



OKLAHOMA ETHICS COMMISSION

STAFF MEMORANDUM

2021-01

Staff Memoranda are drafted by Ethics Commission staff to provide guidance on the application and/or interaction of one or more Ethics Rules; they are not binding advisory opinions issued by the Ethics Commission pursuant to the Oklahoma Constitution and Ethics Rule 1.7.

This Staff Memorandum is issued as a result of language passed by the Oklahoma Legislature in House Bill 2087 (2021) and approved by the Governor on April 26, 2021. The effective date of that legislation is November 1, 2021. It is issued to explain the modifications of Ethics Rule 2.44 by HB 2087 (2021) and the effect of HB 2087 (2021) within the framework of existing Ethics Rules.¹

I. SUMMARY EXPLANATION OF OKLAHOMA CANDIDATE COMMITTEES

In Oklahoma, candidate committees are required to operate in accordance with the Oklahoma Ethics Rules (“Ethics Rules”), pursuant to Article 29, section 3 of the Oklahoma Constitution.² A candidate committee is a committee formed to accept contributions and make expenditures on behalf of a candidate’s campaign for elective office.³ Campaign funds are prohibited from being used by the candidate or any other person for expenses that would exist irrespective of candidacy or costs incurred as a result of an elected candidate’s duties as an officeholder. A candidate committee:

- Is an entity separate and distinct from the candidate for which it is formed;
- Funds are those of the campaign to be used for purposes of the campaign;
- may make certain expenses as defined in the Ethics Rules, including
 - ordinary and necessary campaign expenses,
 - ordinary and necessary officeholder expenses, and
 - surplus fund expenses.⁴

¹ The Legislature may modify existing Ethics Commission Rules, but the Commission has primary lawmaking power regarding civil law within its jurisdiction, pursuant to Okla. Const. art. XXIX, § 3; Ethics Commission v. Cullison, 1993 OK 37, 850 P.2d 1069, 1076 (“The Legislature cannot control the ethical conduct of state officials by legislative enactments that completely bypass the Commission’s rule-making authority.”); 24 Okla. Op. Att’y Gen. 141 (1994) (providing that “the Constitution ensures that the Commission, in every instance, will be afforded the opportunity to initially draft rules within its area of jurisdiction.”); *See also* 24 Okla. Op. Att’y Gen. 114 (1994) (the legislature may no longer initiate civil legislation for conduct of campaigns and other areas assigned to the Ethics Commission).

² Candidate committees are subject to provisions of the Internal Revenue Code to, among other things, ensure contributions to the committee are not treated as personal income of the candidate or taxable to the candidate committee. Questions regarding the regulations set forth in the Internal Revenue Code should be referred to the Internal Revenue Services (IRS) as these are not regulations interpreted or enforced by the Oklahoma Ethics Commission.

³ Ethics Rule 2.2(3).

⁴ Campaign funds may also be used for operating expenses of the candidate committee and other purposes not prohibited by the Ethics Rules or other laws pursuant to Ethics Rule 2.43; *See also* Ethics Rule 2.48 on candidate

The activity of a candidate committee is required to be disclosed to the public to ensure Oklahoma voters have information “about the sources of election-related spending” and to provide a deterrent effect on actual corruption and the appearance of corruption.⁵

II. HB 2087 (2021) Adds Two New Categories of Officeholder Expenses to Rule 2.44.

As promulgated by the Ethics Commission in 2014, Ethics Rule 2.44 provides as follows:

Contributions to a candidate committee of a candidate who is elected to the office for which the contributions were accepted may be used to make expenditures for officeholder expenses until the expiration of the term, resignation or other vacation of the office. When an officeholder dissolves one (1) candidate committee as provided in these Rules and contemporaneously files a Statement of Organization for a different candidate committee prior to the expiration of the term for which he or she has been elected and transfers funds from the first committee to the second committee, the officeholder may pay officeholder expenses until the expiration of the term not to exceed the amount transferred.

HB 2087 (2021) modifies Ethics Rule 2.44 to add new language as underlined below:

- A. Contributions to a candidate committee of a candidate who is elected to the office for which the contributions were accepted may be used to make expenditures for officeholder expenses until the expiration of the term, resignation or other vacation of the office. In addition to other officeholder expenses permitted by these Rules, officeholder expenses may be expended for contributions or dues for a political caucus fund or the costs associated with signage for naming highways and bridges pursuant to Section 1600 of Title 69 of the Oklahoma Statutes.
- B. When an officeholder dissolves one (1) candidate committee as provided in these Rules and contemporaneously files a Statement of Organization for a different candidate committee prior to the expiration of the term for which he or she has been elected and transfers funds from the first committee to the second committee, the officeholder may pay officeholder expenses until the expiration of the term not to exceed the amount transferred.

In summary, HB 2087 (2021) adds two categories of officeholder expenses for which campaign funds may be expended by elected state officers with available campaign funds:⁶

- (1) contributions or dues for a political caucus fund; and
- (2) costs associated with signage for naming highways and bridges, pursuant to Section 1600 of Title 69 of the Oklahoma Statutes.

committee surplus funds. Surplus funds are funds that are not otherwise obligated following the election of the candidate for which the candidate’s committee was created. Surplus funds may be used as set out in Ethics Rule 2.48, including as donations to the State of Oklahoma in accordance with Title 60 O.S. §381.

⁵ McCutcheon v. Federal Election Com’n, 572 U.S. 185 at 223 (2014) (citing Citizens United v. Federal Election Comm’n, 558 U.S. 310 at 367 (2010) and quoting Buckley v. Valeo, 424 U.S. 1).

⁶ For purposes of this staff memorandum, “campaign funds,” as referenced throughout, means the funds deposited in a candidate committee’s campaign depository (e.g., bank account).

HB 2087 (2021) adds two categories of officeholder expenses without changing the definitions, interpretations, or interactions of the existing Ethics Rules. The examination of the effects HB 2087 (2021) cannot be done independently of the remaining Ethics Rules and should be based on the reading of the Ethics Rules as a whole and within the context and purpose of Article XXIX of the Oklahoma Constitution.

III. HB 2087 (2021)'s Provision on Contributions or Dues for a Political Caucus Fund and Interaction with Other Ethics Rules.

Singular provisions of law may not be read in isolation but must be read in accordance with other provisions. With regard to HB 2087 (2021) which modifies language in one Ethics Rule, it is necessary to look at other Ethics Rules to ensure proper application of the modified Rule is consistent and to assist those regulated by the Ethics Rules in complying with the Ethics Rules.

A. Expenses Must Meet the Definition of "Officeholder Expense" to Qualify as an Officeholder Expense for Which Campaign Funds May be Used

HB 2087 (2021) does not alter the definition of "officeholder expense". Accordingly, an expense must still qualify as an "officeholder expense" before campaign funds may be used for that expense. The use of campaign funds for officeholder expenses is only available to candidates who were elected to and currently serve in the office for which the candidate committee was created.⁷

As defined in Ethics Rule 2.2 (14) "Officeholder expenses" are:

ordinary and necessary expenses incurred in connection with a candidate's duties as the holder of a state elective office, provided that the expenses are not otherwise reimbursed or paid for by the state. "Ordinary and necessary expenses" are those that would not exist but for the fact that the candidate was elected to and holds a state elective office....

Officeholder expenses are expenses that (1) would not exist but for the fact that the candidate was elected to and holds a state elective office, (2) are incurred in connection with a candidate's duties as an officeholder, and (3) are not otherwise reimbursed or paid for by the state or another entity.

The Ethics Rules do not provide a specific list of types of expenditures that qualify as officeholder expenses because, as historically advised by Commission staff, officeholder expenses are expenses that are unique to the *office*, not the *officeholder*. What may qualify as a legitimate officeholder expense for one officeholder may not qualify as a legitimate officeholder expense for another.

For example, state legislators may use campaign funds to reimburse themselves for costs incurred while traveling to and from the State Capitol during legislative session that is not reimbursed by the State or another 3rd party. This is because legislators are required to reside in the district they represent and are also required to primarily execute the duties of their office at the State Capitol located in Oklahoma City. In contrast, elected statewide office holders do not have a similar residency requirement and accordingly travel between their residence and state office is not a cost specific to the office held and is more similar to the costs of any other salaried non-elected state officer.

⁷ There is an exception for payment of officeholder expenses from a subsequent candidate committee of the candidate, but this is limited to the amount of funds transferred to the new committee from the old committee. Ethics Rule 2.44.

B. Personal Use Prohibition Remains Unaffected

HB 2087 (2021) does not alter the prohibition on personal use of campaign funds as specifically provided in Ethics Rule 2.39. Campaign funds **must not** be used for personal use of the candidate or any other person. “Personal use” is defined, in part, as follows:

any use of funds to fulfill a commitment, obligation or expense of any person that would exist irrespective of a political party’s activities, a political action committee’s activities or a candidate’s campaign or responsibilities as holder of a state elective office [emphasis added].⁸

As with any expense, before campaign funds can be used, it must be determined whether the expense would exist regardless of the candidate’s campaign or, if elected, the candidate’s duties as an officeholder. If the expense is not resulting from the candidate’s campaign or the candidate’s duties as an officeholder but would exist regardless of running for or holding elective office then campaign funds are prohibited from being used for such expense. An illustrative but not exhaustive list of what qualifies as personal use, is included in Ethics Rule 2.39 including “dues in country clubs, health clubs...or other nonpolitical organizations”.

The characterization of an expense as “personal” does not prevent a candidate or officeholder from making the expense using **personal funds**, it just preserves campaign funds for the uses permitted within the Rules.

C. Candidate Committees are Unable to Contribute to Political Action Committees

HB 2087 (2021) does not impact the longstanding prohibition of candidate committees from contributing to political action committees (PACs).⁹ Oklahoma PACs, known as “limited committees” and “unlimited committees”, are organized for specific purposes that determine the amount and sources of contributions the committee is able to receive and expenditures it is able to make.¹⁰ “Unlimited committees” are organized exclusively for making certain kinds of election communications independent of state candidates.¹¹ “Limited committees” are organized to accept and expend contributions in line with their purpose, which includes making contributions to candidates and other limited committees with similar purposes, and to making certain kinds of election communications.¹² Whereas candidate committees, by definition, exist to accept contributions and make expenditures to elect the candidate for which the committee was formed and are specifically prohibited from making the types of communications that PACs are specifically permitted to make.¹³ Accordingly, candidate committees are unable to contribute to PACs.

D. “Political Caucus” and any Associated “Fund” Is Limited to the Meaning Within the Existing Ethics Rules

⁸ The Commission comment to Ethics Rule 2.39 provides that “[c]ampaign funds are given by contributors with the expectation that those funds will be used for bona fide campaign purposes or, should the candidate be elected, for legitimate officeholder expense. Campaign contributions should not be used for personal enrichment....”

⁹ The current Ethics Rules, which were promulgated in 2014, prevent candidates from contributing to PACs. This continues a restriction that has existed in the Commission’s rules for over 20 years.

¹⁰ Ethics Rules 2.2 and 2.79.

¹¹ Ethics Rules 2.2 (15) and (20), 2.42, and 2.79.

¹² Ethics Rule 2.2; *See also* Ethics Rules 2.41 and 2.43.

¹³ Ethics Rules 2.49 and 2.50

HB 2087 (2021) allows expenditures by candidate committees that qualify as officeholder expenses to be used for “contributions or dues for a political caucus fund”. Commission staff understands “political caucus” as used in HB 2087 (2021) to mean one of the four officially recognized caucuses of the legislature: House and Senate Republican Caucuses and House and Senate Democratic Caucuses. This is consistent with the use of “political caucus” in Ethics Rule 5.¹⁴ This definition has routinely and consistently been utilized in providing guidance from Commission staff to legislators regarding the use of campaign funds for political caucus activities. Accordingly, “political caucus” in HB 2087 (2021) does not include political caucuses outside the four officially recognized caucuses identified above.

A fund for a political caucus is not defined within the Ethics Rules. “Fund” is used within the Oklahoma Constitution and statutory law for deposit and expenditure requirements of state funds to be used for state (ie. “governmental purposes¹⁵”). Absent allegations of a misuse of funds by a state officer or employee, the mechanics of such funds are outside the purview of the Ethics Commission. For this memorandum, it is presumed that a “fund” of an officially recognized political caucus exists to support the official state business of a political caucus. This is consistent with the ever-changing membership of a political caucus of the legislature that is contingent upon election to state office to facilitate the policies and laws in this state. Presumably, such a fund would be created by law in the same manner as all other funds used for state business and would be subject to the same limitations and disclosure that apply to all state funds.¹⁶

In order for campaign funds to be able to be expended to a political caucus fund from a candidate committee in accordance with the Ethics Rules, the expenditure must be one that qualifies as an officeholder expense, is not otherwise reimbursed by the state, is in furtherance of official state business and is not considered personal use.

IV. HB 2087 (2021) Provision on Use of Campaign Funds for Highway and Bridge Signs

The Ethics Rules, prior to passage of HB 2087 (2021), permitted the expenditure of campaign funds to the State and political subdivisions of the State if the gifting provisions of Title 60 O.S. § 381 were met. This would include expenditures for signage included within HB 2087. However, prior to HB 2087 (2021) such expenditure were restricted to a candidate committee’s surplus funds, which are funds that are “not required to be used for campaign expenses or officeholder expenses”.¹⁷

HB 2087 (2021) establishes bridge and highway signage (“signage) expenses may be funded with campaign funds as an “officeholder expense” if the expenditure meets the requirements set forth in Section 1600 of Title 69 of the Oklahoma Statutes. Title 69 O.S. § 1600 provides, in pertinent part, as follows:

¹⁴ Ethics Rule 5.15. “A lobbyist principal...may provide food and beverage for a meeting aof a political caucus of the either House of the Legislature... ‘Political caucus’ shall mean only a caucus of legislators of a political party recognized under the laws of this state.”

¹⁵Bd. of Comm'rs of Marshall Cty. v. Shaw, 1947 OK 181, 199 Okla. 66, 75, 182 P.2d 507, 516 citing to Vette v. Childers, “[public] purpose must not only be affected with a public interest, but must be performed by the State in the exercise of its governmental functions.”

¹⁶ This staff memorandum does not address whether or how a political caucus, or state officers on its behalf, are legally able to create a fund for deposit of such payments or whether in fact such fund records would be open records pursuant to the Open Records Act.

¹⁷ Ethics Rule 2.48

[t]he cost associated with signage related to the naming of highways and bridges on the state highway system **shall be paid by the group sponsoring or requesting the sign** [Emphasis added.]

Accordingly, HB 2087 (2021) does not permit signage to be paid for with campaign funds by an officeholder under any circumstance; but only if the expense qualifies as an officeholder expense and is incurred in accordance with Title 69 O.S. § 1600.¹⁸

V. This Staff Memorandum Discusses the Ethics Rules

The Commission's jurisdiction involving state campaigns is limited to drafting, interpretation, and enforcement of the Ethics Rules.¹⁹ It is not uncommon for the Ethics Rules to overlap or implicate other law, including criminal statutes, constitutional provisions, or other state or federal laws. The Ethics Commission does not interpret these other laws. Officeholders seeking to use campaign funds as contemplated in HB 2087 (2021) should perform due diligence in researching and/or reviewing these other laws. Those seeking interpretations of laws outside of the Ethics Rules should reach out to the appropriate authority or agency. Those seeking a binding interpretation of HB 2087 (2021) or any other Ethics Rule as it applies to them may request an advisory opinion from the Commission in accordance with Article 29 of the Oklahoma Constitution and Ethics Rule 1.7.

CONCLUSION

In conclusion, it is the position of the Commission staff that

- a. The Oklahoma Legislature amended Ethics Rule 2.44 through House Bill 2087 (2021) to include two new categories of officeholder expenses for which officeholders may use campaign funds: (1) contributions or dues for a political caucus fund and (2) signage for naming highways and bridges.
- b. HB 2087 (2021) becomes effective November 1, 2021.
- c. HB 2087 (2021) does not alter the definitions of "officeholder expenses" established in the Ethics Rules. An expenditure of campaign funds pursuant to Ethics Rule 2.44 must first qualify as an officeholder expense as defined in Ethics Rule 2.2(14) in order for such expenditure to be permissible under the Ethics Rules.
- d. HB 2087 (2021) does not modify the definition of "personal use," nor does it alter the prohibition on personal use of campaign funds.
- e. HB 2087 (2021) does not alter the Ethics Rules to allow candidate committees to contribute to political action committees.
- f. Political action committees, as defined in Ethics Rules 2.2 and 2.79, are not political caucuses.

¹⁸ Elected officials should also be mindful that state officers and employees are subject to the misuse of office provisions of Ethics Rule 4.4, which prohibit the use of their position for their or anyone else's private gain, as well as other constitutional and statutory provisions outside of the Ethics Rules that are not addressed in this memo but may be implicated.

- g. “Political Caucus Fund” as provided in HB 2087 (2021) is limited to a fund for an officially recognized political caucus that is created for purposes of official caucus business. The four recognized political caucuses are the House and Senate Republican Caucuses and House and Senate Democratic Caucuses. The expense to such fund must qualify as an officeholder expense as defined in Ethics Rule 2.2(14).
- h. HB 2087 (2021) permits the expenditure of campaign funds for Highway and Bridge signage other than through surplus funds, but also permits such expenditure if it qualifies as (1) an officeholder expense; and (2) meets the requirements within Title 69 O.S. § 1600.
- i. There may be other law that apply to the use of campaign funds and the activities of state officeholders outside the jurisdiction of the Ethics Commission that officeholders should review prior to the use of campaign funds.

DATE ISSUED: This 1st day of **November 2021**.

Approved for issuance by:



Ashley Kemp
Executive Director