AGO 2002-23 PUBLIC OFFICER; CAMPAIGNS; ELECTIONS; SECRETARY OF STATE: Elected public officers are generally prohibited from using campaign funds for typically personal and household expenses if the particular use would fulfill a commitment , obligation, or expense that would exist irrespective of the candidate's campaign or duties as an officeholder. In applying this analysis, each item or expense must be individually analyzed. Accordingly, the use of campaign funds to pay attorney fees for defending a public officer against an ethics charge violation under this test and the facts in this opinion would not be prohibited by NRS 294A.160(1).

Carson City, May 21, 2002

The Honorable Dean Heller, Secretary of State, 101 N. Carson Street, Suite 3, Carson City, Nevada 89701-4786

Dear Mr. Heller:

You have requested an opinion from this office as to whether the personal use of campaign funds, as contemplated in NRS 294.160, includes the payment of attorney fees associated with defending a public officer against an ethics charge. In addition, you have asked for the definition of the term "personal use of campaign funds" as used in NRS 294A.160.

QUESTION ONE

What is the definition of the term "personal use of campaign funds" as used in NRS 294A.160?

ANALYSIS

NRS 294A.160 prohibits the personal use of campaign funds and provides for the disposition of unspent contributions and penalties. NRS 294A.160 provides:

> 1. It is unlawful for a candidate to spend money received as a campaign contribution for his personal use.
> 2. Every candidate for a state, district, county, city or township office at a primary, general, primary city, general city or special election who is elected to

that office and received contributions that were not spent or committed for expenditure before the primary, general, primary city, general city or special election shall:

(a) Return the unspent money to contributors;

(b) Use the money in his next election or for the payment of other expenses related to public office or his campaign;

(c) Contribute the money to:

(1) The campaigns of other candidates for public office or for the payment of debts related to their campaigns;

(2) A political party;

(3) A person or group of persons advocating the passage or defeat of a question or group of questions on the ballot; or

(4) Any combination of persons or groups set forth in subparagraphs (1), (2) and (3);

(d) Donate the money to any tax-exempt nonprofit entity; or

(e) Dispose of the money in any combination of the methods provided in paragraphs (a) to (d), inclusive.

3. Every candidate for a state, district, county, city or township office at a primary, general, primary city, general city or special election who is not elected to that office and received contributions that were not spent or committed for expenditure before the primary, general, primary city, general city or special

election shall, not later than the 15th day of the second month after his defeat:

(a) Return the unspent money to contributors;

(b) Contribute the money to:

(1) The campaigns of other candidates for public office or for the payment of debts related to their campaigns;

(2) A political party;

(3) A person or group of persons advocating the passage or defeat of a question or group of questions on the ballot; or

(4) Any combination of persons or groups set forth in subparagraphs (1), (2) and (3);

(c) Donate the money to any tax-exempt nonprofit entity; or

(d) Dispose of the money in any combination of the methods provided in paragraphs (a), (b) and (c).

4. Every candidate for a state, district, county, city or township office who is defeated at a primary or primary city election and received a contribution from a person in excess of $5,000 shall, not later than the 15th day of the second month after his defeat, return any money in excess of $5,000 to the contributor.

5. Every public officer who:

(a) Holds a state, district, county, city or township office;

(b) Does not run for reelection and is not a candidate for any other office; and

(c) Has contributions that are not spent or committed for expenditure remaining

> from a previous election, shall, not later than the 15th day of the second month after the expiration of his term of office, dispose of those contributions in the manner provided in subsection 3.
>
> 6. In addition to the methods for disposing the unspent money set forth in subsections 2, 3 and 4, a legislator may donate not more than $500 of that money to the Nevada silver haired legislative forum created pursuant to NRS 427A.320.
>
> 7. The court shall, in addition to any penalty which may be imposed pursuant to NRS 294A.420, order the candidate or public officer to dispose of any remaining contributions in the manner provided in this section.
>
> 8. As used in this section, "contributions" include any interest and other income earned thereon.

NRS chapter 294A, Campaign Practices, does not provide a definition for the term "personal use" as it is used in NRS 294A.160(1). Moreover, there appears to be no judicial determination in Nevada that provides a definition, nor have there been any former opinions issued by the Nevada Attorney General's Office specifically examining the term. A review of the legislative history of NRS 294A.160, however, provides some limited assistance in determining what the Legislature intended would constitute the personal use of campaign funds.

NRS 294A.160 was promulgated as Senate Bill No. 166 (S.B. 166) during the 1991 legislative session and became effective on October 1, 1991. Act of October 1, 1991, ch. 585, § 2, 1991 Nev. Stat. 1922. The original version of S.B. 166 did not contain the prohibition of "personal use of campaign funds" language found today in NRS 294A.160(1). However, the minutes of the Senate Committee on Government Affairs from January 30, 1991, state that Senator Cook spoke in favor of S.B. 166 and provided a

statement that "[p]olitical contributions should not be converted to personal income or to pay an individuals [sic] personal expenses for example an individuals [sic] utility bill or personal house payment." Hearing on S.B. 166 Before the Senate Comm. on Gov't Affairs, 1991 Legislative Session, 10 (January 30, 1991). Senator Cook proposed the language of NRS 294A.160(1) as it is today. Hearing on S.B. 166 Before the Senate Comm. on Gov't Affairs, 1991 Legislative Session, 13 (January 30, 1991). The minutes then reflect that Senator Raggio "indicated the language should be specific in the bill, stating no one in public office use campaign contributions for personal benefit" and moved to amend S.B.166 to reflect Senator Cook's changes. Hearing on S.B. 166 Before the Senate Comm. on Gov't Affairs, 1991 Legislative Session, 7 (January 30, 1991).

The Senate Daily Journal, published February 7, 1991, provides additional insight into further discussion by the legislators about debts relating to a campaign and the prohibition of using debts for personal use. Hearing on S.B. 166 Before the Senate Comm. on Gov't Affairs, 1991 Legislative Session, 30 (February 7, 1991). The Senate Daily Journal provides that Senator Cook stated about S.B. 166:

> There was discussion in the Committee on Government Affairs about the meaning of the phrase "for the payment of debts related to their campaigns." There are certain real costs in connection with the holding of a public office for which the use of political contributions is fitting and proper. Certain items were discussed in the committee about the legislative intent of this bill regarding these costs. In order to do a good job, a legislator must keep current with various matters and must stay in touch with the voters. Costs are incurred which may include such items as conference, correspondence with the voters, travel in connection with conferences or meetings that are not reimbursable, meetings with

> various groups, attendance at charitable events, and town meetings. Id.

The minutes reflect that on March 12, 1991, Senator Cook addressed the intent of S.B. 166 in the Assembly Committee on Legislative Functions. Specifically, the minutes reflect that Senator Cook explained that "discussion occurred in the Senate Government Affairs Committee concerning the definition of: '. . . for the payment of debts relating to their campaigns.' The bill's intent, he stated, was to include real costs associated with holding of public office." Hearing on S.B. 166 Before the Senate Comm. on Gov't Affairs, 1991 Legislative Session, 31-32 (March 12, 1991) (emphasis added).

The minutes also reflect that the Nevada Council of Senior Citizens distributed a prepared statement asserting that "[a]llowing '. . . payment of other expenses related to public office or his campaign . . .' is extremely vague and also fraught with possible misuse." Hearing on S.B. 166 Before the Assembly Comm. on Legislative Functions, 1991 Legislative Session, 38 (March 12, 1991). The Nevada Council of Senior Citizens further contended that S.B. 166 would "be institutionalizing bad practices and improving conditions for the process to be further corrupted." Hearing on S.B. 166 Before the Assembly Comm. on Legislative Functions, 1991 Legislative Session, 40 (March 12, 1991). There are no other clarifications or statements regarding the definition of "personal use of campaign funds" in the legislative history.

The State of Nevada, Legislative Counsel Bureau (LCB), by way of an informal letter opinion issued in December 1992 concerning certain specified expenditures, has addressed the language of NRS 294A.160(1). In that letter opinion, the LCB found that NRS 294A.160 permits the expenditure of campaign contributions, which are not spent or committed for expenditure during a campaign, in order to recover the amount paid for a list of registered voters and the amount of the fee paid pursuant to NRS 293.193 to file for office. In addition, the LCB opined that campaign contributions may be used to pay a spouse for services provided as the manager of an elected official's campaign if the elected official is able to furnish adequate proof of the level of the spouse's involvement and commitment and nature of services provided as the manager of the elected official's campaign.

Although only indirectly related to the term "personal use," the Nevada Attorney General's Office issued an opinion on November 5, 1998, which defined the term "campaign contributions." In so doing, the Attorney General's Office reiterated a clear statement from the Legislature that if campaign contributions were converted to personal use, the contribution became a personal gift. The opinion cited to a hearing on 1991 Assembly Bill No. 190 (A.B. 190) as follows:

> In the 1991 Legislature, the then chairman of the Commission on Ethics (Ethics Commission) defined campaign contributions as "public funds in the sense that they are solicited and received for a public purpose, the election to public office to serve the public. They are not solicited or given for private or personal use and, if used personally, that use converts the contribution to a personal gift."

Op. Nev. Att'y Gen. No. 98-29 (November 5, 1998).

Finally, we note that the Nevada Secretary of State's Office provides a "Campaign Guide" that alerts individuals who receive campaign contributions to various legal provisions governing contributions including, but not limited to, contribution restrictions, reporting requirements, and the legal requirement that campaign contributions be maintained in a separate account and not commingled with other monies. The Campaign Guide, however, does not attempt to define "personal use" and simply reiterates the prohibition in NRS 294A.160(1) that "It is unlawful for a candidate to spend money received as a campaign contribution for his or her personal use."

While personal use regulation has had limited exposure in the State of Nevada, it has been an issue addressed by the federal government and many states. The University of California Berkeley, Institute of Governmental Studies did a comparison in December 1997 of California's use regulations with the federal government and other states. RAY LA RAJA ET AL., Cashing in on the Campaign: The Personal Use of Campaign Funds in California,

INST. OF GOVERNMENTAL STUDIES (December 1997). The comparison provides a brief synopsis of the history of the federal rules governing the personal use of campaign funds. "The federal rules governing personal use of campaign funds arise out of the 1979 amendments to the Federal Election Campaign Act. Although the provision disallowing personal use of campaign funds was passed in 1979, the specific rules were not issued until some fifteen years later. What prompted the Federal Elections Commission (FEC) to write the rules was the passage of the Ethics Reform Act of 1989." Id. The federal government developed the Federal Elections Commission (FEC) as a regulatory arm to, among other things, enforce the rules on the use of campaign funds. Id.

The federal rules regarding the personal use of campaign funds are currently codified in 2 U.S.C. § 439a (2001) and 11 C.F.R. 113.1 (2001). The use of campaign funds by a candidate to "defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of a Federal office . . . ." is allowed pursuant to 2 U.S.C. § 439a (2001). Further, 11 C.F.R. 113.1 (2001) provides a specific list of examples of expenses that are considered personal use which do not "defray any ordinary and necessary expenses incurred in connection with his or her duties." Specifically, 11 C.F.R. 113.1(1)(i) (2001) provides in relevant part:

> (i) Personal use includes but is not limited to the use of funds in a campaign account for:
> (A) Household food items or supplies;
> (B) Funeral, cremation or burial expenses;
> (C) Clothing, other than items of de minimis value that are used in the campaign, such as campaign "T-shirts" or caps with campaign slogans;
> (D) Tuition payments, other than those associated with training campaign staff;
> (E) Mortgage, rent or utility payments - -

> (1) For any part of any personal residence of the candidate or a member of the candidate's family; or
> (2) For real or personal property that is owned by the candidate or a member of the candidate's family and used for campaign purposes, to the extent the payments exceed the fair market value of the property usage;
> (F) Admission to a sporting event, concert, theater or other form of entertainment, unless part of a specific campaign or officeholder activity;
> (G) Dues, fees or gratuities at a country club, health club, recreational facility or other nonpolitical organization, unless they are part of the costs of a specific fundraising event that takes place on the organization's premises; and
> (H) Salary payments to a member of the candidate's family, unless the family member is providing bona fide services to the campaign. . . .

However, the list of expenses enumerated in 11 C.F.R. 113.1(1)(i) (2001) which specifically do not "defray any ordinary and necessary expenses incurred in connection with his or her duties" and therefore are statutorily deemed personal use is not exhaustive. Indeed, it would be difficult to see how it could be "given the myriad circumstances that might be described as related to campaign or official work, especially in areas such as meals and travel." LA RAJA, supra, at 2. Instead, 11 C.F.R. 113.1 (2001) provides the FEC with discretion to look at items on a "case by case" basis to determine if the expense would exist "irrespective" of the candidate's campaigning or officeholder status. 11 C.F.R. 113.1(1) (2001) provides in relevant part:

> (ii) The Commission will determine, on a case by case basis, whether other uses of funds in a campaign account fulfill a commitment, obligation or expense that would exist irrespective of the candidate's campaign or duties as a Federal officeholder, and therefore are personal use. Examples of such other uses include:
> (A) Legal expenses;
> (B) Meal expenses;
> (C) Travel expenses, including subsistence expenses incurred during travel. . . .
> (D) Vehicles expenses, unless they are de minimis amount. . . .

The federal rules are designed as a preventative regulatory strategy. LA RAJA, supra, at 1. "The rules mark out what specific kinds of activities are disallowed rather than leaving discretion to the candidate or campaign treasurer to test the limits of what is politically relevant." Id. For example, the rule is clear that "a Congressman must buy groceries whether he is an elected official or not. He cannot write off the purchase of these groceries or the use of a vehicle to pick them up on the campaign account. If the Congressman gets a parking ticket while picking up groceries he cannot pay the fine with campaign funds for the same reason." Id. Moreover, the "'irrespective' clause is useful in common categories of expenditures because it provides a concrete litmus test: are these activities common to all civilians, or is it the nature of the public office that requires them?" Id.

2 U.S.C § 439a (2001) has recently been amended; the new version will take effect November 26, 2002. The amended version provides specificity to the analysis of the use of campaign contributions for certain purposes. In particular, 2 U.S.C. § 439a (2002), as amended, will delineate both permitted uses and prohibited uses of contributions. Permitted uses will be an application of the "ordinary and necessary" test, while prohibited uses will be treated as conversion, applying the "irrespective" test from 2 U.S.C.§ 439a (2001). 2 U.S.C. § 439a (2001), as amended, states:

(a) Permitted Uses. - A contribution accepted by a candidate, and any other donation received by an individual as support for activities of the individual as a holder of Federal office, may be used by the candidate or individual -

(1) for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual;

(2) for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office;

(3) for contributions to an organization described in section 170(c) of the Internal Revenue Code of 1986; or

(4) for transfers, without limitation, to a national, State, or local committee of a political party.

(b) Prohibited Use. -

(1) In general. – A contribution or donation described in subsection (a) shall not be converted by any person to personal use.

(2) Conversion. – For the purpose of paragraph (1), a contribution or donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office, including –

(A) a home mortgage, rent, or utility payment;

(B) a clothing purchase;

> (C) a noncampaign related automobile expense;
> (D) a country club membership;
> (E) a vacation or other non-campaign related trip;
> (F) a household food item;
> (G) a tuition payment;
> (H) admission to a sporting event, concert, theater, or other from of entertainment not associated with an election campaign; and
> (I) dues, fees, and other payments to a health club or recreational facility.

In addition to adopting the "irrespective" test, the amendment to 2 U.S.C. § 439a (2001) has adopted the examples of personal use items from 11 C.F.R. 113.1 (2001) into 2 U.S.C. § 439a (2002). Further, the amendment enumerates and disallows additional specific items as personal use. However, the most significant change appears to be an attempt to increase the preventative nature of the federal rules regarding personal use of campaign funds by creating specific liability to violators for conversion. Obviously there has been no interpretation of the amendments to date.

The differences in personal use laws between the states are very broad. Most states rely "heavily on the notion that people have a common conception of what it means to spend money for activities directly related to a political purpose." LA RAJA, supra, at 2. However, some states provide lists of prohibited expenditures similar to those of the federal government. Only a few states do not address the personal use of campaign funds. LA RAJA, supra, at 2. Relevant portions of statutes and regulations addressing the personal use of campaign funds in the states are summarized in the following table:

PERMITTED USE OF CAMPAIGN FUNDS BY STATE

Alabama	"[D]o not include personal and legislative living expenses . . . ."	ALA. CODE § 17-22A-7(2) (2001)

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Alaska	"[M]ay not be . . . used to give a personal benefit . . . or converted to personal income . . . ."	ALASKA STAT. § 15.13.112(b) (2001)
Arizona	"[S]hall not be used for or converted to the personal use of the . . . individual . . . ."	ARIZ. REV. STAT. § 16-915.01(B) (2001)
Arkansas	"[S]hall not take any campaign funds as personal income." "A candidate who uses campaign funds to fulfill any commitment, obligation, or expense that would exist regardless of the candidate's campaign shall be deemed to have taken campaign funds as personal income."	ARK. CODE ANN. § 7-6-203(g) (2001)
California	"[S]hall not be used to pay for or reimburse the cost of professional services unless the services are directly related . . . ." "Expenditures which confer a substantial personal benefit shall be directly related to a political . . . purpose." "[S]ubstantial personal benefit means an expenditure of campaign funds which results in a direct personal benefit with a value of more than $200 . . . ."	CAL. GOV. CODE § 89513(b) (2001)
Colorado	Not "used for personal purposes not reasonably related to supporting the election . . . ."	COLO. REV. STAT. § 1-45-106(1)(a)(II) (2001)
Connecticut	"'[P]ersonal use' include expenditures to defray normal living expenses . . . and expenditures for the personal benefit of the candidate having no direct connections with . . . the campaign . . . ."	CONN. GEN. STAT. § 9-333i(g)(4) (2001)
Delaware	May make expenditures for "employing attorneys, accountants and other professional advisers . . . ."	DEL. CODE ANN. tit. 15 § 8020(15) (2001)
Florida	"[M]ay not use funds . . . to defray normal living expenses for the candidate . . . ."	FLA. STAT. ch. 106.1405 (2001)
Georgia	Used "only to defray ordinary and necessary expenses . . . incurred in connection with . . . campaign . . . ." "Contributions . . . shall not constitute personal assets of . . . candidate . . . ."	GA. CODE ANN. § 21-5-33(a) (2001)
Hawaii	"[S]hall not be used for personal expenses or to qualify for public funding . . . ."	HAW. REV. STAT. § 11-206(b) (2001)
Idaho	"[M]ay be used . . . to defray any ordinary and necessary expenses incurred in connection with his duties . . . ."	IDAHO CODE § 67-6610C (2000)

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Illinois	"None of the above provisions gives the Board the authority to question the propriety of disbursals . . . . whether for political or nonpolitical accounts."	Troy v. State Board of Elections, 406 N.E.2d 562, 564 (Ill. App.1980)
Indiana	May be used only: "(C) activity related to service in an elected office . . . ." "May not be used for primarily personal purposes . . . ."	IND. CODE § 3-9-3-4 (2001)
Iowa	"2. Campaign funds shall not be used for any of the following purposes: . . . b. Satisfaction of personal debts, other than campaign loans. c. Personal services, including the services of attorneys, accountants, physicians, and other professional persons. However, payment for personal services directly related to campaign activities is permitted."	IOWA CODE § 56.41 (2001)
Kansas	"No moneys received . . . shall be used or be made available for the personal use of the candidate" except "expenses of holding political office . . . ." "'[P]ersonal use' shall include expenditures to defray normal living expenses for the candidate or the candidate's family and expenditures for the personal benefit of the candidate having no direct connection with or effect upon the campaign of the candidate or the holding of public office."	KAN. STAT. ANN. § 25-4157a (2000)
Kentucky	Not "for any purpose other than for allowable campaign expenditures." "'Allowable campaign expenditures' means expenditures including reimbursement for actual expenses, made directly and primarily in support of or opposition to a candidate . . ." (supported by Op. Att'y Gen. 82-255 (May 7, 1982)).	KY. REV. STAT. ANN. § 21.175 (2001)
Louisiana	"[F]unds shall not be used, loaned, or pledged by any person for any personal use unrelated to a political campaign, the holding of a public office or party position . . . ."	LA. REV. STAT. 18:1505.2(I) (2002)
Maine	"[M]ay dispose of a surplus exceeding $50 by: . . . G. Paying for any expense incurred in the proper performance of the office to which the candidate is elected, as long as each expenditure is itemized on expenditure reports . . . ."	ME. REV. STAT. ANN. tit. 21 § 1017(8) (2001)

Maryland	"[M]ay not expend a public contribution for: A. Any purpose that violates any law or regulation of the State . . . ."	MD. REGS. CODE tit. 33 § 14.04.05 (2001)
Massachusetts	"[R]esidual funds shall not be converted to the personal use of the candidate . . . ."	MASS. ANN. LAWS ch. 55, § 18(h)(15) (2002)
Michigan	Narrow restrictions on disbursement of unexpended funds.	MICH. COMP. LAWS § 169.245 (2001)
Minnesota	"[U]nless the use is reasonably related to the conduct of election campaigns, or is a noncampaign disbursement . . . (1) payment for accounting and legal services . . . ."	MINN. STAT. § 211B.12 (2000)
Mississippi	No apparent restrictions on expenditures.	
Missouri	"Contributions as defined in section 130.011, received by any committee shall not be converted to any personal use." However, "[c]ontributions may be used for any purpose allowed by law including, but not limited to: (1) Any ordinary expenses incurred relating to a campaign; (2) Any ordinary and necessary expenses incurred in connection with the duties of a holder of elective office . . . ." "Attorney's fees may be paid from candidate committee funds . . . ."	MO. REV. STAT. § 130.034 (2000) MO. REV. STAT. § 130.033 (2000)
Montana	Shall not "use the funds for personal benefit . . . (2) For purposes of this section, 'personal benefit' means a use that will provide a direct or indirect benefit of any kind to the candidate or any member of the candidate's immediate family."	MONT. CODE ANN. § 13-37-240 (2001)
Nebraska	"Any unexpended public funds shall be repaid to the state. . . ."	NEB. REV. STAT. ANN. § 32-1606(3) (2001)
New Hampshire	"Such surplus campaign contributions, however, shall not be used for personal purposes."	N.H. REV. STAT. ANN. § 64:4-b (2000)
New Jersey	"[A]ll moneys remaining available to any qualified candidate, shall be paid into the fund. . . ." "'[C]ampaign expenses' means any expense incurred . . . other than those items or services which may reasonably be considered to be for the personal use of the candidate. . . ."	N.J. STAT. ANN. § 19:44A-11.2 (2001) N.J. STAT. ANN. §19:44A-35 (2001)

New Mexico	"It is unlawful for any candidate or his agent to make an expenditure of contributions received, except for the following purposes or as otherwise provided in this section: . . . (2) expenditures of legislators that are reasonably related to performing the duties of the office held, including mail, telephone and travel expenditures to serve constituents, but excluding personal and legislative session living expenses . . . ."	N.M. STAT. ANN. § 1-19-29.1 (2001)
New York	"Contributions received by a candidate or a political committee may be expended for any lawful purpose. Such funds shall not be converted by any person to a personal use which is unrelated to a political campaign or the holding of a public office or party position."	N.Y. ELEC. LAW § 14-130 (2001)
North Carolina	"Any money a candidate receives from the Candidates Fund that is unspent within 90 days after the general election shall be returned to the Candidates Fund."	N.C. GEN. STAT. § 163.278.55 (2000)
North Dakota	No apparent restrictions.	
Ohio	No apparent restrictions.	
Oklahoma	Repealed all its election expenditure laws.	
Oregon	Repealed due to VanNatta v. Keisling, 324 Or. 514, 931 P.2d 770 (1997).	
Pennsylvania	Residual funds may be used "to compensate any person for services rendered to a candidate . . . ."	25 PA. STAT. ANN. § 3250 (2001) 25 PA. STAT. ANN. § 3241 (2001)
Rhode Island	Personal use prohibited. "'[P]ersonal use' is defined as any use other than expenditures related to gaining or holding public office and for which the candidate for public office or elected public official would be required to treat the amount of the expenditure as gross income under § 61 of the Internal Revenue Code of 1986, 26 U.S.C. § 61, or any subsequent corresponding Internal Revenue Code of the United States, as from time to time amended."	R.I. GEN. LAWS § 17-25-7.2 (2001)

South Carolina	"No candidate, committee, public official, or political party may use campaign funds to defray personal expenses which are unrelated to the campaign or the office if the candidate is an officeholder nor may these funds be converted to personal use."	S.C. CODE ANN. § 8-13-1348 (2000)
South Dakota	No apparent restrictions.	
Tennessee	"[N]o candidate for public office shall use any campaign funds either prior to, during or after an election for such candidate's own personal financial benefit or any other nonpolitical purpose as defined by federal internal revenue code."	TENN. CODE ANN. § 2-10-114 (2001)
Texas	"A person who accepts a political contribution as a candidate or officeholder may not convert the contribution to personal use . . . (d) In this section, 'personal use' means a use that primarily furthers individual or family purposes not connected with the performance of duties or activities as a candidate for or holder of a public office. The term does not include: (1) payments made to defray ordinary and necessary expenses incurred in connection with activities as a candidate or in connection with the performance of duties or activities as a public officeholder . . . ."	TEX. ELEC. CODE ANN. § 253.035 (2000)
Utah	No apparent restrictions.	
Vermont	"No member of a political committee which has surplus funds after all campaign debts have been paid shall convert the surplus to personal use."	VT. STAT. ANN. tit. 17, § 2804 (2001)

Virginia	"Amounts received by a candidate or his campaign committee as contributions that are in excess of the amount necessary to defray his campaign expenditures may be disposed of only by one or any combination of the following: . . . (vi) defraying any ordinary, nonreimbursed expense related to his elective office. It shall be unlawful for any person to convert any contributed moneys, securities, or like intangible personal property to his personal use."	VA. CODE ANN. § 24.2-921 (2001)
Washington	"Contributions . . . may only be transferred to the personal account of a candidate . . . under the following circumstances: (1) Reimbursement for or loans to cover lost earnings incurred as a result of campaigning or services performed for the political committee. . . . (2) Reimbursement for direct out-of-pocket election campaign and postelection campaign related expenses made by the individual. . . . (3) Repayment of loans made by the individual to political committees . . . ."	WASH. REV. CODE § 42.17.125 (2001)
West Virginia	"[M]ay be used by the candidate to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of public office . . . ."	W. VA. CODE ANN. § 3-8-10 (2001)
Wisconsin	Surplus funds from state election fund grant must be returned.	WIS. STAT. § 11.50 (2000)
Wyoming	No apparent restrictions.	

Most states limit campaign fund activities to expenses that are "directly related" or "ordinary and necessary" for conducting a campaign or performing official duties. LA RAJA, supra, at 2. Moreover, the phrase "personal use" appears to be a term of art, as its meaning is addressed by an application of law to individual fact items or expenses in each state. "The differences across the states are most likely a product of history, political culture, and particular scandals that created a demand for reform. Sometimes, the rules are changed according to the whim of an individual legislator." LA RAJA, supra, at 3.

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In order to thoroughly investigate the differences between the states in defining the personal use prohibition under individual state statutes, it would be necessary to compare case laws, advisory opinions, and enforcement decisions issued by the relevant regulatory agencies of the states on each particular item or expense. LA RAJA, supra, at 2. Therefore, most of the analysis with regard to "personal use" addresses situations that have arisen with regard to specific items or expenses that a candidate or officeholder has alleged are "directly related" or "ordinary and necessary" for conducting a campaign or performing official duties. Few courts have attempted to actually find a general definition for personal use.

The Maryland Attorney General's Office has attempted to articulate a definition for their prohibition against the "personal use" of campaign funds in an opinion issued October 19, 1993. Specifically, the Maryland Attorney General's Office adopted a "but for" test to determine whether the use of campaign funds for an item or expense would be appropriate, that is, "but for the candidacy, they would not have occurred." 78 Op. Md. Att'y Gen. 155 (October, 1993). The Maryland Attorney General started with the proposition that if there were no candidacy, the expense would not have been incurred. Id. The Maryland Attorney General further stated, "[p]ost-election expenditures 'promote the success of the candidate,' in the sense that they meet obligations that arose directly from the candidacy and that, if not satisfied, would hurt the candidate's future prospects." Id.

A few states apply a "substantial benefit test" to determine whether a payment from campaign funds is for personal use. On June 15, 1993, the Washington Attorney General's Office opined that expenses are personal if they provide a personal benefit to the officeholder. 1993 Op. Wa. Att'y Gen. No. 12 (June, 1993). On August 18, 1982, the California Attorney General issued a narrower opinion, stating that:

> A payment from campaign funds is for personal use if the payment creates a substantial personal benefit and does not have more than a negligible political, legislative, or governmental purpose. However, a payment from campaign funds is not for personal use if it is to

> replace articles lost, damaged, or stolen in connection with political, legislative or governmental activity.

65 Op. Cal. Att'y Gen. 493 (August, 1982).

One state, South Carolina, has even suggested that the term "personal use" can only be defined by looking at the nexus between the use of the funds and the intent of the donor. On August 17, 1988, the South Carolina Attorney General's Office opined that while "[o]nly a court could categorically conclude whether particular facts or circumstances constitute a violation of such provisions" there is a "possibility that campaign funds are impressed with a trust which controls the manner of expending such funds for purposes other than campaign expenses." Op. S.C. Att'y Gen. No. 88-150 (August, 1988).

As discussed and analyzed herein, the term "personal use," as used in NRS 294A.160(1), cannot be narrowly defined. In fact, the term has been broadly defined under federal law and in the different states. In Nevada, the legislative history reveals that the Legislature generally intended to disallow expenditures of campaign monies for typical personal and household expenses such as food, clothing, rent, utilities and the like. Accordingly, we conclude that the intent behind NRS 294A.160(1) was to enact a standard similar to that adopted by the federal government and articulated in 11 C.F.R. 113.1(1). Specifically, we conclude that NRS 294A.160(1) prohibits use of funds in a campaign account if the particular use would fulfill a commitment, obligation, or expense that would exist irrespective of the candidate's campaign or duties as an officeholder. In applying this analysis, each item or expense must be individually analyzed.

CONCLUSION TO QUESTION ONE

The term "personal use," as used in NRS 294A.160(1), has not been specifically defined by the Nevada Legislature or the Nevada courts. An analysis of the personal use laws of the federal government and other states reveals a broad definition for the term "personal use." Nevada's legislative history reveals that the Legislature generally intended to disallow expenditures of campaign monies for typical personal and household

expenses such as food, clothing, rent, utilities and the like. Based on that legislative history, we conclude that in enacting NRS 294A.160(1), the Nevada Legislature intended to enact a standard similar to that adopted by the federal government and articulated in 11 C.F.R. 113.1(1), and to thereby prohibit use of campaign funds if the particular use would fulfill a commitment, obligation, or expense that would exist irrespective of the candidate's campaign or duties as an officeholder.

QUESTION TWO

Does the use of campaign funds by a public officer to pay attorney fees associated with defending that public officer against an ethics violation charge before a city or state ethics board constitute the personal use of campaign funds, in violation of NRS 294A.160?

ANALYSIS

NRS 294A.160 does not specifically address the use of campaign funds to pay attorney fees for defending a public officer against an ethics violation charge. NRS 294A.160 does, however, provide in subsection 1 that "[i]t is unlawful for a candidate to spend money received as a campaign contribution for his personal use" and in subsection 2(b that campaign contributions may be used for "the payment of other expenses related to public office or his campaign." Therefore, the question becomes, is the use of campaign funds to pay attorney fees for defending a public officer against an ethics charge considered "personal use" or "the payment of other expenses related to public office or his campaign?"

As discussed in question one above, there is no specific answer to that question in the laws of the State of Nevada, nor has there been a judicial determination made that would provide an answer. However, the federal government and several states have addressed this question.

The FEC has issued several advisory opinions that address the rule on the personal use of campaign funds and the "irrespective" clause of the federal rules. Specifically as to legal expenses, the FEC concluded, in Advisory Opinion Number 1996-24, that legal expenses do not exist irrespective of a candidate's campaign or officeholder status if the candidate

is paying those legal expenses to defend himself/herself against allegations of improper or wrongful conduct made about a candidate in a campaign context. The FEC "recognized" that "the activities of candidates and officeholders may receive heightened scrutiny and attention because of either status as candidates and officeholders" which would not exist irrespective of a candidate's campaign or officeholder status. Id. In Opinion Number 1997-12, the FEC "slightly" modified the test as stated in Opinion Number 1996-24. In Opinion Number 1997-12, the FEC concluded that there is a three-part analysis to determine if legal services would not exist irrespective of a candidate's campaign or officeholder status. That test is:

> 1) any legal expense that relates directly and exclusively to dealing with the press, such as preparing a press release, appearing at a press conference, or meeting or talking with reporters, would qualify for 100% payment with campaign funds because you are a candidate or federal officeholder;
> 2) any legal expense that relates directly to allegations arising from campaign or officeholder activity would qualify for 100% payment with campaign funds;
> 3) 50% of any legal expense not covered by 1 above that does not directly relate to allegations arising from campaign or officeholder activity can be paid for with campaign funds because you are a candidate or federal officeholder and are providing substantive responses to the press (beyond pro forma "no comment" statements).

(The test as stated in Advisory Opinion Number 1997-12 was confirmed by the Federal Election Commission in Advisory Opinion Number 1998-1).

Some states have found that attorney fees for defending a public officer against an ethics violation charge is sufficiently related to the campaign or public office such that the use of campaign funds to pay the attorney fees is not considered personal use. In Ohio, an appellate court found that "not all payment of attorney fees with campaign funds is forbidden. The Ohio Elections Commission [OEC] allows the payment of attorney fees with campaign funds for representation against charges brought before the OEC itself. *State of Ohio v. Ferguson*, 126 Ohio App. 3d 55, 59, 709 N.E.2d 887, 890 (1998). The Texas Ethics Commission suggested the application of a test to determine if attorney fees could be paid with campaign funds: "[W]hether the legal expense arose directly from the requestor's activities as a candidate." Op. Tex. Ethics Comm. No. 105 (December 10, 1992).

Moreover, as stated in question one, the Maryland Attorney General's Office asked, "would the expense have been incurred had there been no candidacy?" or "but for the candidacy" would the costs have been incurred? 78 Op. Md. Att'y Gen. 155 (October, 1993). The Maryland Attorney General concluded that the attorney fees to defend an ethics violation would not have been incurred had there been no candidacy, therefore the use of campaign funds to pay those fees was not personal use. Id. However, the Maryland Attorney General's Office also addressed in a footnote the limited the use of campaign funds to pay attorney fees:

> We do not suggest that campaign funds may generally be used for the cost of defending against criminal charges. If, for example, a candidate or incumbent is indicted for armed robbery, he or she may not use campaign funds to defend against the charge. While in one sense it would undoubtedly promote the success of the candidacy to be acquitted of the robbery charge, and in the case of an incumbent acquittal would protect his or her incumbency, there is no nexus between the charge of armed robbery and the candidacy. Id.

However, in contrast, the Alabama Attorney General, in an opinion dated June 12, 2000, adopted an FEC advisory opinion that legal fees incurred pursuant to the defense of a criminal prosecution relative to official conduct in office may be paid from campaign funds. Op. Ala. Att'y Gen. No. 2000-165 (June, 2000), citing Federal Election Comm. Advisory Op. No. 1977-39 (August 26, 1977). Similarly, the South Carolina Attorney General's Office stated in an opinion dated September 29, 1986, "[f]unds to help pay personal legal fees appear to be distinguishable from campaign funds . . . ." Op. S.C. Att'y Gen. No. 86-71 (September, 1986).

Few states have found an absolute bar to the use of campaign funds to pay for attorney fees. The Tennessee Attorney General's Office opined on October 23, 1997, that "a candidate may not use surplus campaign funds to cover his or her legal expenses, regardless of whether the action is related to the performance of his or her job duties. Such expenses are not 'ordinary and necessary expenses incurred in connection with the office of the officeholder' within the meaning" of the Tennessee Code. Op. Tenn. Att'y Gen. No. 97-146 (October, 1997).

An analysis of the various laws and opinions on the use of campaign funds reveals that the federal government and most states are likely to find that, on a case-by-case basis, campaign funds used to pay attorney fees for defending a public officer against an ethics charge are expenses related to the public office or campaign.

CONCLUSION TO QUESTION TWO

There has been no specific legislative definition or judicial determination in the State of Nevada regarding whether the use of campaign funds by a public officer to pay attorney fees associated with defending that public officer against an ethics violation charge before a city or state ethics board constitutes the "personal use" of campaign funds, in violation of NRS 294A.160. However, applying the "irrespective" test, as concluded in question one to this opinion, 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 NRS 294A.160.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By: MARK J. KRUEGER
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