



Policy Proposal for the Regulation of Legal Defense Funds Under New York City Laws

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I. Executive Summary

Mayor De Blasio has incurred significant legal bills defending against state and federal charges of corruption in connection with his fundraising efforts. He initially declared his intention to pay all of the legal bills by establishing a dedicated legal defense fund (LDF). Recently, the Mayor has revised his position and will have his employer, the City of New York, pay for the legal services incurred in relation to his duties as mayor, a position which Common Cause/NY supports. That will leave some portion of the legal bills unpaid, which the Mayor will, if permitted by city law, pay by establishing a legal defense fund.

An LDF is an appropriate vehicle under the circumstances. LDFs have increasingly come to be used by federal, state, and local government officials to raise money for defending themselves against law suits arising from their election activities or activities related to their duties as officeholders. But the lack of a specific law regulating LDFs within the framework of New York City's ethics or campaign finance laws renders the successful establishment of such a fund extremely difficult.

Under the New York State Election Law, an elected official is permitted to use campaign funds to pay for legal fees incurred in defending against lawsuits that arise from campaign activities or the holding of a public office or party position.¹ State law thus affords state officials an opportunity to raise legal defense funds by raising campaign funds.

New York City campaign finance law, however, not only sets much more stringent contribution limits than state law, but also specifies the activities for which campaign funds may and may not be used. Since New York City's allowable expenditures under its public funding regulations does not list LDFs, or law suits arising from activities related to an official's duties as

¹ See N.Y. Elec. Law § 14-130 (McKinney 2015).

officeholder, as a permissible use of campaign funds, a city candidate or official who relies on public funding cannot use campaign funds to pay for legal fees, as they would if New York State law applied.² Moreover, in the absence of specific legislation enabling LDF fundraising the New York City Conflicts of Interest Board has interpreted the New York City Charter to impose severe restrictions on a candidate's or elected official's ability to engage in such fundraising.³

This policy brief discusses common issues that arise with LDFs, examines regulatory responses to these issues by other jurisdictions, and makes a recommendation for legislation to govern LDFs under New York City laws.

II. Introduction

LDFs for public officials are common enough that many jurisdictions have established specific rules for them.

At the federal level, both the House and the Senate specifically provide for legal expense funds that can be used to pay “for investigative, civil, criminal, or other legal proceedings relating to an officeholder’s election to office, official duties while in office, and administrative or fundraising expenses of the fund, including any tax liabilities.”⁴

At the state level, California specifically provides for the establishment of an “account to defray attorney’s fees and other related legal costs incurred for the candidate’s or officer’s legal defense if the candidate or officer is subject to one or more civil or criminal proceedings or

² New York City Campaign Finance Act § 3-706, N.Y.C. Code § 3-706 (2006). Section 3-706(4)(a) does allow campaign expenditures to defend against claims or suits arising out of a candidate’s election activities.

³ See Conflicts of Interest Board, Advisory Opinion No. 2017-2 (March 29, 2017) [hereinafter “COIB 2017-2”].

⁴ Ellen P. Aprill, Legal Defense Funds as Political Organizations, 131 Tax Notes 277, 278 (2011); see also House Committee on Standards of Official Conduct, 110th Congress, House Ethics Manual 63-64 (2008), http://ethics.house.gov/Media/PDF/2008_House_Ethics_Manual.pdf (identifying circumstances under which an LDF may be established by a member of the House); Senate Select Committee on Ethics, Regulations of Trust Funds to Defray Legal Expenses Incurred by Members, Officers, and Employees of the United States Senate (adopted Sept. 30, 1980; amended Aug. 10, 1988), *reprinted in* Senate Select Committee on Ethics, 108th Congress, Senate Ethics Manual app. I, at 486, 488 (2003) <http://ethics.senate.gov/downloads/pdf/manual.pdf> (identifying circumstances under which an LDF may be established by a member of the Senate).

administrative proceedings arising directly out of the conduct of an election campaign, the election process, or the performance of the officer’s governmental activities and duties.”⁵

Connecticut,⁶ Massachusetts,⁷ Michigan,⁸ Nevada,⁹ North Carolina,¹⁰ Oregon,¹¹ and Wisconsin¹² all explicitly provide for LDFs in their election laws. The cities of Los Angeles,¹³ San Diego,¹⁴ and San Jose¹⁵ have also provided for LDFs in local legislation.

Neither New York State nor New York City campaign finance laws address the topic of LDFs explicitly.¹⁶

The need for LDFs – or other allowances – has been tied to the heightened ethics scrutiny of elected officials.¹⁷ Professor Kathleen Clark, a highly regarded government ethics scholar, has described the problem as follows:

When a government official is accused of wrongdoing and investigated, it is obvious that she needs to obtain legal advice. In addition, during the investigation, dozens of employees who work with the accused wrongdoer are often repeatedly questioned by prosecutors and other investigators. These employees often feel the need to retain legal counsel in responding to such questions in order to ensure that they will not later come under suspicion for obstruction of justice. The resulting legal fees that some government employees face can outstrip both their government salary and their net worth.¹⁸

⁵ Cal. Gov’t Code § 85304(a) (West 2015).

⁶ See Conn. Gen. Stat. § 1-86d (2017).

⁷ See Mass. Gen. Laws Ann. ch. 55, § 18E (West, Westlaw through Ch. 9 of 2017 1st Ann. Sess.).

⁸ See Mich. Comp. Laws Ann. §§ 15.521–.539 (West, Westlaw through P.A.2017).

⁹ See Nev. Rev. Stat. Ann. §§ 294A.286–.287 (West 2015).

¹⁰ See N.C. Gen. Stat. § 163-278.300–.320 (2016).

¹¹ See Or. Rev. Stat. § 244.205–.221 (2015).

¹² See Wis. Stat. § 11.1301 (2017).

¹³ See L.A., Cal., Mun. Code § 49.7.20 (2015).

¹⁴ See San Diego, Cal., Mun. Code § 27.2965(b)(2) (2017).

¹⁵ See San Jose, Cal., Mun. Code §§ 12.06.1100–.1180 (2017)

¹⁶ But New York State law does permit elected officials to use campaign contributions to pay for legal expenses related to “a political campaign or the holding of a public office or party position.” N.Y. Election Law § 14-130 (McKinney 2015). This provision does not preempt the use of LDFs. Nor does it preclude the adoption of local laws to address this issue. See *McDonald v. N.Y.C. Campaign Fin. Bd.*, 985 N.Y.S.2d 557, 117 A.D.3d 540 (2014); see also N.Y. Att’y Gen. Op. No. 97-24 (May 2, 1997) (citing *Corning v. Vill. of Laurel Hollow*, 408 N.Y.S.2d 131, 64 A.D.2d 918 (1978) *aff’d*, 48 N.Y.2d 348 (1979)) (“a local law may . . . provide for defense and indemnification regarding actions by a municipal officer or employee that fall within the scope of his or her employment.”).

¹⁷ Kathleen 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, 67–69 (1997).

¹⁸ *Id.* at 69–70 (citations omitted).

This reality must inform the legal treatment of LDFs if government service is to be open to persons who are not wealthy. And it helps explain the frequently permissive approach to regulating LDFs that many jurisdictions have taken.

Government officials and employees are generally entitled to legal representation by the government in civil cases,¹⁹ and their legal defense costs in criminal probes may be reimbursed by the government under appropriate circumstances.²⁰ The various state and federal probes into alleged wrongdoing by Mayor de Blasio are estimated to have already cost city taxpayers over \$11 million.²¹ On June 30, Mayor de Blasio released a statement indicating that he has determined that the most appropriate course of action is to let the City cover the costs for legal work related directly to his public service and decision-making in government “as it would for any of its employees in a similar situation”, which he estimated would total approximately \$2 million.²²

But government-provided representation is not always available or appropriate. The conduct in question must have been within the scope of a government employee’s employment or an elected official’s activities related to his duties as an officeholder. Depending on the jurisdiction, the government may have discretion over, or may limit, the circumstances under which such defense may be provided. Fees incurred in connection with criminal probes may not be covered, or may be reimbursed only if the official is exonerated. And the need to advocate

¹⁹ See, e.g., N.Y. Pub. Off. Law § 17 (McKinney 2017) (providing for legal defense of state officials sued for monetary damages); N.Y. Gen. Mun. Law § 50-k (McKinney 2017) (providing for legal defense of New York City employees sued for monetary damages).

²⁰ See, e.g., N.Y. Pub. Off. Law § 19 (McKinney 2017) (providing for reimbursement of criminal defense expenses if officer is acquitted or criminal charges are dismissed); N.Y. Gen. Mun. Law § 50-k(3)–(5) (conditioning indemnification of legal costs).

²¹ Erin Durkin, Taxpayers to Pay Up to \$11.65M for Legal Defense of de Blasio Administration in Probe of Fund-Raising Practices, New York Daily News (Jan. 26, 2017), <http://www.nydailynews.com/news/politics/taxpayers-pay-11m-de-blasio-aides-legal-defense-article-1.2956898>.

²² Mayor Bill de Blasio, Our Legal Bil, Medium, June 30, 2017, Medium, <https://medium.com/@NYCMayorsOffice/our-legal-bills-9fdb22748fb6>

positions that may diverge from the government's position may require the official to hire her own attorney.²³

LDFs thus remain important resources for public officials (and employees) to preserve their rights when they are caught up in investigations of wrongdoing or must defend themselves against civil or criminal charges.

At the same time, an LDF for a public official raises legal and ethical concerns.²⁴ While campaign contributions are not considered gifts, contributions to LDFs directly benefit a public official and arguably run afoul of otherwise applicable rules limiting the acceptance of gifts.²⁵ LDF establishment and management should thus be governed by rules that take existing ethics and anti-corruption laws into account.

Laws and regulations governing LDFs vary. Typically, any such fund must be registered or declared with the state, must be expended solely for the purposes for which they are established, and any remaining funds must either be returned to the donors or contributed to charity. But governing rules diverge on other questions, such as:

1. How should such a fund be structured? For example, should the elected official be required to establish the fund in the form of a trust account?
2. Should there be contribution limits? And if so, how should they be structured? Should contribution limits conform to limits imposed on campaign contributions?
3. Should there be limitations on who may contribute to such a fund? For example, should lobbyists and/or government contractors be prohibited from contributing?

²³ See Clark, *supra* note 17, at 78–79 (discussing limitations on government-provided representation at the federal level).

²⁴ Erin Durkin, Most New Yorkers Think Mayor de Blasio Seeking Contributions for Legal Defense Raises Ethics Questions, New York Daily News (Mar. 1, 2017) <http://www.nydailynews.com/new-york/de-blasio-defense-fundraising-raises-ethics-qualms-poll-article-1.2986001>.

²⁵ These rules will vary depending on the official's branch of government. The executive, the legislature, and the judiciary typically have different ethics rules.

4. What disclosure requirements should be imposed? Should contributions and expenditures be made public?

These questions must be considered against the background of existing ethics and election laws.

III. Ethics Rules

In an advisory opinion on LDFs issued on March 29, 2017, the New York City Conflicts of Interest Board (COIB) concluded that contributions to an official’s LDF should be treated like “any gifts to the public servant personally.”²⁶ In other words, LDF contributions are presumed to be subject to the restrictions on gifts to public officials set forth in the New York City Charter and in other applicable state and local laws.

Chapter 68 of the NYC Charter prohibits a public official from engaging in conduct that “is in conflict with the proper discharge of his or her duties.”²⁷ Section 2604(b)(3) of the Charter prohibits a public servant from using or attempting to use “his or her position . . . to obtain any financial gain . . . or other personal advantage.”²⁸ Section 2604(b)(5) explicitly prohibits all paid City officers, employees, and officials from accepting a valuable gift from any person or firm that “is or intends to become engaged in business dealings with the city.”²⁹ “Valuable gift” means any gift worth \$50 or more.³⁰

Chapter 68 includes several exceptions. A valuable gift from a close personal friend may be accepted if it is given on a social occasion on which a gift is customary (such as a birthday), the close personal friendship precedes any business relationship with the City, and the gift would

²⁶ COIB 2017-2, *supra* note 3, at 3.

²⁷ N.Y.C. Charter § 2604(b)(2) (2017).

²⁸ *Id.* § 2604(b)(3).

²⁹ *Id.* § 2604(b)(5).

³⁰ 53 RCNY § 1-01(a). The rule is aggregative and cumulative, meaning that two or more gifts that individually are worth less than \$50 would be counted together if received within a twelve-month period from the same person. *Id.* Gifts from relatives of the same person and from affiliated persons (such as employees of the same company) are also aggregated. *Id.* This means, for example, that two employees of a firm who contribute \$25 each are in violation of the rule.

not result in or create the appearance of impropriety.³¹ Gift giving between two or more public servants is also permitted, but special concerns of coercion and indebtedness arise in connection with gifts between “superiors and subordinates.”

The COIB has thus concluded that (1) a public servant may not accept an LDF contribution from his or her City subordinates, (2) may not accept an LDF contribution that amounts to \$50 or more during any twelve-month period from any person or firm having business dealings with the City, (3) may accept contributions in *any* amount from a family member or close personal friend who has no business dealings or ministerial duties with, and no appearances before, the City, and (4) for contributions from virtually all others, the Board will presume the public servant is being offered LDF contributions only because of his or her City position, thus rendering contributions of \$50 or more a violation of City ethics laws.³²

Under New York State law, an elected official is permitted to use campaign funds to pay for legal fees incurred in defending against lawsuits that arise from campaign activities or the holding of a public office of a party position.³³ And campaign contributions are not deemed to be gifts.³⁴ State law thus affords state officials an opportunity to raise legal defense funds by raising campaign funds.

This “safety valve,” however, is not available to New York City officials, like the mayor. New York City campaign finance law not only sets much more stringent contribution limits than state law, but also specifies the activities for which campaign funds may and may not be used.³⁵ Since New York City’s public funding regulations do not list LDFs, or law suits arising from activities related to an official’s duties as officeholder, as a permissible use of campaign funds, a

³¹ Id. § 1-01(c).

³² See COIB 2017-2, *supra* note 3, at 4–5.

³³ See N.Y. Elec. Law § 14-130 (McKinney 2015).

³⁴ See COIB 2017-2, *supra* note 3, at 3.

³⁵ N.Y.C. Code § 3-704.

city candidate or official who relies on public funding cannot use campaign funds to pay for legal fees, as they would if only New York State law applied.³⁶

The COIB’s advisory ruling thus leaves New York City public officials without a reasonable opportunity to raise sufficient funds to pay for legal fees incurred in defending against law suits that arise from holding a public office. As a recent article in the *New York Times* points out, under the COIB’s ruling “the mayor would have to raise money from 17 people to cover an hour of legal work” at the rates charged by some of the law firms that provided legal services to the city in the investigations into the mayor’s fundraising practices.³⁷

The COIB appears to recognize this in its advisory opinion, pointing out that existing law could be changed by City Counsel legislation to alter this result.³⁸ In this context, it should be noted that New York City’s campaign finance law specifically allows candidates elected to public office to raise funds for their inauguration and transition into office.³⁹ Arguably, such inauguration and transition fundraising gives rise to ethics concerns similar to those that trouble LDF fundraising.

In the following, we explore what LDF legislation looks like in other jurisdictions. Based on this analysis we propose legislation (included in the Appendix) to address the need for regulating LDFs under New York City laws.

IV. Registration, Fund Structure, and Management

LDFs for public officials raise money from the public for a particular purpose. Although such activity does not necessarily require a trust, it is in the nature of a trust, because it creates a fiduciary obligation to use the funds for the purpose for which they were donated. To assure the integrity of such fundraising – and to preempt abuse – all jurisdictions that have addressed LDF

³⁶ *Id.* § 3-706. Section 3-706(4a) does allow campaign expenditures to defend against claims or suits arising out of a candidate’s election activities.

³⁷ David J. Goodman, *De Blasio Stymied in Attempt to Pay Legal Fees with Donations*, *New York Times* (March 29, 2017), https://www.nytimes.com/2017/03/29/nyregion/bill-de-blasio-investigation-legal-fees.html?_r=0.

³⁸ See COIB 2017-2, *supra* note 3, at 6.

³⁹ N.Y.C. Code § 3-801.

fundraising have thus established certain rules governing the creation, management, and dissolution of such funds.

Jurisdictions providing for LDFs standardly require the creation of a separate account, a clear statement of purpose, and some form of registration of an LDF with state and/or local authorities.⁴⁰ They typically prohibit the commingling of LDF assets, limit the scope of proper use of funds, impose record-keeping requirements, and provide for the appropriate disposition of funds upon conclusion of the law suit(s) for which the LDF was created.⁴¹

California, for example, requires that state and local candidates and officers create a separate account for an LDF⁴² and establish a “controlled committee” to manage it.⁴³ An LDF committee is thereby subject to the same rules that apply to a candidate’s campaign committee.⁴⁴ The LDF committee must file a statement of organization with the Secretary of State, and may additionally be required to file with a local filing officer, if the candidate or officer is local.⁴⁵ The statement of organization must clearly identify the specific legal dispute(s) for which the account is established. Its name must contain the words “Legal Defense Fund” and the name of the candidate.⁴⁶ The LDF may only be used to cover “attorney fees and other legal costs” of “civil or criminal proceedings or administrative proceedings arising directly out of the conduct of an election campaign, the electoral process, or the performance of the officer’s governmental activities and duties.”⁴⁷ Regulations provide that “[t]he candidate or officer, and the treasurer of the legal defense committee, are subject to record keeping requirements,” and “shall keep separate detailed accounts, records, bills, and receipts, for each legal proceeding including documentation to support the basis and timing . . . for raising legal defense funds.”⁴⁸ The

⁴⁰ See *infra*, pp. 11–12.

⁴¹ See *infra*, pp. 11–12.

⁴² See Cal. Gov’t Code §§ 85304(a), 85304.5(a).

⁴³ Cal. Code of Regs. tit. 2, §§ 18530.4–.45, 2 C.C.R. §§ 18530.4–.45.

⁴⁴ See *id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Cal. Gov’t Code §§ 85304(d), 85304.5(d).

⁴⁸ 2 C.C.R. §§ 18530.4(c), 18530.45(e).

committee is also subject to the same audits that apply to campaign committees.⁴⁹ Upon resolution of the legal dispute, if the remaining funds exceed \$5000, they must be returned to donors on a pro rata basis.⁵⁰

Connecticut,⁵¹ Massachusetts,⁵² Michigan,⁵³ Nevada,⁵⁴ North Carolina,⁵⁵ Oregon,⁵⁶ Wisconsin,⁵⁷ and other jurisdictions that provide for LDFs all share similar provisions.

Congress and some other jurisdictions go further, in that they require an LDF to be set up as a trust.⁵⁸ Requiring that LDFs be set up as trusts has the benefit of clarifying the appropriate legal form for such a vehicle and subjecting the LDF to all state law requirements of a trust, such as the specification of the purposes of the fund in a trust declaration, the appointment of trustees with fiduciary responsibilities, the requirement that trust funds be maintained in a separate account, be used solely for trust purposes, not commingled with other assets, and be properly accounted for. But few jurisdictions have followed the Congressional approach in this regard.

The proposed legislation follows California's approach.

V. Scope of Permitted Use of Funds

Candidates and elected officials are generally permitted to use LDF funds to cover legal fees and costs of civil, criminal, or administrative proceedings against them that arise from their campaign activities or their activities as officeholders.⁵⁹

⁴⁹ See *id.*

⁵⁰ 2 C.C.R. §§ 185304(h), 18530.45(j). The statute and relevant regulations notably permit remaining funds that do not exceed \$5000 *in toto* to be used for various purposes, including paying off campaign debts or donating them to other political committees. See *id.*

⁵¹ See Conn. Gen. Stat. § 1-86d (2017).

⁵² See Mass. Gen. Laws Ann. ch. 55, § 18E (West, Westlaw through Ch. 9 of 2017 1st Ann. Sess.).

⁵³ See Mich. Comp. Laws Ann. §§ 15.521–.539 (West, Westlaw through P.A.2017).

⁵⁴ See Nev. Rev. Stat. Ann. § 294A.286–.287 (West 2015).

⁵⁵ See N.C. Gen. Stat. § 163-278.300–.320 (2016).

⁵⁶ See Or. Rev. Stat. § 244.205–.221 (2015).

⁵⁷ See Wis. Stat. § 11.1301 (2017).

⁵⁸ See Ellen P. Aprill, *supra* note 4, at 288 (“the fund must be a trust.”); see also Or. Rev. Stat. § 244.205 (“a public official may establish a legal expense trust fund if the public official incurs or reasonably expects to incur legal expenses described in subsection (2) of this section.”).

⁵⁹ See, e.g., Cal. Gov. Code §§ 85304, 85304.5; 2 C.C.R. §§ 18530.4–.45; M.G.L.A. 55 § 18E; M.C.L.A. § 15.525; N.C.G.S. §§ 163-278.300, .320; O.R.S. § 244.205.

LDF funds may not be used to cover legal costs associated with personal, non-professional activities. Massachusetts law thus broadly provides that “[l]egal defense funds may be created by a candidate, a state party committee or the candidate's political committee to defend against a criminal matter or to pay costs associated with a civil matter that is not primarily personal in nature.”⁶⁰

Nor may LDF funds be used for election purposes.⁶¹ The rationale for this is obvious: to allow such use would enable candidates to perform an end run around contribution limits. This provides another reason why funds raised to defray legal costs should be separated from campaign funds.

The obverse does not follow. In other words, campaign contributions may be used to defray legal costs associated with an election campaign or an elected public servant’s official duties without prejudicing contribution limits. New York State permits this.⁶² One reason for regulating the establishment of LDFs, however, is to preclude the use of campaign funds for an official’s legal defense. Massachusetts, for example, requires the establishment of separate accounts for recount funds, inauguration funds, and LDFs.⁶³

California goes further in specifying that LDF funds may be used solely for “attorney’s fees and legal costs,” but not for advertising expenses, mass mailings, political consultants, or costs associated with raising LDF funds.⁶⁴ Nor may LDF money be used to cover “a payment or reimbursement for a fine, penalty, judgment or settlement, or a payment to return or disgorge contributions made to any other committee controlled by the candidate or officer.”⁶⁵ In other words, “legal defense” means just that. And fines, settlements, or payments must be paid out of

⁶⁰ M.G.L.A. 55 § 18E.

⁶¹ See, e.g., N.C.G.S. § 163-278.320 (“The elected officer's campaign itself shall not be funded from a legal expense fund.”); M.G.L.A. 55 § 18E (“[A]ny donations received by the fund shall not be deposited into the candidate's campaign account or a committee account; . . . donations to such fund shall not be used to benefit a political committee.”).

⁶² See N.Y. Election Law § 14-130.

⁶³ See M.G.L.A. 55 § 18E.

⁶⁴ 2 C.C.R. §§ 18530.4(g)(1)(B), 18530.45(i)(1)(B).

⁶⁵ Id.

pocket, or from other appropriate funds under California law. Other jurisdictions may come to the same conclusion, but in California the statute expressly prohibits it.

The proposed legislation follows California's approach.

VI. Contribution Limits

Like campaign contributions and contributions to an elected official's inauguration and transition fund, LDF contributions raise the concern that public officials will be beholden to private interests. The problem of corruption or the appearance of corruption has been addressed in the campaign finance area by limiting the dollar amount that a person may contribute directly to a candidate's election campaign.⁶⁶ The assumption is that officials are more likely to be indebted to individuals who contribute large sums to their election campaigns.⁶⁷ Regulations governing the establishment of inauguration and transition funds, however, have not always taken the same approach.

Two central questions concerning LDFs are thus whether contribution limits should be imposed and, if so, how they should be set. Jurisdictions that have addressed these issues have reached different conclusions, suggesting that there is no single, compelling rationale either for imposing contribution limits, or for establishing the level of such limits.

The state of California does not impose contribution limits on LDFs;⁶⁸ nor do Massachusetts⁶⁹ and Michigan.⁷⁰ In these jurisdictions individuals are permitted to make unlimited contributions to a candidate's or official's LDF. However, California does explicitly permit local governments to impose different requirements.⁷¹ Accordingly, the City of San

⁶⁶ See, e.g., N.Y. Election Law § 14-114.

⁶⁷ See, e.g., Buckley v. Valeo, 424 U.S. 1, 25 (1976) (holding that restrictions on "large campaign contributions" are justified by the state's interest in "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office.").

⁶⁸ See 2 C.C.R. §§ 18530.4–45 (requiring only that "[l]egal defense funds . . . be raised in an amount reasonably calculated to pay, and . . . only be expended for, attorney's fees and other related legal costs.").

⁶⁹ M.G.L.A. 55 § 18E.

⁷⁰ M.C.L.A. §§ 15.521–.539.

⁷¹ 2 C.C.R. § 18530.45(b)(2).

Diego, California, imposes a contribution limit of \$500 per calendar year for contributions to an elected official's LDF.⁷²

Other jurisdictions impose contribution limits that are related to those set forth in their campaign finance laws. The City of Los Angeles, California, for example, limits an individual's LDF contribution to the per-person contribution limit that applies to candidates for citywide office.⁷³ Connecticut limits contributions to an official's LDF to \$1,000,⁷⁴ which appears to be roughly based on the campaign contribution limits for state legislators.⁷⁵

No jurisdiction imposes expenditure limits on LDFs.⁷⁶

Several jurisdictions distinguish between different types of contributors. For example, Connecticut does not limit contributions from family and close personal friends "whose relationship with the public official or state employee is not dependent on the official's or employee's status as a public official or state employee."⁷⁷ California, on the other hand, prohibits lobbyists who are registered to lobby a particular official's agency from contributing altogether to the official's LDF.⁷⁸ (Restrictions on particular classes of persons – specifically lobbyists and government contractors – will be further addressed in the next section.)

Whether officials would realistically be able to raise enough money to cover their legal expenses is an important consideration that weighs on the decision to impose contribution limits.⁷⁹

⁷² San Diego, Cal., Mun. Code § 27.2965(c).

⁷³ L.A., Cal., Mun. Code § 49.7.20.

⁷⁴ Conn. Gen. Stat. § 1-86d(b)(2).

⁷⁵ Conn. Gen. Stat. § 9-611(a)(4).

⁷⁶ *See, e.g.*, 2 C.C.R. §18530.4(e) ("an expenditure from a legal defense account is not subject to the provisions [concerning campaign expenditure limits].").

⁷⁷ Conn. Gen. Stat. § 1-86d(b)(3).

⁷⁸ *See* Cal. Gov. Code § 85702; 2 C.C.R. § 18572(a).

⁷⁹ *See, e.g.*, Goodman, *supra* note 37 (noting Mayor de Blasio's struggle to pay his legal fees after NYC's Conflicts of Interest Board limited LDF contributions to \$50); William Neuman, [De Blasio, in Reversal, Says New York Will Pay \\$2 Million for His Lawyers](https://www.nytimes.com/2017/06/30/nyregion/de-blasio-investigations-legal-fees.html), New York Times, June 30, 2017, <https://www.nytimes.com/2017/06/30/nyregion/de-blasio-investigations-legal-fees.html>

The proposed legislation recommends that the contribution limits for LDFs be identical to the contribution limits set forth in New York City’s campaign finance laws.⁸⁰ This approach strikes a balance between an official’s need to raise sufficient funds to cover legal expenses and the concern that large contributions may lead to corruption or the appearance of corruption. This approach also mirrors the approach that New York City takes on contribution limits to a candidate’s inauguration and transition fund.⁸¹

VII. Prohibited Contributions, Lobbyists, and Contractors

Whether special restrictions should be imposed on LDF contributions by lobbyists and government contractors is also a crucial question for legislation.

On the one hand, lobbyists (and perhaps government contractors) are the most likely to give, and thus enable a candidate or official to raise the necessary funds to pay their legal bills. When President Bill Clinton raised money for his LDF to cover the legal costs of his impeachment proceedings, he initially took money from lobbyists, but then voluntarily declined lobbyist contributions. The result was that contributions precipitously declined.⁸²

On the other hand, LDF contributions by lobbyists or government contractors raise special conflict-of-interest concerns. This has been recognized in the campaign finance context by New York City (and other jurisdictions), who has imposed special, lower contribution limits on lobbyists and persons doing business with the City.⁸³ Conflicts of interest are even more palpable in the case of an LDF set up to cover defense costs arising out of an official’s governmental duties unrelated to an election. In such a case, LDF contributions are moneys that directly offset payments that the official would have to make out of pocket to cover his/her legal fees and costs.

⁸⁰ See *infra*, Section X (“Appendix”) at p. 20.

⁸¹ See N.Y.C. Code § 3-801(2)(b) (citing N.Y.C. Code § 3-703(1)(f)) (limiting contributions for mayor, public advocate, and comptroller to \$4,500, borough presidents to \$3,500, and city council members to \$2,500).

⁸² See Aprill, *supra* note 4, at 280.

⁸³ See N.Y.C. Code § 3-703(1-a) (setting forth restrictions and lower contribution limits for persons doing business with the City). Lobbyists are considered persons “doing business” with the City. *Id.* § 3-702(18)(a).

California thus prohibits lobbyists from making contributions to any candidate or elected official whom they are registered to lobby.⁸⁴ Connecticut goes further, prohibiting all contributions to LDFs by lobbyists, persons doing business with the state, and others who are engaged in activities that are directly regulated by an official's department or agency.⁸⁵

Other states look to campaign finance restrictions to limit conflicts of interest by lobbyists. For, example, Nevada prohibits the solicitation of campaign contributions when the legislature is in session; likewise, it prohibits solicitation of LDF contributions when the legislature is in session.⁸⁶

The proposed legislation looks to the New York City Campaign Finance Act to set contribution limits and to restrict LDF fundraising from lobbyists, persons “doing business” with the City, corporations, limited liability companies, and partnerships. It recommends that LDF contributions by lobbyists and persons “doing business” with the City be subject to the lower contribution limits for such persons set forth in the New York City Campaign Finance Act.⁸⁷ Contributions to LDFs by corporations, limited liability companies, and partnerships should be prohibited entirely, as are contributions to candidates under New York's Campaign Finance Act.⁸⁸

VIII. Disclosure

Disclosure requirements are distinct from record-keeping requirements. Detailed record-keeping of all contributions and expenditures is required to satisfy regulatory authorities that moneys from contributors are properly accounted for and spent in permitted fashion, as well as

⁸⁴ See Cal. Gov. Code § 85702; 2 C.C.R. § 18572(a).

⁸⁵ See Conn. Gen. Stat. § 1-86d(b)(1)(citing Conn. Gen. Stat. §§ 1-84, 1-97).

⁸⁶ See Nev. Rev. Stat. §§ 294A.300(1), (4).

⁸⁷ See N.Y.C. Code §3-703(1-a).

⁸⁸ See *id.* § 3-703(l).

for tax purposes. Such records are potentially subject to audits,⁸⁹ but not all jurisdictions require that they be disclosed to the public to serve this purpose.

In contrast, public disclosure—especially of contributions—renders contributions and contributors transparent for purposes of political accountability and the enforcement of campaign finance and conflict-of-interest regulations. Disclosure that aims at accountability should be standardized, readily accessible to the public online, and sufficiently frequent to be useful to those who might act on the disclosed information.⁹⁰

All jurisdictions that have statutes governing the establishment of LDFs require the disclosure of LDF contributions and the names of contributors, typically by quarterly report.⁹¹ Most jurisdictions also require the disclosure of expenditures.⁹² But California does not. Frequently, the LDF disclosures are made in the same way, and to the same agency, as campaign finance disclosures.⁹³

The proposed legislation makes LDF contributions and expenditures subject to the same disclosure regime as that of campaign funds under the New York City Campaign Finance Act.

IX. Conclusion

A significant number of state and local jurisdictions have adopted legislation to permit, and regulate, the establishment of LDFs for elected officials. A review of such legislation shows that jurisdictions tend to converge on the registration, fund structure, management, reporting and

⁸⁹ See, e.g., 2 C.C.R. § 18530.45 (“[t]he candidate or officer, and the treasurer of the legal defense committee, are subject to recordkeeping requirements specified in Section 84104 and shall keep separate detailed accounts, records, bills, and receipts, for each legal proceeding including documentation to support the basis and timing, as set forth in subdivision (i)(3), for raising legal defense funds. The legal defense committee shall be subject to audits under Chapter 10 of Title 9 of the Government Code.”).

⁹⁰ See Archon Fung, Mary Graham, & David Weil, Full Disclosure: The Promise and Perils of Transparency xiv (Cambridge University Press, 2008) (“the linchpin of effective transparency [is] the connection between information and action.”).

⁹¹ See, e.g., 2 C.C.R. § 18530.45.

⁹² See, e.g., Mich. Comp. Laws Ann. § 15.527 (requiring expenditures greater than \$50 and all contributions be disclosed via quarterly transaction reports with detailed information regarding the transactions); see also Nev. Rev. Stat. Ann. § 294A.286; Conn. Gen. Stat. § 1-86d; Aprill, *supra* note 4, at 279 (noting that the House and Senate require disclosure of expenditures over \$250 and \$25, respectively).

⁹³ See, e.g., 2 C.C.R. § 18530.45; Nev. Rev. Stat. Ann. § 294A.286.

disclosure requirements for LDFs. There is considerable variation, however, with regard to contribution limits, and restrictions on government contractors and lobbyists. On questions of LDF registration, fund structure, fund management, and the scope of permitted use of funds, the proposed legislation follows California's approach. On contribution limits, disclosure requirements and special restrictions on lobbyists, persons doing business with the city, and business entities, the proposed legislation follows New York City campaign finance law.

X. Appendix

Amendment to Title 3, Chapter 78 of the Campaign Finance Law

NEW 3-802: -Legal Defense Funds [requires re-numbering of current 3-802]

1. A current or former candidate for elective city office or a current or former elected city officer may establish one or more legal defense funds.
 - a. A legal defense fund must be
 - i. A separate account
 - ii. Used solely to defray attorney's fees and other related legal costs incurred for the current or former city candidate's or elected city officer's legal defense if the current or former city candidate or elected city officer is subject to a civil or criminal proceeding or administrative proceedings arising directly out of the conduct of an election campaign, the electoral process, or the performance of the officer's governmental activities and duties.
 - b. These funds may be used only to defray those attorney fees and other related legal costs related to the proceeding.
 - c. The current or former city elected officer or candidate shall file with the Campaign Finance Board a Statement of Purpose identifying the specific case, proceeding, matter or investigation for which the legal defense fund is established.
 - d. The legal defense fund shall be named "The [name of current or former city officer or candidate] Legal defense Fund for [number of case, proceeding, or matter or, if a number does not exist, a brief description of the case, proceeding or matter]."
2. Contributions to a legal defense fund are subject to the following:
 - a. A current or former elected city officer or candidate may not solicit or accept a contribution or cause a contribution to be solicited or accepted before the legal defense fund is established and the Statement of Purpose has been filed.
 - b. The legal defense fund shall be established through a separate checking account and all contributions received for the legal defense fund shall be deposited in that account.
 - c. A person shall not make or commit to make, nor may the former or current city candidate or elected officer who has established the legal defense fund solicit or accept, a contribution or contributions to the legal defense fund in an amount that exceeds the contribution limit for the office for which they are a candidate or have been elected to fill as set forth in paragraph (f) of subdivision one of Section 3-703, as adjusted pursuant to subdivision seven of such section as applicable and as modified by the limits set forth in paragraph (d) of subdivision one of Section 3-703.
 - d. All contributions to a legal defense fund shall be subject to all reporting and disclosure requirements as set forth in paragraph (f) of subdivision one of Section 3-703 and all rules promulgated by the Campaign Finance Board relating thereto.

- e. Contributions made pursuant to this section and in full compliance with its requirements shall not be considered to fall within the scope of the prohibitions of NYC Charter Section 2604(b)(3) or (5).
3. Expenditures by a legal defense fund are subject to the following:
 - a. An expenditure must be related to the case, proceeding or matter identified in the Statement of Purpose.
 - b. All expenditures by the legal defense fund must be made from the fund's checking account.
 - c. All expenditures are subject to disclosure, reporting, audit and examination pursuant to the requirements of the Campaign Finance Act and its implementing regulations.
4. Within 180 days after the final conclusion of the case, proceeding, or matter and the payment of all debts incurred in connection with that case, proceeding, or matter, funds remaining in the committee's checking account shall be disposed of by repayment of contributions to contributors, by transfer to another legal defense committee, or by payment to the City's General Fund.
5. For purposes of this section, "attorney's fees and other related legal costs" includes only the following:
 - a. Attorney's fees and other legal costs related to the defense of the current or former city candidate or elected officer;
 - b. Administrative costs directly related to compliance with the requirements of this title.
6. "Attorney's fees and other related legal costs" does not include expenses for fundraising, media or political consulting fees, mass mailing or other advertising, or a payment or reimbursement for a fine, penalty, judgment or settlement, or a payment to return or disgorge contributions made to any other committee controlled by the current or former city candidate or city elected officer.