney to "prosecute and defend all suits and actions which any such officer or board directs or to which it is a party ..." R.C. §309.09(A) concludes by limiting the employment of "... any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code."

In addition to these sections, R.C. §309.05 grants to a taxpayer the right to seek the removal of the prosecuting attorney for "wanton and willful neglect of duty or gross misconduct in office ..." This section identifies the parameters of such an action, and directs the court to declare such removal or dismiss the complaint. As presented in the advisory opinion request letter, the Hamilton County Court of Common Pleas granted such a dismissal in the case of *Davis v. Michael K. Allen, Hamilton County Prosecutor*, one of the cases for which Mr. Allen is seeking to have the Commission approve the disbursement of funds from Mr. Allen's campaign committee pursuant to R.C. §3517.13(O).

R.C. §3517.13(O) limits the manner in which campaign funds may be used. Campaign funds are primarily used for legitimate and verifiable campaign expenses under R.C. §3517.13(O)(1). As stated above and acknowledged by the requester, though, the conduct in this situation is not campaign activity. The only applicable provision, which would allow for the use of campaign funds, is R.C. §3517.13(O)(2), which holds as follows:

No beneficiary of a campaign fund ... shall convert for personal use, ... anything of value from the beneficiary's campaign fund, ...except as reimbursement for any of the following:

...

(2) Legitimate and verifiable ordinary and necessary prior expenses incurred by the beneficiary in connection with duties as the holder of a public office ... (Emphasis added)

In applying the provisions of this statute to these circumstances, the Commission will first look at the essential duties of a prosecuting attorney, as outlined above. Paraphrasing, the duty of a county prosecuting attorney is to give legal representation to the county in which he resides. When performing these functions, a prosecuting attorney is acting “in connection with duties as the holder of a public office” for purposes of the provisions of R.C. §3517.13(O).

The Commission cannot accept any assertion that an acknowledged sexual relationship has any connection to the duties, responsibilities or powers of a county prosecuting attorney. There is nothing more personal than relations between consenting adults. Further, there is nothing less related to the duties of any holder of a public office than these same type of relations, regardless of whether they were consensual or an alleged form of harassment. Without this linkage to the duties of a holder of a public office, therefore, any expenditure of campaign funds connected to the legal fees, settlement or any other form of payment in conjunction with the lawsuit identified as *Collins v. Allen* will not be permitted.

Nor will the Commission approve any expenditure of campaign funds relating to the lawsuit identified in the advisory opinion request letter as *Allen v. Hamilton County*. As was just explained, the conduct of Mr. Allen cannot be linked to the duties, responsibilities or powers of a county prosecuting attorney. While certainly there may be an obligation on the part of the county to allow for the defense of an officeholder in a civil proceeding pursuant to the provisions of R.C. §2744.07, as identified in the advisory opinion request letter, such an obligation arises only when the situation occurs as a result of

a loss caused by an act or omission of the employee in connection with a governmental or proprietary function. The political subdivision has the duty to defend the employee if the act or omission occurred while the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities.

Intimate adult relations do not connect with a governmental or proprietary function. Further, any assertion that such activity can occur in “good faith” or “not manifestly outside the scope of employment or official responsibilities”, as required by this statute, cannot be accepted.

While the Commission believes that it could take a different approach to the expenditures relating to the other two lawsuits identified in the advisory opinion request letter, because the remaining lawsuits were filed as a direct result of the intimate affair in which the prosecutor engaged, the Commission hereby

declares that no expenditure of campaign funds for legal fees connected to this situation is “legitimate and verifiable, ordinary and necessary prior expense ... in connection with duties as the holder of a public office.”

Although it was unsuccessful, the citizen’s lawsuit seeking the prosecutor’s removal from office was brought in good faith as a response to the requestor’s conduct. As well, the request by the local newspaper for certain public records occurred only after the sexual harassment lawsuit came to light. The newspaper sought the information in an effort to fulfill its role as watchdog of the public trust. In both cases, however, had the intimate affair never taken place, the subsequent legal actions would not have been filed. This Commission believes that any and all legal fees that result from the intimate relationship between Mr. Allen and the assistant prosecutor that preceded this request must be considered totally unrelated to the duties of a public officeholder and instead, the direct personal responsibility of the former prosecutor.

Accordingly, it is the opinion of the Ohio Elections Commission, and you are so advised, that the use of campaign funds pursuant to R.C. §3517.13(O)(2) is denied for any payments for legal fees in connection with all of the lawsuits identified in the advisory opinion request letter, as there is no plausible “... connection with [any] duties as the holder of a public office ...”

Sincerely,

Catherine Cunningham
Chair

judicial finding made by the Federal District Court in the *Allen v. Hamilton County*.

As the county solely relies on the statutory duties of the prosecuting attorney to defend the county. The suit brought pursuant to R.C. §309.05, identified as *Davis v. Allen*, asserts that the conduct of the prosecuting attorney was “wanton and willful neglect of duty or gross misconduct in office” and that he should be removed from office. That provision obligates the prosecuting attorney to defend the county, and so Mr. Allen, in defending against this lawsuit, is simply fulfilling his statutory duty. Similarly, in the lawsuit identified as *Enquirer v. Allen*, the prosecuting attorney is again merely fulfilling his statutory duties to provide legal advice and services to defend the county. The legal action brought against the county invoked a duty of the prosecuting attorney on behalf of his “client.” The request by the local newspaper for certain public records requires action by the prosecuting attorney to defend the county and protect the legal rights of the appropriate county officeholder relating to the public records at issue. Since the legal representation by Mr. Allen on behalf of the county is his statutory duty, it must fulfill the terms of R.C. §3517.13(O)(2), which allows for the use of campaign funds for expenditures “... in connection with duties as the holder of a public office ...” This is true even though the lawsuit resulted from an act of the requester that certainly does not meet this same statutory provision.