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Legal Defense Fund Rules for Officials of the Congressional and Executive Branches

When members of Congress and officials of the Executive Branch get in trouble with the law or face alleged ethical violations, they may establish a fund – commonly referred to as a legal defense fund or legal expense trust – to defend themselves. These funds are governed by House and Senate ethics rules and guidelines from the Office of Governmental Ethics (OGE) which impose various requirements. The rules governing congressional legal defense funds are generally more restrictive and much more specific than the rules governing officials of the executive branch, but both have an array of defense options at their disposal, including the use of campaign funds.

Congressional Legal Defense Funds

House

Following House Rule XXV, clause 5(a)(3) and direction from the House Committee on Ethics, Members of the House may accept contributions to a legal defense fund, established as a trust, as long as the legal expenses in question arise from one of the following matters:

- The individual's candidacy for or election to federal office.
- The individual's official duties or position in Congress (including a matter before the Standards Committee).
- A criminal prosecution.
- A civil matter bearing on the individual's reputation or fitness for office.¹

Certain pro-bono work, such as help filing amicus curiae briefs, does not require trust disclosure.² Legal Defense Funds must be administered by an independent trustee, but ultimate responsibility for a trust's administration lies with the trustor.³

Trusts require Ethics Committee approval before they can start soliciting or receiving donations, and must file quarterly reports with the Legislative Resource Center until they are terminated. They may not accept more than \$5,000 from a single donor in a calendar year, and donations may not come from registered lobbyists or foreign agents. Furthermore, any funds remaining after the legal matter has been settled must be returned to the donors.⁴ Beneficiaries must file quarterly reports which include the full name and address of all contributors and recipients exceeding \$250 within a calendar year, as well as any from LLCs, corporations, or labor unions.⁵ Additionally, contributions above \$335 in a calendar year must be disclosed on the beneficiary's

annual Financial Disclosure Statement.⁶ The quarterly reports can be found on the Legislative Resource Center computers, which requires visiting the physical office in the Cannon House Office Building (room 135).

Senate

Senate legal defense funds operate similarly to their House counterparts. Trusts must be approved by the Select Committee on Ethics for the purpose of paying for legal proceedings “relating to or arising by virtue of service in or to the Senate.” Senate rules prohibit contributions from registered lobbyists or foreign agents, as well as Senate staffers, corporations, labor unions, a Member’s principal campaign committee, or foreign nationals. Anyone else may contribute up to \$10,000 a year, though the trustor (and relatives) may contribute as much as they wish.⁷

Trustees must file quarterly reports with both the Select Committee on Ethics and the Office of Public Records. These reports must include the name and address of contributors donating over \$25 a year as well as descriptions of expenditures.⁸ Like House legal defense forms, Senate disclosures are only accessible via a visit to the Office of Public Records (Hart Senate Office Building, room 232).

Executive Branch Legal Defense Fund

Executive Branch legal defense fund guidelines are less stringent than those of Congress. OGE has created guidelines that agencies may follow when establishing their policies. These guidelines come from an advisory opinion issued in 1993. In this informal letter, the OGE cites the Supreme Court’s decision in *Crandon v. US* (1990), which found that 18 U.S.C. § 209’s ban on Federal employees receiving outside salaries was limited to payment for their work. The OGE sees contributions to legal defense funds as gifts unrelated to employees’ normal work, and are therefore permissible as long as they incorporate the following guidelines:

- Donors must contribute anonymously.
- The administrating trustee is not connected to the employee’s official duties.
- The trust does not solicit funds from the employee’s coworkers.
- Contributions do not come from sources with a vested interest in the officeholder or the officeholder’s agency.
- Contributions do not violate executive gift rules.⁹
- No specific disclosure requirements are recommended by OGE in keeping with anonymous donations.

As per OGE gift rules, contributions to Executive legal defense funds should be limited to \$50 a year from any one source.¹⁰ However, these are merely guidelines, not rules. There is some discussion within OGE to promulgate rules regarding legal defense funds, but nothing has materialized as of this writing.

Though legal defense funds have so far been uncommon among executive branch officials, President Bill Clinton set up two legal defense funds in the 1990s to help pay for his legal expenses and those of his wife, Hillary Clinton, associated with charges of lying under oath, Whitewater and the Paula Jones sexual harassment lawsuit. Neither fund followed the guidelines suggested by OGE. Clinton's second legal defense fund, for example, imposed a voluntary contribution limit of \$10,000 per donor per year and opted to disclose the sources of the funds to the public on a biannual basis.¹¹

Other Options

Using Campaign Funds for Legal Defense

In addition to establishing legal defense funds, Congressional and Executive officials may also cover legal costs with campaign funds as long as the legal costs were incurred as a result of the candidate's campaign or "duties as a Federal officeholder." The Federal Election Commission (FEC) determines the validity of expenditures on a case-by-case basis.¹² The House Committee on Ethics insists that, though it is "generally permissible," Members should consult the Committee and the FEC before they use campaign funds for legal expenses.¹³ Senate candidates may use campaign funds for legal defense if they obtain written permission from the Select Committee on Ethics.¹⁴

These same FEC rules, including case-by-case evaluation, also apply to Executive officeholders, but the OGE has not issued any restrictions on needing permission before spending funds.¹⁵ Donald Trump's 2020 re-election campaign spent \$50,000 in June of 2017 to hire a law firm, which is legal as long as the legal services provided relate to the campaign or duties of office.¹⁶

Legal expenses paid in this manner are filed as campaign expenses with the FEC, not as part of officeholders' financial disclosure reports.

Using Party Funds

The use of party funds is currently a legal gray area. Responding to reports that President Trump's allies are pressing the RNC to cover the President's legal bills, chairwoman Ronna Romney McDaniel said that she did not "even know if that's legal."¹⁷ According to the FEC and ethics committees in the House and Senate, the campaign funds that can be directly spent on officials' legal needs must come from an official's primary campaign committee.¹⁸ However, parties can donate up to \$5,000 a year (\$47,000 maximum for Senate campaign periods) to candidates' primary campaign funds, which the campaign could theoretically then decide to use for legal expenses.¹⁹ Of course, this means that the funds going toward legal defense are technically from the campaign, not the party. Similarly, party funds could go to a PAC, which could then contribute to a legal defense fund.²⁰

The White House Counsel

The White House Counsel is an office within the White House that provides legal advice to the President, the White House, and the Executive Office of the President.²¹ The Counsel and its staff advise on the use of executive powers, vet nominees and appointees, inform staff of ethics rules, and serve as a liaison between the President and the Department of Justice.²² The position suffers from a lack of clarity when it comes to its role as an advocate for the President, as the line between the individual and the institution can blur.²³ However, depending on the nature of the advice being given, the Counsel may be required to break confidentiality in order to comply with a request for information from another office. Claiming executive or attorney-client privilege is not guaranteed to be accepted by courts.²⁴ Based on the description of the office and its historical role, the Counsel serves the Office of the President, not the legal needs of White House employees.²⁵ That said, the limits of the office are somewhat vague; it has contact with much of the White House staff but is still viewed as offering legal advice for the President. Neither OGE nor the Office of Legal Counsel has issued advisories clarifying limits, if any, on who within the White House may receive advice or when a President is seeking advice for him/herself or the office.

Personal Funds

Officials are, of course, able to spend personal funds on legal help. Personal legal expenses can be hard to track, as they are not subject to regular disclosure requirements. However, they may end up on financial disclosure forms if the fees turn into debt owed to a firm. House officials are not required to disclose legal fees in their annual financial disclosure forms unless they owe more than \$10,000 in fees for a “prolonged period,” at which point they become liabilities and must be reported in Schedule D of the form.²⁶ Senate rules require the disclosure of liabilities exceeding \$10,000 to any creditor, and do not explicitly exclude legal fees.²⁷ Executive employees are held to rules similar to those of the House; they are explicitly not required to disclose legal fees unless they owe \$10,000 or more in overdue fees.²⁸ Personal legal expenses are only reported in this manner; they are not traceable unless they are liabilities.

Resources for Tracking Legal Expenses

U.S. House of Representatives Office of the Clerk

- Member and candidate financial disclosure is available online at: http://clerk.house.gov/public_disc/index.aspx.
- Legal defense fund reports and certain employees’ disclosures are only available at the Legislative Resource Center (Cannon House Office Building, Room 135).

U.S. Senate Office of Public Records

- Senator and candidate financial disclosure is available online at: <https://efdsearch.senate.gov/search/>.
- Legal defense fund reports are only available in the Office of Public Records (Hart Senate Office Building, Room 232).

Federal Election Committee

- Candidate and Committee records are available online at: <https://www.fec.gov/data/>.

Office of Government Ethics

- Presidential, Vice Presidential, Appointee, and Nominee financial records are available at: <https://www.oge.gov/web/oge.nsf/Financial+Disclosure>.

August 1, 2017

Endnotes

¹ House Committee on Ethics. “Contributions to a Legal Expense Fund.” U.S. House of Representatives. <http://ethics.house.gov/contributions-legal-expense-fund>.

² House Committee on Ethics. “Contributions to a Legal Expense Fund.”

³ House Committee on Ethics. *Memorandum for All Members, Officers, and Employees RE Revised Legal Expense Fund Regulations*. U.S. House of Representatives, 2011. <http://ethics.house.gov/sites/ethics.house.gov/files/Pink%20Sheet%20With%20Regs.pdf>. Page 1.

⁴ House Committee on Ethics. “Contributions to a Legal Expense Fund.”

⁵ House Committee on Ethics. *Memorandum for All Members, Officers, and Employees RE Revised Legal Expense Fund Regulations*. U.S. House of Representatives, 2011. Page 5.

⁶ House Committee on Ethics. “Contributions to a Legal Expense Fund.”

⁷ Senate Select Committee on Ethics. *Senate Ethics Manual*. Government Printing Office, 2003.

<https://www.ethics.senate.gov/downloads/pdf/manual.pdf> . Pages 30-31.

⁸ Senate Select Committee on Ethics. *Senate Ethics Manual*. Page 31.

⁹ Office of Government Ethics. “93 x 21: Letter to an Alternate Designate Agency Ethics Official dated August 30, 1993.” 1993.

[https://www.oge.gov/web/OGES.nsf/All%20Documents/0C4D87012885C50385257E96005FBC7B/\\$FILE/579f6ba49f8a41f39222f42604c851de2.pdf?open](https://www.oge.gov/web/OGES.nsf/All%20Documents/0C4D87012885C50385257E96005FBC7B/$FILE/579f6ba49f8a41f39222f42604c851de2.pdf?open).

¹⁰ Office of Government Ethics. “Gifts from Outside Sources.” 2017.

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<http://www.cnn.com/ALLPOLITICS/1998/02/18/defense.fund/>

¹² Federal Election Commission. “11 CFR Ch. 1.” Government Publishing Office, 2017.

<https://www.gpo.gov/fdsys/pkg/CFR-2017-title11-vol1/pdf/CFR-2017-title11-vol1-part113.pdf>. §113.1(g)(1)(ii)(A).

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- ¹³ House Committee on Ethics. “Proper Use of Campaign Funds and Resources.” https://ethics.house.gov/campaign-activity/proper-use-campaign-funds-and-resources#campaign_legal_expenses.
- ¹⁴ Senate Select Committee on Ethics. “Campaign Activity-Permissible Officially-Related Uses of Campaign Funds.” U.S. Senate. <https://www.ethics.senate.gov/public/index.cfm/campaign-activity>.
- ¹⁵ Federal Election Commission. “11 CFR Ch. 1.” §113.1(g)(1)(ii)(A).
- ¹⁶ Overby, Peter. “As Team Trump Lawyers Up, Who’s Paying the Attorney Fees?” *NPR*, 2017. <http://www.npr.org/2017/07/19/537985015/as-team-trump-lawyers-up-whos-paying-the-attorney-fees>.
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- ¹⁸ See Federal Election Commission. “11 CFR Ch. 1.” §113.1(g)(1)(ii)(A), House Committee on Ethics, “Proper Use of Campaign Funds and Resources,” Federal Election Commission. “Advisory Opinion 2006-36.” 2007, and Senate Select Committee on Ethics, “Campaign Activity-Permissible Officially-Related Uses of Campaign Funds.”
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- ²⁰ Federal Election Commission. “Contributions Made by Party Committees.”
- ²¹ “The Office of White House Counsel.” The White House. <https://www.whitehouse.gov/participate/internships/departments#WHC>.
- ²² Borrelli, Maryanne, Karen Hult, and Nancy Kassop. “The White House Counsel's Office.” *Presidential Studies Quarterly* 31, no. 4, 2001. Pages 563-73. <http://www.jstor.org.proxyau.wrlc.org/stable/27552341>.
- ²³ Borrelli et al. “The White House Counsel's Office.” Page 565.
- ²⁴ Borrelli et al. “The White House Counsel's Office.” Page 574-75.
- ²⁵ Overby, Peter. “As Team Trump Lawyers Up, Who’s Paying the Attorney Fees?”
- ²⁶ House Committee on Ethics. *Instruction Guide: Financial Disclosure Statements and Periodic Transaction Reports*. 2016. <https://ethics.house.gov/sites/ethics.house.gov/files/Instructions.pdf>. Pages 28-30.
- ²⁷ Senate Select Committee on Ethics. *The Senate Code of Official Conduct*. U.S. Senate, 2015. https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=efa7bf74-4a50-46a5-bb6f-b8d26b9755bf. Page 35-36.
- ²⁸ Office of Government Ethics. “Public Financial Disclosure Guide-FAQs-Liabilities.” <https://www.oge.gov/Web/278eGuide.nsf/Content/FAQs~FAQs:+Liabilities>.