



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>September 21, 2011</p>	<p>No. I11-006 (R11-010)</p> <p>Re: Donations to Legal Defense Funds</p>
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To: The Honorable Steve Pierce
Arizona State Senate

Question Presented

If a lawsuit is filed pursuant to Arizona Revised Statutes (“A.R.S.”) § 16-351 challenging a candidate’s nomination petition signatures in order to disqualify the candidate from the ballot, are donations made to a legal defense fund for the sole purpose of covering the candidate’s legal expenses to defend the lawsuit considered contributions within the meaning of A.R.S. § 16-901?

Summary Answer

No. Consistent with interpretations of the Federal Election Commission, “contribution” as defined in A.R.S. § 16-901(5) does not include donations made to a legal defense fund for the sole purpose of covering the candidate’s legal expenses to defend a lawsuit over nominating

petition signatures. Such donations, however, must be made to a separate fund that is not a political committee.

Analysis

Contributions to candidates for political office in Arizona are regulated by Title 16. Section 16-901(5) defines the term contribution as “anything of value made for the purpose of influencing an election.” The definition includes donations to support such activities as “supporting or opposing the circulation of a petition for a ballot measure, question or proposition or the recall of a public officer” and the retirement of campaign debts. *Id.* The statute, does not, by its terms, state that donations to defray the costs of defending a lawsuit that threatens a person’s appearance on the ballot are contributions.

The definition of contribution, while broad, is limited to those donations “made for the purposes of influencing an election.” Although the phrase “influencing an election” is not defined in § 16-901(5), the phrase has been interpreted by Arizona courts and would apply to donations made to support express advocacy on behalf of a candidate. *Cf. Kromko v. City of Tucson*, 202 Ariz. 499, 503, ¶ 10, 47 P.3d 1137, 1141 (App. 2002) (construing term “influencing the outcome of elections” in A.R.S. § 9-1500.14 to mean a communication that unambiguously “encourages a vote for or against a candidate or encourages the reader to take some other kind of action” related to the election) (quoting *Schroder v. Irvine City Council*, 118 Cal. Rptr. 2d 330, 339 (Cal. App. 2002)). Likewise, the specific examples enumerated in § 16-901(5) relate directly to campaigning, including opposing the circulation of petitions.¹ Defending a challenge

¹ Other provisions of § 16-901(5) are more specific. For example, the statute presumes that “[m]oney or the fair market value of anything directly or indirectly given or loaned to an elected official for the purpose of defraying the expense of communications with constituents, regardless of whether the elected official has declared his candidacy” is a contribution. A.R.S. § 16-901(5)(a)(ii); Ariz. Att’y Gen. Op. I00-007 (“If the Legislature had intended to adopt an ad

to petition signatures is neither campaigning nor advocacy, but rather the defense of a person's appearance on the ballot.

Furthermore, legal services that otherwise meet the definition of contributions, such as the review of campaign materials for compliance with election law, are exempt from the definition of contribution, provided that the attorney is paid by his or her regular employer. A.R.S. § 16-901(5)(b)(ix). Donations to a legal defense fund for the purposes of defending a challenge to candidate signatures do not otherwise meet the definition and, thus, the Legislature apparently did not intend such donation to be contributions.²

The statutory definition of "political committee" reflects the same principle. Political committees, as defined by A.R.S. § 16-901(19), include candidates and "association[s] . . . organized . . . for the purpose of influencing the result of any election" that "engage[] in *political* activity in behalf of or against a candidate." (emphasis supplied). Accordingly, donations to a legal defense fund for the sole purpose of defending a ballot challenge are not donations to a committee "engage[d] in political activity."

This result is consistent with the guidance of the Federal Election Commission. It has been the Federal Election Commission's longstanding policy that monies received and spent by a

hoc approach to constituent communications based on an evaluation of whether a specific correspondence had the purpose of influencing the outcome of an election, the Legislature would not have specified that monies received for constituent communications are 'contributions.');" *see also* A.R.S. § 41-133 (setting forth provisions of office holder expense accounts for state elected officials).

² Additionally, Arizona law permits publicly financed candidates to maintain legal defense funds to cover the costs of "fines or civil penalties, [] costs or legal fees related to representation before the commission, or for defense of any enforcement action under [the Citizens Clean Elections Act]," and does not allow public funds to be used for these expenses. A.R.S. § 16-948(D). Because publicly financed candidates face severe restrictions on the acceptance of private campaign contributions, the allowance of private funding for a legal defense fund implies that such funds are not contributions. *See also* A.R.S. § 16-961(A) (stating that the term contribution, as used in the Citizens Clean Election Act, is defined in § 16-901).

legal defense fund are not “funds ‘in connection with an election for federal office.’” F.E.C. Advisory Opinion 2003-15, 2003 WL 22019457 at *3. In Advisory Opinion 1996-39, the Commission explained that donations to secure a candidates’ placement on the ballot were outside the purview of the Federal Election Campaign Act of 1971 because the ballot access litigation was “a condition precedent to the candidate’s participation in the primary election.” 1996 WL 577570 at *1. Thus “funds received and spent to pay for the expenses of the litigation [similar to that proposed in the question presented] would not be treated as contributions or expenditures for purposes of the Act, provided they are raised and spent by an entity other than a political committee.” *Id.* at *1.³

Conclusion

Donations made to a legal defense fund for the sole purpose of defending a challenge to a candidate’s petition signatures are not contributions within the meaning of § 16-901(5) provided they are made to a separate fund that is not a political committee.

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³ The FEC also advises that candidates should take care “to avoid activity which would influence the candidate’s election” *Id.* at *2. Donations to a political committee are presumed to be for the purpose of influencing an election. *See* Ariz. Att’y Gen. Op. I11-003 (“A committee’s effort in supporting or opposing a recall election . . . constitutes ‘influencing an election’ as that terms is used in § 16-901.”).