

Date of Hearing: July 3, 2019

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Marc Berman, Chair

SB 71 (Leyva) – As Amended May 17, 2019

SENATE VOTE: 35-0

SUBJECT: Political Reform Act of 1974: campaign expenditures: limitations.

SUMMARY: Requires a candidate or elected officer to reimburse any campaign funds or legal defense funds for legal expenses related to a claim of sexual assault, sexual abuse, or sexual harassment against the candidate or officer if the candidate or officer is held liable for the violation. Prohibits the use of campaign funds or legal defense funds to pay penalties or settlements related to a claim of sexual assault, sexual abuse, or sexual harassment. Specifically, **this bill:**

- 1) Prohibits funds held in a legal defense account from being used to pay or reimburse a candidate or elected officer for a penalty, judgment, or settlement related to a claim of sexual assault, sexual abuse, or sexual harassment filed against the candidate or elective officer in any civil, criminal, or administrative proceeding. Requires a candidate or elective officer who uses funds in a legal defense account for other legal costs and expenses related to claims of those unlawful practices and is held liable for such a violation to reimburse the account for all funds used in connection with those other legal costs and expenses.
- 2) Prohibits campaign funds from being used to pay or reimburse a candidate, elected officer, individual with the authority to approve the expenditure of campaign funds held by a committee, employee or staff of the committee or the elected officer's governmental agency, or any other person for a penalty, judgment, or settlement related to a claim of sexual assault, sexual abuse, or sexual harassment filed against the person in any civil, criminal, or administrative proceeding. Requires a candidate, elected officer, individual with authority to approve the expenditure of campaign funds held by a committee, or employee or staff of the committee or the elected officer's governmental agency who uses campaign funds for other legal costs and expenses related to claims of those unlawful practices and who is held liable for such a violation to reimburse the campaign for all funds used in connection with those other legal costs and expenses.
- 3) Provides that for the purposes of this bill, the terms "sexual assault" and "sexual abuse" have the same meaning as in a specified provision of the Penal Code, and the term "sexual harassment" has the same meaning as in a specified provision of the Government Code.

EXISTING LAW:

- 1) Creates the Fair Political Practices Commission (FPPC), and makes it responsible for the impartial, effective administration and implementation of the Political Reform Act (PRA).
- 2) Establishes specified per-source limits on campaign contributions to candidates for state elective office. Some local jurisdictions also impose limits on contributions to candidates seeking elective offices therein.

- 3) Provides that all contributions deposited into a campaign committee account are deemed to be held in trust for expenses associated with the election of the candidate or for expenses associated with holding office. Provides that an expenditure to seek or hold office is within the lawful execution of this trust if it is reasonably related to a political, legislative, or governmental purpose. Requires expenditures that confer a substantial personal benefit to be directly related to a political, legislative, or governmental purpose.
- 4) Provides generally that attorney's fees and other costs related to administrative, civil, or criminal litigation may only be paid with campaign funds if the litigation is directly related to activities of the committee that are consistent with its primary objectives or arises directly out of a committee's activities or out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer.
- 5) Authorizes state and local candidates and elective officers to establish a separate account (a legal defense account) to defray attorney's fees and other related legal costs incurred if they are subject to civil, criminal, or administrative proceedings arising directly out of the conduct of an election campaign, the electoral process, or the performance of their governmental activities and duties.
- 6) Requires that all contributions to a legal defense account be publicly reported, as specified.
- 7) Provides that contributions to legal defense accounts are not subject to state contribution limits but may be subject to local jurisdiction contribution limits, where applicable.
- 8) Provides that once the legal dispute is resolved, candidates and elective officers must dispose of any funds remaining in a legal defense account after all expenses associated with the dispute are discharged, as specified.
- 9) Prohibits an expenditure of campaign funds to pay a fine, penalty, judgment, or settlement relating to an expenditure of campaign funds that was found to be improper because the expenditure resulted in either of the following:
 - a) A personal benefit to the candidate or officer, and the expenditure was not reasonably related to a political, legislative, or governmental purpose; or,
 - b) A substantial personal benefit to the candidate or officer, and the expenditure was not directly related to a political, legislative, or governmental purpose.

FISCAL EFFECT: According to the Senate Appropriations Committee, this bill would likely result in minor costs to the FPPC.

COMMENTS:

- 1) **Purpose of the Bill:** According to the author:

Current law authorizes elected officials and candidates to use campaign and legal defense funds to pay for the legal expenses that may arise directly out of the conduct of an election campaign, the electoral process, or the performance of the officeholder's governmental activities and duties. Under the Political Reform Act,

attorneys' fees and other costs related to administrative, civil, or criminal lawsuits may only be paid with campaign funds if the case is directly related to a political, legislative, or legal purpose.

In March 2018, the [FPPC] withdrew an advice letter sent to and requested by former Senator Tony Mendoza that permitted him to use legal defense and campaign funds to defend himself against claims of sexual harassment that arose during his status as an elected official. Following its withdrawal of the advice letter, the FPPC reexamined its policies pertaining to the use of campaign and legal defense funds. To remove any ambiguity, SB 71 would prohibit legal defense and campaign funds from being used to pay or reimburse for a penalty, judgment, or settlement related to a claim of sexual assault, sexual abuse, or sexual harassment filed against a candidate or elected officer in any civil, criminal, or administrative proceeding.

- 2) **Mendoza FPPC Advice Letter:** At its December 2018 meeting, the FPPC considered a recommendation from its Law & Policy Committee that the FPPC consider sponsoring legislation that limited the use of campaign and legal defense funds to defend against claims related to violations of the Fair Employment and Housing Act. The memorandum outlining the legislative proposal stated, in part:

At the March 2018 meeting, the [FPPC] rescinded the Mendoza Advice Letter A-18-009. The letter concluded then-Senator Tony Mendoza may establish a legal defense fund to defray attorney's fees related to a claims of wrongful termination, proceedings related to Senate Resolution 69 (2018), and a subsequent civil proceeding should one be filed. The letter had also stated Mr. Mendoza may use campaign and legal defense funds to defend himself from claims of sexual harassment that arose directly out of his activities, duties, or status as a candidate or elected officer.

The [PRA] authorizes certain candidates and elective officers to establish legal defense funds to defray attorney's fees and other related legal costs in defense of a candidate who is subject to one or more civil, criminal, or administrative proceedings arising directly out of conduct of an election campaign or performance of governmental activities and duties.

The [PRA provides that] expenditures that confer a substantial personal benefit must be directly related to a political, legislative, or governmental purpose. The [PRA] prohibits the use of campaign funds for fines, penalties, judgements, or settlements...

The rescission of the *Mendoza Advice Letter* has left a potential gap in the [FPPC's] policy of whether...payments or reimbursements are permitted for claims related to violations of the Fair Employment and Housing Act.

Senate Resolution 69 (Vidak) and Senate Resolution 85 (DeLeon) of 2018, both of which sought the expulsion of Senator Tony Mendoza from the Senate, were never brought up for a vote on the Senate floor.

The FPPC approved the recommendation of the Law & Policy Committee, and this bill was introduced in the Senate with the bill language that was approved by the FPPC.

- 3) **Employer Liability:** As outlined above, this bill prohibits campaign funds from being used to pay any person for a penalty, judgment, or settlement related to a claim of sexual assault, sexual abuse, or sexual harassment filed against the person in any civil, criminal, or administrative proceeding. For the purposes of the PRA, the term “person” is defined broadly to include various non-individual entities, including committees.

According to information from the Department of Fair Employment and Housing, employers are liable for sexual harassment by their supervisors or agents. Because committees often are employers, it is possible that a committee could be found to have liability as an employer in a sexual harassment claim. Under this bill, however, it appears that the committee would have no way to satisfy that liability, since the term “campaign funds” is defined to include any assets received or possessed by a committee that receives contributions. This could create a situation where a victim of sexual harassment is unable to recover damages from a committee that has liability for that harassment under state law. It further could allow a committee that is liable for sexual harassment by its supervisors or agents to avoid any consequences for that sexual harassment (though it is possible that the supervisor or agent could be individually liable as well). It seems unlikely that this is the author’s intent. Accordingly, further refinements to this bill may be warranted, in a manner that is consistent with prior committees’ actions on this bill, to ensure that victims of sexual harassment have the ability to recover damages from liable parties.

- 4) **FPPC Position:** Although the FPPC was the sponsor of this bill when it was introduced in the Senate, the bill subsequently was amended when coming off of the Senate Appropriations Committee’s suspense file. Based on those amendments, the FPPC has now changed its position on this bill to “support if amended.” While the FPPC’s letter indicates that the current version of the bill “provides an improvement on current law,” the letter identifies the following concerns with the current version of the bill:

- The bill could be interpreted to allow for the expenditure of campaign funds to defend against sexual assault allegations that are unrelated to campaign or governmental purposes.
- It is unclear how a provision requiring reimbursement of campaign funds where a person was held liable for a violation would apply for settlements where there is “no admission of liability” by the alleged offender.
- The bill may allow the use of campaign funds to pay settlements prior to the filing of any formal action in a civil, criminal, or administrative proceeding.
- The provision requiring reimbursement of campaign funds where a person was held liable for a violation could result in situations where the FPPC is unable to collect a debt against a violator.

Although the FPPC’s letter does not identify specific amendment language that it is seeking, amendments to address some or all of the FPPC’s concerns may be viewed as inconsistent with the amendments to this bill that were adopted by the Senate Appropriations Committee.

- 5) **Arguments in Support:** In support of a prior version of this bill, Common Cause – California wrote:

Campaign contributions are given to candidates to help elect them to office; not to insulate them from committing crimes, like sexual harassment, that are entirely unrelated to campaigning. For too long, claims of officeholders sexually harassing staff and members of the Capitol community have been swept under the rug. Our campaign finance system should not be used to perpetuate this wrong.

Under this bill, campaign funds could still be used for legal defense against claims related to legitimate campaign activities – for example, claims of reporting violations, disclosure violations, or receiving contributions over state limits. However, candidates could no longer avail themselves of special interest money to shield them from the consequences of abusing others, a twisted luxury that was never available to the abused.

- 6) **Political Reform Act of 1974:** California voters passed an initiative, Proposition 9, in 1974 that created the FPPC and codified significant restrictions and prohibitions on candidates, officeholders and lobbyists. That initiative is commonly known as the PRA. Amendments to the PRA that are not submitted to the voters, such as those contained in this bill, must further the purposes of the initiative and require a two-thirds vote of both houses of the Legislature.

REGISTERED SUPPORT / OPPOSITION:

Support

Common Cause – California (prior version)
Fair Political Practices Commission (if amended)

Opposition

None on file.

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