
STATE OF MICHIGAN

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MICHIGAN CAMPAIGN FINANCE ACT:

PUBLIC OFFICERS AND EMPLOYEES:

CANDIDATE COMMITTEES:

Whether campaign funds may be used to pay an elected officeholder's legal fees incurred to defend against criminal charges

Under sections 9(1) and 21a of the Michigan Campaign Finance Act, MCL 169.209(1) and 169.221a, the candidate committee of an elected official is permitted to make an expenditure for an incidental expense to pay for legal fees incurred by the officeholder to defend against criminal charges, but only if the expense is an ordinary and necessary business expense of the elected official as described under section 162 of the Internal Revenue Code, 26 USC 162, and is paid or incurred in carrying out the business of an elective office. To qualify as such an ordinary and necessary business expense, the source of the charge or the character of the conduct from which the charge stems must arise in the course of carrying out the business of being a public official. Expenses incurred to defend against charges that originate from personal activity unrelated to performing the functions of the public official's office will not so qualify.

Opinion No. 7240

December 15, 2009

Honorable Gilda Jacobs
State Senator
The Capitol
Lansing, Michigan 48909

You have asked whether the Michigan Campaign Finance Act (MCFA or Act), MCL 169.201 *et seq*, permits an "elected officeholder" to "use campaign finance funds from his or her candidate committee to pay for legal fees and expenses incurred in defending against criminal charges brought against the officeholder."

Under the MCFA, an individual who becomes a candidate for state, judicial, county, city, township, village, and certain school offices must form a candidate committee, and register the committee with either the Secretary of State or the county clerk's office, depending on the office sought. MCL 169.203(1) and (2); MCL 169.221. The candidate committee is under the direction and control of the candidate, MCL 169.203(2), and its purpose is to accept contributions and make expenditures on behalf of the candidate's election to office, and to disclose such contributions and expenditures by filing forms and reports with the appropriate official. MCL 169.203(2) and (4); 169.225; 169.226; 169.233; 169.235.[1]

With respect to money or resources received, the MCFA limits the purposes for which candidate committees may use such money or resources to making a "contribution"[2]
or "expenditure." MCL 169.203(2) and (4); MCL 169.221.[3] Relevant to your question is the committee's ability to make expenditures. The term "expenditure" means:

> [A] payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance
> of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. [MCL 169.206(1).]

The MCFA allows different types of expenditures, including an expenditure for an "incidental expense" under section 21a:

> A candidate committee of a candidate who is elected or appointed to an elective office may make an expenditure for

an incidental expense for the
elective office to which that candidate was elected or appointed. [MCL 169.221a.][4]

Thus, a candidate committee may make expenditures as that term is defined in the Act, and for those candidates already in office, the committee may make an expenditure for an incidental expense. The only other method for expending or disbursing money or resources from a candidate committee is set forth in MCL 169.245, which allows a candidate committee to "transfer any unexpended funds" to another candidate committee or certain other identified committees, tax-exempt charitable organizations, or to return the funds to contributors, when the committee and its assets are no longer needed or available to the candidate.

Turning to your question, the MCFA does not specifically address whether the candidate committee of an elected officeholder may disburse monies for the payment of attorney fees incurred by the officeholder in defending against criminal charges. But because candidate committees are limited to disbursing money or resources as "expenditures" under the Act, a committee may only make such disbursements if the payment of attorney fees qualifies as an "expenditure" as that term is defined in the MCFA.

To constitute an expenditure under section 6(1) of the MCFA, MCL 169.206(1), a "payment . . . for . . . services" must be "in assistance of . . . the *nomination or election of a candidate*." (Emphasis added.) The plain language of section 6(1) limits its application, as relevant here, to disbursements that assist in the nomination or election of a candidate.[5]
Because your request and accompanying materials focus chiefly on the purposes for which an elected officeholder may expend his or her candidate committee funds, this letter will not address whether, and under what circumstances, legal fees may qualify as "expenditures" under section 6(1).

However, as noted above, section 21a of the MCFA expressly authorizes an elected officeholder's candidate committee to make an expenditure for an "incidental expense." MCL 169.221a. Section 21a was added to the MCFA by 1994 PA 411. Previously, elected officeholders could establish an officeholder expense fund (OEF) to be used for "expenses incidental to the person's office." MCL 169.249 (repealed by 1999 PA 224); 1989 AACS, R 169.62.[6] The Secretary of State's accompanying administrative rule, R 169.62, provided in subsection (1) that an OEF could "be used only for disbursements which are incidental to the office of the elected public official who established the fund," explaining that a disbursement was incidental if it was "traditionally associated with, or necessitated by, the holding of a particular public office" *and* if it was included within one or more of numerous categories of allowable expenses listed in the rule. Under subsection (2) of the rule, a disbursement from an OEF that was an "ordinary and necessary business expense of a public official as a public official as authorized by the internal revenue code of 1986, 26 U.S.C. § 1 *et seq*.," was presumed to qualify as an incidental expense. R 169.62(2). The Secretary of State's office interpreted former section 49 and R 169.62(1) as allowing an official to use his or her OEF to pay legal fees if the requisite showing could be made (Interpretive Statement to William J. O'Neil, December 20, 1991).[7]

Subsequently, due to concerns over how OEFs were utilized, the Legislature determined it was necessary to eliminate OEFs, and it implemented a more regulated approach to the use of campaign funds for non-campaign related activities. See House Legislative Analysis, HB 4837, January 17, 1995. It enacted section 21a, MCL 169.221a, and amended section 9, MCL 169.209, to allow expenditures for incidental expenses by candidate committees. In doing so, the Legislature essentially codified R 169.62 in the definition of "incidental expense" now set forth in section 9(1) of the MCFA but with a few modifications pertinent to your question.

The Legislature eliminated the prior rule's independent requirement that the expense be "traditionally associated with or necessitated by" holding of office, opting instead to define incidental as meaning "ordinary and necessary" as described in a specific section of the Internal Revenue Code of 1986 (IRC or Code), section 162. While it chose to also include a finite list of allowable incidental expenses similar to the prior rule, unlike the prior rule it made that list non-exclusive rather than limited to those expressly identified:

> "Incidental expense" means an expenditure that is an ordinary and necessary expense, as described in section 162 of the internal revenue code of 1986, 26
> U.S.C. 162, paid or incurred in carrying out the business of an elective office. Incidental expense includes, but is not limited to, any of the following [expenses
> listed in subsection (1)(a)-(p)]. [MCL 169.209(1).]

In addition, while former section 49(3) made it a misdemeanor to improperly use an OEF, the Legislature did not retain this enforcement tool when it enacted section 21a. Other provisions in the MCFA contain specific criminal penalties to deter violations, such as corporate contributions under MCL 169.254,[8] but the Legislature chose not to make unauthorized expenditures for incidental expenses subject to criminal sanctions.

None of the categories of allowable expenses listed in section 9(1) expressly refer to the payment of attorney fees incurred by a candidate or officeholder to defend against criminal charges. MCL 169.209(1)(a)-(p).[9] Thus, the question becomes whether an expenditure for attorney fees incurred by an elected official in defending against criminal charges may be considered an "ordinary and necessary expense" under 26 USC 162 that was "paid or incurred in carrying out the business of an elective office."

By defining an incidental expense as one that is "an ordinary and necessary expense, as described in section 162 of the internal revenue code of 1986," the Legislature made MCL 169.209(1) a "reference" statute. As the Supreme Court explained in *Pleasant Ridge v Governor*, 382 Mich 225, 245; 169 NW2d 625 (1969), quoting *Haveman v Kent County Rd Comm'rs*, 356 Mich 11, 18; 96 NW2d 153 (1959): "It is an established rule that when one statute adopts by reference a definition in a former statute such definition becomes a part of the later statute." In upholding a Michigan statute that was found to incorporate federal law by reference, the Court further relied upon a congruent principle of federal statutory construction: "The adoption of an earlier statute by reference, makes it as much a part of the later act as though it had been incorporated at full length." *Id*. at 246 quoting *Engel v Davenport*, 271 US 33, 38; 46 S Ct 410; 70 L Ed 813 (1926). Thus, the language of section 162 of the Code describing "an ordinary and necessary expense" is regarded as part of the MCFA which, therefore, makes that federal statutory language subject to the principles of statutory construction applicable to Michigan statutes.

The cardinal principle of statutory construction is to ascertain the intent of the Legislature, looking first to the language of the statute. *Burton v Reed City Hosp Corp*, 471 Mich 745, 751; 691 NW2d 424 (2005). In *Chambers v Trettco, Inc*, 463 Mich 297, 313-314; 614 NW2d 910 (2000), the Supreme Court addressed the relevance of federal interpretations of a counterpart federal statute when construing a Michigan law:

> We are many times guided in our interpretation of [a Michigan law] by federal court interpretations of its counterpart federal statute. However, we have generally been careful to make it clear that we are not compelled to follow those federal interpretations. Instead, our primary obligation when interpreting Michigan law is always "to ascertain and give effect to the intent of the Legislature, . . . 'as gathered from the act itself.'" Although there will often be good reasons to look for guidance in federal interpretations of similar laws, particularly where the Legislature has acted to conform Michigan law with the decisions of the federal judiciary, we cannot defer to federal interpretations if doing so would nullify a portion of the Legislature's enactment. [Quoting *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 598; 608 NW2d 57 (2000); citations omitted.]

Section 162 of the IRC does not define the term "ordinary and necessary expense." Rather, section 162(a) provides for a deduction from gross income for ordinary and necessary trade or business expenses:

> In general. There shall be allowed as a deduction all the *ordinary and necessary expenses* paid or incurred during the taxable year in carrying on any trade or business . . . . [26 USC 162(a); emphasis added.]

For purposes of section 162, the term "trade or business" includes the "performance of the functions of a public office." 26 USC 7701(a)(26).

The specific issue of attorney fees is not addressed in section 162 of the IRC. There is, however, considerable federal case law regarding what constitutes an "ordinary and necessary" business expense,[10] including case law addressing whether attorney fees qualify as such an expense. As noted above, it is appropriate to consider those interpretations, insofar as they are not inconsistent with the terms of the MCFA.

The basic principle concerning the deductibility of legal expenses was set forth by the United States Supreme Court in United States v Gilmore, 372 US 39; 83 S Ct 623; 9 L Ed 2d 570 (1963), which held that legal expenses incurred by a taxpayer in defending against a claim affecting valuable business and property rights in a divorce case were not deductible because the claim flowed from the divorce, rather than from a business matter. In formulating what is now called the "origin of the claim" test, the Court stated that "the characterization, as 'business' or 'personal,' of the litigation costs of resisting a claim depends on whether or not the claim *arises in connection with* the taxpayer's profit-seeking activities." *Gilmore*, 372 US at 47-48. "[T]he origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test" of whether the expense was business-related or personal, and thus whether it is deductible. *Gilmore*, 372 US at 49. The origin of the claim is identified by analyzing all of the facts and circumstances surrounding the litigation. *Gilmore*, 372 US at 47-48. See also *Boagni v Comm'r*, 59 TC 708, 713 (1973)

(factors to be analyzed include "the issues involved, the nature and objectives of the litigation, the defenses asserted, the purpose for which the claimed deductions were expended, the background of the litigation, and all facts pertaining to the controversy") (citation omitted).

Three years after deciding *Gilmore*, the United States Supreme Court addressed whether legal fees incurred by a taxpayer in defending against criminal charges were
deductible under section 162 of the IRC.[11] In *Internal Revenue Comm'r v Tellier*, 383 US 687; 86 S Ct 1118; 16 L Ed 2d 185 (1966), the Court held that legal expenses incurred by a securities dealer in the unsuccessful defense of a criminal prosecution for fraud arising from his business activities were deductible as ordinary and necessary business expenses under section 162 (a) of the Code. In reaching this decision, the *Tellier* Court relied on *Gilmore's* "origin of the claim" test, and concluded, although it was not disputed by either party, that "[t]he criminal charges against the respondent found their source in his business activities as a securities dealer. The respondent's legal fees, paid in defense against those charges, therefore clearly qualify under *Gilmore* as 'expenses paid or incurred . . . in carrying on any trade or business' within the meaning of § 162(a)." Tellier, 383 US at 689.[12]

In so stating, the Court rejected the argument that upholding deductions for legal fees incurred in defending against criminal charges violated public policy. The Court observed that "the federal income tax is a tax on net income, not a sanction against wrongdoing." *Tellier*, 383 US at 691, 694-695. After reviewing several other cases in which the Court addressed similar arguments, the *Tellier* Court commented:

> No public policy is offended when a man faced with serious criminal charges employs a lawyer to help in his defense. That is not "proscribed conduct." It is
> his constitutional right. In an adversary system of criminal justice, it is a basic of our public policy that a defendant in a criminal case have counsel to represent
> him. [*Id*. at 694; citations omitted.]

In its decision, the Supreme Court drew no distinction between legal fees incurred in a civil proceeding and those incurred in a criminal proceeding for purposes of 26 USC 162.

Accordingly, for purposes of determining whether a public official's attorney fees paid in defending against charges brought in a criminal prosecution constitute an "ordinary and necessary expense" under section 9(1) of the MCFA, one must look to the source of the claim or charge, or the character of the conduct from which the claim or charge stems. If the source of the criminal charge arose out of the business activities of the public official, the legal expenses will qualify as an "ordinary and necessary expense" as described in 26 USC 162. If the charge originates from personal activity – activity unrelated to the performance of the functions of the public official's office – the expenses will not so qualify.

This approach is consistent with that followed in Revenue Ruling 74-394, 1974-2 CB 40, where the Internal Revenue Service addressed whether a state court judge could deduct attorney fees he incurred in defending against a civil removal proceeding based on an allegation that he used his office to advance the private commercial interests of another. Relying on *Gilmore* and *Tellier*, the Service concluded that "[s]ince the charges brought against the taxpayer arose out of the allegation that he used the prestige of his office to advance the private commercial interests of others, such charges have their origin in the conduct of his duties as a judge." Thus, the fees were deductible as ordinary and necessary expenses. See also Revenue Ruling 71-470; 1971-2 CB 121 (concluding that legal fees incurred by an elected official in defending against a voter recall effort were deductible under section 162(a)).

But determining that a public official's legal expenses would be deductible as ordinary and necessary expenses as described in section 162 of the Code does not alone answer whether these fees would qualify as "incidental expenses" under section 21a of the MCFA, and therefore constitute permissible expenditures by a candidate committee. This is because the definition of the term "incidental expense" under section 9(1) of the MCFA does not end with its reference to 26 USC 162. In order to satisfy every element of the definition, the attorney fees must be ordinary and necessary expenses as described in section 162 of the Code that were "*paid or incurred in carrying out the business of an elective office*." MCL 169.209(1) (emphasis added).

Again, the primary goal of statutory construction is to give effect to the intent of the Legislature. *Burton*, 471 Mich at 751. To determine legislative intent, the plain meaning of the words used must be considered, taking into account the context in which the words are used. *Sweatt v Dep't of Corrections*, 468 Mich 172, 179; 661 NW2d 201 (2003). Of particular relevance here, however, is the additional rule of statutory construction that all language in a statute must be given meaning so as to avoid rendering any part of the text chosen by the Legislature nugatory or surplusage. See *Herald Co v Eastern Michigan Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006).

Under this latter rule, the words "paid or incurred in carrying out the business of an elective office" in section 9(1) may not be regarded as merely repetitious of the meaning conveyed by the words that precede it referring to 26 USC 162. And yet it is difficult to immediately discern a difference in meaning between that which is paid or incurred in carrying out the business of an elective office and that which would qualify as an ordinary and necessary business expense under 26 USC 162 as construed by court decisions. Both would appear to require a clear demonstration that the expense was business-related and not personal.

This difficulty is resolved when one recalls that the words "paid or incurred . . . in carrying on any trade or business" in section 162(a) of the Code do not themselves make clear that they encompass the business of holding elective office. Indeed, it is in an entirely different section of the Code, 26 USC 7701(a)(26), where the Congress extended the term "trade or business" to the functions of an elective office. The apparent intent of the Legislature in including the phrase "paid or incurred in carrying out the business of an elective office" in section 9(1) of the MCFA was to make clear that, while the type of incidental expenses that would qualify as "ordinary and necessary" could be determined by reference to an established standard developed under section 162(a) of the Code, to qualify as "incidental expenses" for campaign finance purposes, they must have been paid or incurred in carrying out the business of holding elective office notwithstanding any inconsistent federal authority.

The final step in analyzing your question is determining whether attorney fees incurred by an elected official in Michigan to defend against criminal charges can be considered as having been paid or incurred "in carrying out the business of an elective office." This may only be determined on a case-by-case basis through examining the particular facts involved.[13] No appellate court decision has been discovered interpreting the phrase "carrying out the business of an elective office" for purposes of MCL 169.209, nor does any other Michigan statute use similar terminology to examine as guidance. As noted above, while federal precedent interpreting 26 USC 162 is not *determinative* of the meaning of this phrase, the Legislature's adoption of the federal statutory standard in the MCFA to determine permissible expenditures makes it entirely appropriate to consult federal precedent as guidance.

Moreover, the "origin of the claim" test adopted by the United States Supreme Court is consistent with the language of the MCFA to allow expenses "paid or incurred in carrying out the business of an elective office."[14] Thus, to the extent the federal courts and agencies have concluded that the phrase "carrying on any trade or business" in 26 USC 162 includes expenses for legal costs incurred in defending actions arising in the carrying out of a taxpayer's business activities, including a public official's business in being a public official, it is reasonable to conclude, in the absence of any express authority to the contrary, that the phrase "paid or incurred in carrying out the business of an elective office" in MCL 169.209(1) similarly encompasses such expenses.

In fact, when the Legislature amended the MCFA in 1994, *Gilmore* and *Tellier* had been precedent for over 20 years, and the principle that attorney fees arising out of business activities may qualify for deduction as ordinary and necessary expenses was thus well-established. Moreover, in providing the definition of "incidental expense" in MCL 169.209(1), the Legislature rejected retaining the more limited categories of allowable expenses that were formerly identified by R 169.62, in favor of a broader general category – those expenses that would be ordinary and necessary under 26 USC 162 – followed by a list that included, but was "not limited to," categories of expenses the Legislature expressly authorized.[15]

It is recognized that some States have decided, under their specific statutes that do not incorporate section 162 of the Internal Revenue Code, that campaign funds may not be used to pay for attorney fees incurred in defending against criminal charges.[16] Furthermore, some have argued it may be inconsistent with donor intent to allow the use of campaign contributions for that purpose.[17] But the analysis here must be faithful to the language of the MCFA as currently written. As the policy-making branch of state government, the Legislature is free to change Michigan law in this area to restrict or otherwise prohibit that which is currently allowed as an incidental expense. As long as Michigan law continues to be based upon a standard drawn from established federal tax law and decisions, however, this office is constrained to honor that standard even where a different policy outcome might be preferred.

In addition, as others have observed, there are competing policy reasons that support permitting elected officials to use unexpended campaign funds to offset the costs of defending themselves against charges involving their official actions. It is not uncommon for persons holding elective office to become the subjects of investigations for civil or criminal wrongdoing.[18] Yet it is axiomatic that under state and federal law persons are accorded a presumption of innocence when they stand accused of criminal wrongdoing. See *Clark v Arizona*, 548 US 735, 766; 126 S Ct 2709; 165 L Ed 2d 842 (2006) ("The first presumption is that a defendant is innocent . . . .") Moreover, as noted in *Tellier*, defendants are entitled to the assistance of a lawyer in presenting a defense. *Tellier*, 383 US at 694. Whether such investigations result in criminal convictions or the official is exonerated, substantial legal fees typically become necessary in mounting a defense, and it is the origin of the claim, rather than its ultimate consequences to the official, that forms the basis for the relevant test. See

Gilmore, 372 US at 47-48.

Further, it is instructive to briefly examine federal campaign finance law, because, while it differs from the MCFA in some respects, it is similar in pertinent ways that provide guidance in analyzing your question. As interpreted by the Federal Election Commission (FEC), federal law permits the use of campaign funds to pay for attorney fees incurred in defending against criminal charges, so long as the charges relate to "the candidate's campaign activities or duties as a Federal officeholder." FEC Advisory Opinion 2005-11; FEC Advisory Opinion 2003-17. As with the MCFA, federal law does not specifically address legal fees. Rather, the law permits officeholders to use campaign funds for a number of purposes, including "for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office," 2 USC 439a(2), and for "any other lawful purpose," 2 USC 439a(6). In addition, while it does so more directly than the MCFA, federal law makes the same distinction that is embedded in the MCFA between business-related and non-business uses by prohibiting officeholders from converting campaign funds for "personal use," which occurs if a contribution is used to fulfill any "expense . . . that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." 2 USC 439a(b).

Given the federal statutory scheme, the FEC addresses the appropriateness of paying legal fees using campaign funds on a "case-by-case basis," to determine whether such a payment would constitute a prohibited "personal use" or would otherwise be permitted, 11 CFR 113.1(g)(1)(i), and in some of those cases, the FEC has examined attorney fees incurred in defending against criminal charges. For example, in Advisory Opinion 2005-11, the FEC concluded that California Representative Randall "Duke" Cunningham was permitted to use campaign funds to pay for legal fees incurred during a grand jury investigation into allegations that a federal defense contractor paid an above-market price for Cunningham's home and allowed Cunningham to live rent-free on his yacht:

> According to the media reports you submitted, the grand jury investigation appears to focus on allegations that Representative Cunningham obtained benefits
> (i.e., the sale of his house at an above-market price and a rent-free stay on a yacht) from Mr. Wade because of his status as a U.S. Representative and his position
> on the Permanent Select Committee on Intelligence and the House Appropriations Defense Subcommittee. Thus, based on the representations made in your request
> and the submitted news articles, the Commission concludes that the legal fees and expenses associated with the grand jury investigation would not exist irrespective
> of Representative Cunningham's campaign or duties as Federal officeholder. Accordingly, the Committee may use campaign funds to pay for legal fees and expenses
> incurred in connection with the grand jury investigation and legal proceedings that may arise from this investigation. [Advisory Opinion 2005-11, p 3, citing Advisory
> Opinions 2003-17, 1998-1, 1997-12, 1996-24, 1995-23.]

See also Advisory Opinion 2009-10 (FEC reaffirmed its treatment of the legal fees issue, concluding that Indiana Representative Peter Visclosky was permitted to use campaign funds to pay fees incurred in connection with a federal investigation into improper contributions made to Visclosky's campaign by a lobbyist and appropriations earmarks related to the lobbyist made by Visclosky).

Therefore, federal campaign finance law, like federal tax law, recognizes that legal fees incurred by an officeholder to defend against criminal charges may relate to the business of holding office and may, therefore, qualify as an appropriate campaign expenditure.

Thus, under sections 9(1) and 21a of the Michigan Campaign Finance Act, MCL 169.209(1) and 169.221a, the candidate committee of an elected official is authorized to make an expenditure for an incidental expense to pay for legal fees incurred by the officeholder to defend against criminal charges provided that the expense is an ordinary and necessary business expense of the elected official as described under section 162 of the Internal Revenue Code, 26 USC 162, and is paid or incurred in carrying out the business of an elective office. To qualify as such an ordinary and necessary business expense, the source of the charge or the character of the conduct from which the charge stems must arise in the course of carrying out the business of being a public official.[20]

Notably, the Office of the Secretary of State reached a similar conclusion in a recent interpretive statement addressing whether the MCFA "'explicitly or implicitly prohibit[s] the use of campaign finance funds to pay direct or indirect legal expenses associated with the office holder.'" Interpretive Statement to Cathy Garrett (July 8, 2009). Citing *Gilmore* and *Tellier*, the statement concluded that the MCFA does not prohibit such expenditures, and further determined that such expenditures are permitted under section 21a and 9(1) as incidental expenses if the fees would qualify as ordinary and necessary business expenses of the official under section 162 of the Code.

The Secretary's office further stated, however, that an elected official who seeks to use candidate committee funds to pay for legal fees as incidental expenses "must" or "ought" to be required to submit to the appropriate filing official documentation supporting such a claim, specifically a written ruling from the IRS determining that the fees are ordinary and necessary expenses under the Code, because the "Department is not expert in the application of federal tax law." According to the interpretive statement, if the IRS concludes the fees are deductible under 26 USC 162, the filing official should accept that ruling and allow the elected official's expenditures as incidental expenses. This aspect of the statement is problematic.

By incorporating section 162 of the IRC into section 9(1) of the MCFA, the Legislature did not defer resolution of the ultimate question regarding what constitutes an incidental expense under the MCFA to a federal agency. Rather, by incorporating section 162 into the MCFA, the Legislature took advantage of an established and predictable framework within which to analyze a set of facts to resolve whether an expenditure is an incidental expense under the MCFA. See *Pleasant Ridge v Governor*, 382 Mich at 243-248 (statutes that incorporate existing federal statutes by reference are valid and constitutional); *Radecki v Worker's Disability Compensation Bureau Director*, 208 Mich App 19, 23; 526 NW2d 611 (1994). While obtaining a written ruling from the IRS may be helpful and provide guidance, the Legislature did not require it, nor could any ruling so received be automatically deemed determinative. It would remain necessary to ensure that the interpretation is consistent with the legislative intent embodied in the MCFA. See *Chambers*, 463 Mich at 313-314.[21]

Moreover, the test for determining whether an elected official's legal fees will qualify as ordinary and necessary business expenses under 26 USC 162, while fact intensive, is not so complicated or mired in the intricacies of the tax code that a determination could not be made upon the presentation of a reasonably complete statement of facts. The test, as enunciated in *Gilmore* and *Tellier*, is whether the source of the criminal charge, in other words the activity forming the basis of the charge, arose in the context of carrying out the official's business as an officeholder. Determining whether particular activity engaged in by a public official relates to carrying out his or her business of serving as a public official does not require expertise in tax law.[22]

A few illustrative examples demonstrate how the applicable test might be applied in a given fact situation. For example, where an elected official is the subject of civil removal proceedings and retains legal counsel to defend his entitlement to continue to hold office against claims of misusing the office, the nexus to the business of holding office is direct and fees so incurred may qualify as incidental expenses. See Revenue Ruling 74-394, *supra*. In addition, as in the *Tellier* case (where a securities broker's legal fees to defend against criminal fraud charges were deemed deductible as ordinary and necessary business expenses), an officeholder alleged to have violated criminal law in performing the business of his or her office who incurs legal fees to defend against the charge, may likewise establish the necessary nexus to demonstrate the fees were incurred as incidental to holding office.

On the other hand, where an officeholder is called upon to defend against charges unrelated to carrying out the business of the elected office, such as, for example, in a case arising out of the operation of a motor vehicle while intoxicated or an incident involving domestic violence, the nexus to the business of the office will likely be too remote to qualify any legal fees so expended as an incidental expense under the MCFA.[23] Rather, such claims will likely be more appropriately characterized as personal in nature and fail to provide a basis for payment out of campaign funds as an incidental expense under section 21a of the MCFA.[24]

Again, while the inquiry is fact intensive, upon analyzing the totality of the circumstances surrounding the relevant proceedings or litigation in each case, and with reference as necessary to the well-established body of case law, a determination regarding whether a particular official's legal fees will qualify as incidental expenses for purposes of section 21a and section 9(1) of the MCFA is possible. While an IRS ruling may be helpful in that analysis, such a ruling may not be required as a basis for resolving the issue, and may not be regarded as solely determinative.

It is my opinion, therefore, that under sections 9(1) and 21a of the Michigan Campaign Finance Act, MCL 169.209(1) and 169.221a, the candidate committee of an elected official is permitted to make an expenditure for an incidental expense to pay for legal fees incurred by the officeholder to defend against criminal charges, but only if that the expense is an ordinary and necessary business expense of the elected official as described under section 162 of the Internal Revenue Code, 26 USC 162, and is paid or incurred in carrying out the business of an elective office. To qualify as such an ordinary and necessary business expense, the source of the charge or the character of the conduct from which the charge stems must arise in the course of carrying out the business of being a public official. Expenses incurred to defend against charges that originate from personal activity unrelated to performing the functions of the public official's office will not so qualify.

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Attorney General

[1] Once a candidate is elected to office, his or her candidate committee remains active in order to receive contributions and make expenditures regarding the candidate's next election effort, and the committee generally remains subject to the Act's reporting requirements.

[2] The term "contribution" means:

> [A] payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question. [MCL 169.204 (1).]

[3] While the MCFA does not expressly state that a candidate committee may only make contributions or expenditures, the Act provides for no manner of receiving or disbursing money or resources received by a committee other than through receiving contributions and making expenditures as those terms are defined in the Act.

[4] The Act also provides definitions for an "in-kind contribution or expenditure," MCL 169.209(3), and an "independent expenditure," MCL 169.209(2), but neither of these forms of expenditure is pertinent to your inquiry. A candidate committee may also make small expenditures using petty cash. See MCL 169.223.

[5] For purposes of the MCFA, an elected officeholder is presumed to be a "candidate for reelection to that same office" unless the officeholder is otherwise barred from seeking reelection. See MCL 169.203(1).

[6] Before its repeal, MCL 169.249 provided, in part:

> (1) An elected public official may establish an officeholder expense fund. The fund may be used for expenses incidental to the person's office.
>
> The fund may not be used to make contributions and expenditures to further the nomination or election of that public official.

[7] The O'Neil Interpretive Statement only discusses whether the fees were payable under subsection (1) of R 169.62. There are two older interpretive statements addressing whether legal fees were payable out of an officeholder's OEF, but these statements were issued before the adoption of R 169.62. See Interpretive Statement to Senator Jack Welborn, February 1, 1980 (attorney fees not payable from OEF for pursuing lawsuit involving personal money damages), and Interpretive Statement to Harold Dunne, October 28, 1988 (attorney fees payable from OEF for pursuing litigation regarding city charter).

MCL 169.215(2) authorizes the Secretary of State to issue declaratory rulings and interpretive statements. In an interpretive statement, the Secretary of State provides an informational response to the question presented.

[8] The Supreme Court is currently reconsidering whether the prohibition against corporate contributions violates the First Amendment of the Constitution of the United States. *Citizens United v Federal Elections Comm*, No. 08-205, argued September 9, 2009.

[9] [1] In this respect, MCL 169.209(1) is similar to former R 169.62. See December 20, 1991, Interpretive Statement, *supra*. The categories listed in section 9(1) of the MCFA include:

> (a) A disbursement necessary to assist, serve, or communicate with a constituent.
>
> (b) A disbursement for equipment, furnishings, or supplies for the office of the public official.
>
> (c) A disbursement for a district office if the district office is not used for campaign-related activity.
>
> (d) A disbursement for the public official or his or her staff, or both, to attend a conference, meeting, reception, or other similar event.
>
> (e) A disbursement to maintain a publicly owned residence or a temporary residence at the seat of government.
>
> (f) An unreimbursed disbursement for travel, lodging, meals, or other expenses incurred by the public official, a member of the public official's immediate family, or a member of the public official's staff in carrying out the business of the elective office.
>
> (g) A donation to a tax-exempt charitable organization, including the purchase of tickets to charitable or civic events.

(h) A disbursement to a ballot question committee.

(i) A purchase of tickets for use by that public official and members of his or her immediate family and staff to a fund-raising event sponsored by a candidate committee, independent committee, political party committee, or a political committee that does not exceed $100.00 per committee in any calendar year.

(j) A disbursement for an educational course or seminar that maintains or improves skills employed by the public official in carrying out the business of the elective office.

(k) A purchase of advertisements in testimonials, program books, souvenir books, or other publications if the advertisement does not support or oppose the nomination or election of a candidate.

(*l*) A disbursement for consultation, research, polling, and photographic services not related to a campaign.

(m) A fee paid to a fraternal, veteran, or other service organization.

(n) A payment of a tax liability incurred as a result of authorized transactions by the candidate committee of the public official.

(*o*) A fee for accounting, professional, or administrative services for the candidate committee of the public official.

(p) A debt or obligation incurred by the candidate committee of a public official for a disbursement authorized by subdivisions (a) to (*o*), if the debt or obligation was reported in the candidate committee report filed for the year in which the debt or obligation arose. [MCL 169.209(1)(a)-(p).]

[10] The meaning of the terms "ordinary" and "necessary" for purposes of section 162 is well-established. "[T]he term 'necessary' imposes 'only the minimal requirement that the expense be 'appropriate and helpful' for 'the development of the [taxpayer's] business,' . . . [and] to qualify as 'ordinary' the expense must relate to a transaction 'of common or frequent occurrence in the type of business involved.'" *INDOPCO, Inc v Comm'r*, 503 US 79, 85-86; 112 S Ct 1039; 117 L Ed 2d 226 (1992) (internal citations omitted).

[11] Although the Supreme Court has addressed whether a public official's campaign-related expenses are deductible under section 162, see *McDonald v Comm'r*, 323 US 57; 65 S Ct 96; 89 L Ed 68 (1944), the Court has not addressed whether one engaged in the business of holding public office may deduct legal expenses incurred in defending against civil or criminal proceedings under the Code. For a general discussion of issues relating to the tax consequences of deducting legal fees, see Dorocak, *The Clintons' Legal Defense Fund: Income from Payment of Legal Expenses by Another and Deductability of Such Expenses*, 104 W Va L Rev 1 (2001).

[12] Although *Gilmore* addressed deductions under a prior section of the Code, the test the Court applied in *Gilmore* is applicable to section 162. See *Tellier*, 383 US 687; *Nadiak v Comm'r*, 356 F2d 911 (CA 2, 1966).

[13] Although you included with your request background materials concerning former Detroit Mayor Kwame Kilpatrick's use of campaign funds to pay for legal fees incurred in defending against a criminal case brought against him, your request is framed more generally and does not ask this office to review the Office of the Secretary of State's interpretive statement regarding his use of those funds or the local filing official's determination made after that ruling was issued. Moreover, it is the longstanding policy of this office to decline to provide an opinion on questions that are factual in nature, because such issues fall outside the scope of the opinions process established by MCL 14.32. See *Michigan Beer & Wine Wholesalers Ass'n v Attorney General*, 142 Mich App 294, 300-302; 370 NW2d 328 (1985).

[14] The purpose of the MCFA is not the same as that of the tax code. The purpose of the MCFA is to regulate and require the disclosure of all monies and resources received and disbursed in political campaigns. See *People v Weiss*, 191 Mich App 553, 563; 479 NW2d 30 (1991). While that difference must be borne in mind when applying the MCFA to particular circumstances, the "origin of the claim" test conforms to the express terms of the MCFA.

[15] In *In re Forfeiture of $5,264*, 432 Mich 242, 249-250, 253 n 7; 439 NW2d 246 (1989), the Supreme Court construed the language "any thing of value . . . including but not limited to" followed by a listing of specific items. Rejecting the argument that, under the doctrine of *ejusdem generis*, the general words "any thing of value" should be understood as limited in meaning to items of the same general kind or class as the listed items, the Court held: "[W]e do not view the proviso, 'including but not limited to,' to be one of limitation. Rather, we believe the phrase connotes an illustrative listing, one purposefully capable of enlargement." 432 Mich at 255. See also *Williams v Teck*, 113 P3d 1255, 1258 (Colo App, 2005) (concluding that a candidate committee could use unexpended campaign funds to pay legal fees, noting that the words "including, but not limited to" in CRS 1-45-106(1)(b)(V) merely illustrated the kinds of expenses that may be regarded as directly related to an elected official's duties).

[16] See, e.g., *In re Election Law Enforcement Comm Advisory Opinion No 01-2008*, 960 A2d 413 (NJ Super, 2008), *petition for certification granted*, 198 NJ 473; 968 A2d 1189 (March 10, 2009), and *Ohio v Ferguson*, 709 NE2d 887 (Ohio App, 1998).

[17] See Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways That Government Officials Pay Their Lawyers*, 50 Stan L Rev 65, 122-123 (1997).

[18] 50 Stan L Rev at 67-70. Notably, in *In re Election Law Enforcement Comm Advisory Opinion No 01-2008*, *supra*, although the New Jersey Court concluded that an officeholder could *not* use funds from his candidate committee to pay for legal fees incurred to defend against criminal charges, that Court specifically emphasized that its holding was limited to the defense of charges filed by federal or state law enforcement agencies alleging corruption in office. The Court did "not address, for example, criminal complaints filed by private citizens against a candidate during the heat of a political campaign." *In re Election Law Enforcement*, 960 A2d at 419 n 5.

[19] 50 Stan L Rev at 67-72.

[20] In the event an elected official cannot demonstrate that his or her attorney fees are "incidental expenses" under section 9(1) or otherwise elects not to use candidate committee funds to pay for legal expenses, the official may consider establishing a legal defense fund under the recently enacted Legal Defense Fund Act, 2008 PA 288, MCL 15.521 *et seq*.

[21] Moreover, as a matter of practicality, the process for obtaining some type of written ruling from the Internal Revenue Service is burdensome, generally requires the payment of a significant fee, and comes with no guarantee that the Service will actually issue any written guidance, particularly where the question and answer will not involve any real federal tax consequences. See <http://www.irs.gov/faqs/faq/0,,id=199552,00.html> and <http://www.irs.gov/pub/irs-irbs/irb07-01.pdf> (accessed December 1, 2009).

[22] While the Legislature's use of the word "business" as opposed to "duties" in section 9(1) connotes an intent to include a broad category of expenses, there can be no doubt that the word "business" includes the traditional duties of a particular elective office. For instance, in *Diggs v Comm'r*, 715 F2d 245, 252 (CA 6, 1983), the Sixth Circuit observed that the business of a congressman "clearly includes the 'representation' of constituents." See also *Chappie v Comm'r*, 73 TC 823, 833 (1980) (business of a state legislator is to represent constituents). This is only one example of many other functions or activities that would fall within the "business" of being an elected official. See also MCL 169.209(1)(a)-(p) for a non-exhaustive listing of other allowable incidental expenses.

[23] The background materials you provided to this office, along with a supplementary memorandum provided by Professor Emeritus Maurice Kelman, indicate that one of the specific issues of interest to you includes the possible use of campaign funds by the Kwame M. Kilpatrick for Mayor Candidate Committee to defend against the criminal charge of assaulting or obstructing a public officer. While factual disputes may not be resolved in the opinions process established under MCL 14.32, the facts of this particular criminal charge are well known to this office, as a result of the two-count felony complaint I authorized against Kwame Kilpatrick for Assaulting or Obstructing a Public Officer in violation of MCL 750.479, *People v Kilpatrick*, Wayne County Circuit Court Case No. 08-10777-01-FH, which led defendant Kilpatrick to enter a plea of guilty on September 4, 2008.

Utilizing the test set forth in this Opinion, the source of the claim or charge in the *Kilpatrick* case was the defendant's interference with an attempt made by a detective and an investigator from the Wayne County Sheriff's Department to serve a subpoena on a witness in a pending criminal case. The facts underlying the charge were that the defendant, while yelling obscenities, grabbed the detective by both shoulders and shoved him into the investigator, knocking both of them off balance. These charges cannot reasonably be regarded as arising out of the office-related activities of an elected official. Thus, any campaign funds used to defend against the charges brought in Wayne County Case No. 08-10777-01-FH would constitute improper expenditures under the MCFA.

The Secretary of State is charged with implementing and enforcing the MCFA. See MCL 169.215(1). This office is aware that the Wayne County Clerk, after receiving guidance requested from and provided by the Secretary of State's Office, concluded that the Kilpatrick Committee's campaign finance funds spent on legal fees were proper expenditures under the MCFA. But the July 8, 2009 Interpretive Statement to Cathy Garrett provided by the Secretary of State's Office has been superseded by the legal analysis in this Opinion. Improper expenditures by a candidate committee may be redressed through the complaint and investigation process described in section 15 of the MCFA, MCL 169.215. Accordingly, a copy of this Opinion is being provided to the Secretary of State for whatever action she deems appropriate.

[24] As noted above, the Legislature did not impose a criminal penalty for making an improper expenditure for an incidental

expense. While it is primarily a disclosure statute, *People v Weiss*, 191 Mich App at 562, the MCFA does contain a general civil enforcement provision in MCL 169.215(14), which provides that a person who violates a provision of the Act is subject to a civil fine of not more than $1,000 for each violation, unless otherwise specified in the MCFA.

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http://opinion/datafiles/2000s/op10317.htm
State of Michigan, Department of Attorney General
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