

DRAFT

PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT

MEMORANDUM

To: Rick Boucher
From: Marc Korman
Re: Virginia Campaign Finance Laws
Date: May 12, 2015

The following memorandum provides an overview of Virginia's campaign finance laws. The Virginia Fair Elections Practice Act of 1970 first established the process of filing campaign finance reports with the State Board of Elections prior to and after an election. The law has been updated multiple times in the intervening years. In 1996, it was rebranded the Campaign Finance Disclosure Act.¹

Contribution Limits

Virginia's campaign contribution rules are considered to be among the most lax in the nation. According to the National Conference of State Legislatures, Virginia is one of just six states to allow unlimited contributions to candidates by individuals, a state party, a political action committee, a corporation, or a union.² Campaign fundraising is prohibited by members of the General Assembly, statewide officials, and their campaign committees during the regular legislative session.³

¹ Despite the new name, the 1996 law apparently only changed some dates and penalties and was not a major rewrite of the law.

² See http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2012-2014.pdf. The other states are Alabama, Missouri, Nebraska, Oregon, and Utah.

³ VA. CODE ANN. § 24.2-954.

Independent Expenditures

Virginia has an independent expenditure reporting rule, requiring any person, candidate, campaign committee, or political committee that makes independent expenditures in the aggregate of \$1,000 for a statewide election or \$200 for any other election to maintain records and report.⁴ Reports must be made within 24 hours of the funds being expended or materials are published/broadcast to the public.⁵

Filing of Campaign Finance Reports

For non-election years, candidates with November elections⁶ must file campaign finance reports twice a year.⁷ In election years, candidates must file far more frequently starting on April 15, eight days before the primary, on a monthly basis through October, and eight days before the general election.⁸

Certain large contributions must also be reported outside of the normal filing periods. Any single \$5,000 contribution for statewide office; \$1,000 contribution for the General Assembly; or \$500 for any other office received on and after the 12th day preceding the primary or general election must be reported in writing to the Board of Elections.⁹

⁴ VA. CODE ANN. § 24.2-945.2.

⁵ *Id.*

⁶ A different schedule is set for candidates for local office with May elections. *See* VA. CODE ANN. §24.2-947.7. Similarly, a different schedule applies for special elections. *See* VA. CODE ANN. §24.2-947.8.

⁷ VA. CODE ANN. §24.2-947.6(A).

⁸ *Id.*

⁹ VA. CODE ANN. § 24.2-947.9.

Political action committees, political party committees, referendum committees, and inaugural committees each have their own reporting schedules.¹⁰

Uses of Campaign Funds

One specific issue raised is the state of the law with regard to limits on the use of campaign funds.

Federal and Other States

At the federal level, as well as in several states, there are restrictions on the use of campaign funds. For example, the Federal Election Campaign Act specifies permitted and prohibited uses of contributions and donations received by a candidate.¹¹ Contributions and donations are explicitly not to be used for “personal use” which means they cannot be “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.”¹² The House of Representatives’ rules limit the use of campaign funds—with certain exceptions—to “bona fide campaign or political purposes.”¹³ The rules also state that campaign funds may not be converted “to personal use.”¹⁴

¹⁰ VA. CODE ANN. § 24.2-949.6; VA. CODE ANN. § 24.2-950.6; VA. CODE ANN. § 24.2-951.4; VA. CODE ANN. § 24.2-951.5; VA. CODE ANN. § 24.2-951.6; VA. CODE ANN. § 24.2-952.4

¹¹ 2 U.S.C. § 439a.

¹² *Id.* at § 439a(b). The statute provides several examples including a home mortgage, rent, or utility payment; clothing purchase; non-campaign related automobile expense; country club membership; vacation or other non-campaign related trip; a household food item; a tuition payment; admission to an event not associated with an election campaign; and dues, fees, and other payments to a health club or recreational facility.

¹³ House of Representatives Rule XXIII, Clause 6. The federal statute allows campaign funds to be used to pay federal officeholder expenses. The House Rules are a bit more limited than this in that they provide more specificity as to what officeholder expenses are permissible.

¹⁴ House of Representatives, Rule XXIII, Clause 6(B).

A number of states also place limits on campaign expenditures. The Federal Election Commission (“FEC”) has a chart tracking state practices.¹⁵ Although the chart demonstrates the states’ interest in this issue and range of regulatory options, it should not be too heavily relied on as its Virginia provisions are not entirely accurate.¹⁶

Generally, state limits on campaign expenditures can be classified two different ways: standard-based and category-based.¹⁷ A standard-based limit is similar to the U.S. House of Representatives rule which applies a standard for political campaigns to follow (*i.e.*, funds must be used for “bona fide campaign or political purposes.”). California, for example, uses a standard-based approach. The state law says that political campaign committee expenditures “shall be reasonably related to a political, legislative, or governmental purpose of the committee.”¹⁸ Alabama’s state ethics law uses a negative standard and prohibits contributions from being converted for “personal use.”¹⁹

Other states use a category-based approach in that their statute lists specific categories of allowable spending. The law in West Virginia, for example, specifies sixteen categories of

¹⁵ See <http://www.fec.gov/pubrec/cfl/cfl98/chart3a.html>.

¹⁶ The chart says that personal use of campaign expenditures is prohibited in Virginia. But, as described below, that is not an accurate statement of the current law.

¹⁷ A 50 state survey was not conducted for this memorandum. The examples listed do not necessarily represent the sum total of state laws on this issue.

¹⁸ CAL. GOV’T CODE § 89512.5.

¹⁹ ALA. CODE § 36-25-6. Alabama’s election law also places a restriction on “contributions that are in excess of any amount necessary to defray expenditures of the candidate, public official, or principal campaign committee.” Such funds may only be used for “necessary and ordinary expenditures of the campaign” and may not be used for “personal and legislative living expenses.” ALA. CODE § 17-5-7. Personal and legislative living expenses are a defined term in the statute. Alabama’s election law is actually similar to Virginia’s law—as explained further below—in that the ban only applies to “excess contributions” and not all campaign spending. But in Alabama the election law is backstopped by the broader ethics law.

allowable spending and the Secretary of State has explained that this list should be “strictly interpreted” and spending outside the categories is prohibited.²⁰ Kentucky and Delaware law also detail allowable expenditures in categories.²¹

Virginia

Virginia currently does not restrict the use of campaign funds for personal purposes. In 2010, the Virginia General Assembly passed H 125, a bill that required the State Board of Elections to provide to candidates a “written explanation prepared by the Attorney General of the provisions of the Act that prohibit the use of campaign funds and shall delineate the differences between prohibited personal uses of campaign funds and permitted uses of the funds.”²² The Attorney General’s written opinion concludes that the “General Assembly has clearly prohibited the personal use of campaign contributions by candidates, but only in the context of the filing of the required final campaign finance report.”²³

²⁰ W. VA. CODE R. § 3-8-9; West Virginia Secretary of State, Pages Regarding Campaign Finance *available at* http://www.sos.wv.gov/elections/campaignfinance/Pages/Instructions_Expenditures.aspx#allowable.

²¹ KY. REV. STAT. ANN. § 121.175 (providing a non-exclusive list of types of “allowable campaign expenditures”); DEL. CODE ANN. TIT. 15 § 8020 (listing 19 categories of “authorized campaign expenditures”).

²² VA. CODE ANN. § 24.2-946(1)(E).

²³ See Written Explanation by the Attorney General, *available at* <http://elections.virginia.gov/Files/CandidatesAndPACs/LawsAndPolicies/AttorneyGeneralPersonalUseExplanation.pdf> (emphasis in original). The State Board of Elections agrees with this interpretation. In its summary guide to candidates, it explains “The law has to be taken as a whole, not by parts. When reading § 24.2-948.4 as a whole, it is clear that prohibition against converting contributed campaign funds to personal use only applies to the closing of a campaign finance account.” *Candidate Campaign Committees at 29 available at* <http://www.vademocrats.org/sites/va-dems-v2.vanwebhost.com/files/Candidate%20Campaign%20Committee.pdf>.

Section 24.2-948.4 of the Virginia Code sets the requirements for the final report of a campaign committee, including requirements for disposing of excess funds. Excess funds can be used in multiple ways, but one restriction is that it is “unlawful for any person to convert any contributed moneys, securities, or like intangible personal property to his personal use or to the use of a member of the candidate’s ‘immediate family.’”²⁴ Final reports must be filed when a candidate no longer seeks election to the same office in a successive election, a candidate seeks election to a different office, or the candidate is deceased.²⁵ The Attorney General’s interpretation gives ample opportunity for a candidate to use campaign funds for personal use during the campaign or even after, if they are not required to file their final report because the candidate does not meet the qualifications requiring such a report.

But note that the Attorney General’s opinion goes on to explain that “expenditure” has a limited, standard-based definition in Section 24.2-945.1(A) of the Virginia Code. The definition is that an expenditure is “for the purpose of expressly advocating the election or defeat of a clearly identified candidate.”²⁶ But, despite the presence of that definition, the Attorney General has concluded that there is no prohibition on personal use of campaign funds except in the context of the final report. That means that arguably, even without a statutory change, a court or Attorney General²⁷ could interpret the Section 24.2-945.1(A) definition of “expenditure” as

²⁴ VA. CODE ANN. § 24.2-948.4(D).

²⁵ VA. CODE ANN. § 24.2-948.4(B). Political action committees, political parties, referendum committees, and inaugural committees all have similar provisions for when final reports are required. *See id.* at §§ 24.2-949.9; 24.2-950.9; 24.2-951.9; and 24.2-952.7. These sections of the code also prohibit the conversion of funds to personal use.

²⁶ Written Explanation by the Attorney General; *see also* VA. CODE ANN. § 24.2-945.1(A).

²⁷ The explanation was written by Virginia’s previous Attorney General and not the current occupant.

restricting campaign expenditures from personal use, as in other states. That said, currently the state of the law in Virginia allows campaign funds to be expended for personal use except when a final campaign finance report is being filed.