

**STATE OF MICHIGAN**  
**SECRETARY OF STATE**  
**BUREAU OF ELECTIONS**

In the Matter of:

Docket No. 11-02-CF

Kwame M. Kilpatrick for Mayor  
Wayne Co. Committee Id. No. 152736  
P.O. Box 44710  
Detroit, Michigan 48244

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Michael Naughton (P70856)  
James C. Thomas, P.C.  
535 Griswold Street  
Suite 2500  
Detroit, Michigan 48226

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**BRIEF IN SUPPORT OF**  
**NOTICE OF ALLEGED CIVIL VIOLATION**

The Secretary of State brings this action against the respondent, Kwame M. Kilpatrick for Mayor, which violated the Michigan Campaign Finance Act (MCFA), 1976 PA 388, MCL 169.201 *et seq.* by making unlawful expenditures for incidental expenses on behalf of former Detroit Mayor Kwame Kilpatrick, contrary to MCL 169.221a. On September 4, 2008, Mr. Kilpatrick pled guilty to two felony counts of obstruction of justice for lying under oath in a civil proceeding. Deposition of Kwame Kilpatrick, March 9, 2011, *Kilpatrick v SkyTel, Inc., et al.*, p. 5-7, 10 (Exhibit 1).

The respondent illegally paid \$976,493.29 as incidental expenses for legal fees, primarily incurred during the reporting period by the candidate, Mr. Kilpatrick, to defend against ten felony charges filed in March and August, 2008. Annual Campaign

Statement for the Reporting Period January 1, 2008 through December 31, 2008, filed April 2, 2009, and Amended Annual Campaign Statement for the Reporting Period January 1, 2008 through December 31, 2008, filed May 4, 2011 (Exhibit 2). The Secretary of State will show that: 1) the respondent has failed to properly establish on the campaign statement that any of the attorney fees were incidental to Mr. Kilpatrick's office; 2) the respondent's attorneys fees are personal expenses of Mr. Kilpatrick and are not ordinary and necessary business expenses related to the execution of his official duties; and, 3) the payments are an unauthorized use of candidate committee funds to the extent they paid for legal costs incurred with respect to the March and August 2008 criminal charges, and perhaps for other personal expenses of the candidate.

#### **STATEMENT OF FACTS**

The respondent is the candidate committee of former Detroit Mayor Kwame Kilpatrick, which at all times "shall be under the control and direction of the candidate named in the ... statement of organization." MCL 169.203(2). Mr. Kilpatrick served as Mayor of Detroit from January 1, 2002 through September 18, 2008.

In March 2008, Mr. Kilpatrick was charged with eight felony counts of perjury, misconduct in office, obstruction of justice, and conspiracy to obstruct justice based on perjured testimony he gave in the case of *Brown v Mayor of Detroit*,<sup>1</sup> regarding the existence of a romantic relationship between Mr. Kilpatrick and his Chief of Staff. Mr. Kilpatrick was subsequently charged in August 2008 with two felony counts of assaulting a police officer while the officers attempted to serve a subpoena on a witness. On

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<sup>1</sup> The facts underlying the *Brown v Mayor of Detroit* lawsuit are described in detail in the Court of Appeals opinion, 271 Mich App 692 (2006), which was reversed in part on appeal to the state Supreme Court, 478 Mich 589 (2007). Section I of the Court of Appeals opinion is cited here for its explanation of the facts and procedural history of the case.

September 4, 2008, Mr. Kilpatrick pled guilty to two counts of obstruction of justice and one count of assaulting a law enforcement officer. He resigned from office two weeks later.

On April 2, 2009,<sup>2</sup> the respondent filed an annual campaign statement with the Wayne County Clerk as required by MCL 169.235(1) for the reporting period that began on January 1, 2008 and ended on December 31, 2008. (Exhibit 2). The annual campaign statement included the following entries on Schedule 1-C, Incidental Office Expense

Disbursements:

RECIPIENT	DATE	AMOUNT	PURPOSE
Dykema Gossett	1/25/08	\$80,000.00	"Legal fee"
Mitchell Lord & Associates	2/12/08	60,000.00	"Legal fee"
Moffitt & Broadnax Ltd	2/22/08	20,000.00	"Legal fee"
Winston & Strawn LLP	3/24/08	50,000.00	"Legal fee"
Pepper Hamilton LLP	4/7/08	38,856.96	"Legal fee"
James C. Thomas PC	4/11/08	50,000.00	"Legal fee"
Mitchell Lord & Associates	4/14/08	50,000.00	"Legal fee"
Dykema Gossett	5/7/08	10,000.00	"Legal fee"
Parkman Adams & White LLC	5/8/08	100,000.00	"Legal fee"
Winston & Strawn LLP	5/19/08	106,173.00	"Legal fee"
James C. Thomas PC	6/2/08	60,158.81	"Legal fee"
Philip Thomas Attorney at Law	6/6/08	3,770.50	"Legal fee"
Philip Thomas Attorney at Law	6/23/08	3,500.00	"Legal fee"
James C. Thomas PC	6/25/08	60,000.00	"Legal fee"
The Cochran Firm	6/27/08	40,000.00	"Legal fee"
The Cochran Firm	7/8/08	30,000.00	"Legal fee"
James C. Thomas PC	7/23/08	2,637.50	"Legal fee"
Winston & Strawn LLP	8/19/08	70,339.67	"Legal fee"
James C. Thomas PC	8/22/08	111,456.85	"Legal fee"
Gerald Evelyn Attorney at Law	9/2/08	10,000.00	"Legal fee"
Winston & Strawn LLP	9/2/08	7,000.00	"Legal fee"
Pepper Hamilton LLP	9/19/08	10,000.00	"Legal fee"
Philip Thomas Attorney at Law	9/19/08	2,000.00	"Legal fee"
Philip Thomas Attorney at Law	12/26/08	600.00	"Legal fee"
<b>TOTAL</b>		<b>\$976,493.29</b>	

<sup>2</sup> An amended annual campaign statement for this reporting period was filed on May 4, 2011 (Exhibit 2).

## ARGUMENT

### **I. The respondent illegally used candidate committee funds to pay Mr. Kilpatrick's legal fees incurred while defending himself from numerous felony charges.**

A public official, like any other individual facing criminal charges, is entitled to a robust defense. However, a public official may not use candidate committee funds to pay legal fees incurred as a result of their private behavior. Indeed, such expenditures are contrary to the MCFA, specifically, MCL 169.206(1), 221a, and 245.

Candidate committee funds may only be used to make expenditures, pay incidental expenses, and transfer unexpended funds for limited purposes. MCL 169.206(1), 221a, and 245; see also Declaratory Ruling to Mitch Irwin (May 29, 1979) (Exhibit 3). These statutes reflect Michigan's strong public policy forbidding the conversion of candidate committee funds for personal use. The respondent's payment of Mr. Kilpatrick's legal fees is not an authorized expenditure because these payments were not made "in assistance of ... the nomination or election of a candidate [.]” MCL 169.206(1). Likewise, the payments are not qualified transfers under MCL 169.245. The only other permissible use for candidate committee funds recognized by the MCFA is the payment of incidental expenses. MCL 169.221a. The 2008 expenditures for attorney fees at issue here are not authorized incidental expenses.

An incidental expense is “an expenditure that is an ordinary and necessary expense, as described in section 162 of the internal revenue code of 1986, 26 USC 162, paid or incurred in carrying out the business of an elective office.” MCL 169.209(1). When this provision was enacted in 1994,<sup>3</sup> it was designed to reign in abuses of

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<sup>3</sup> 1994 PA 411, imd. eff. December 29, 1994.

officeholder expense funds that could be “used for expenses incidental to the person’s office.” MCL 169.249 (repealed by 1999 PA 224). As the legislative analysis made plain, under the former system,<sup>4</sup> “[t]he question of what is and is not a proper incidental expense is, as one report put it, ‘constantly at issue.’” House Legislative Analysis, 1994 PA 411, January 17, 1995 (Exhibit 4). With the enactment of 1994 PA 411, the legislature codified a non-exclusive list of 16 categories of permissible incidental expenses to guide elected officials on the appropriate use of candidate committee funds. MCL 169.209(1)(a)-(p).

While a payment for attorney fees is not specifically covered by any of the sixteen enumerated categories, it may nonetheless be authorized if the expense is ordinary, necessary, and paid or incurred while executing the duties of public office, and consistent with the public policy of Michigan as expressed in the MCFA. MCL 169.209(1). In assessing whether the payment of legal fees as an incidental expense is legal, the Secretary of State must consider the origin of the legal charge or claim against a public official, “or the character of the conduct from which the claim or charge stems.” Op Atty Gen No 7240 at p. 4 (December 15, 2009)<sup>5</sup> (Exhibit 5). The public official for whom an

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<sup>4</sup> The administrative rules governing now-defunct officeholder expense funds authorized disbursements for incidental expenses, which were defined as those “traditionally associated with, or necessitated by, the holding of a particular public office [,]” and “an ordinary and necessary business expense of a public official as a public official as authorized by the internal revenue code of 1986 [.]” R 169.62(1), (2), 1989 MR 6. In addition, these rules specifically required the Secretary of State to direct “the public official to reimburse an amount equivalent to the unauthorized disbursement to the officeholder’s expense fund.” R 169.63(3), 1989 MR 6. If the elected official failed to reimburse the account, the Secretary of State was required to “refer the matter to the attorney general for commencement of an action to recover the unauthorized disbursement from the officeholder’s expense fund.” R 169.63(4), 1989 MR 6.

<sup>5</sup> An Attorney General opinion is binding on state agencies. *Traverse City School District v Attorney General*, 384 Mich 390, 407 n.2 (1971); *People v Penn*, 102 Mich App 731, 733 (1981); *Michigan Beer & Wine Wholesalers Assn v Attorney General*, 142 Mich App 294, 300 (1985); *Queen Airmotive, Inc v Dept of Treasury*, 105 Mich App 231, 236 (1981); *Campbell v Patterson*, 724 F2d 41, 43 (CA 6, 1983), *cert den* 465 US 1107 (1984).

incidental expense for legal fees is made must establish “that the expense was business-related and not personal.” *Id* at p. 5.

In March 2008, Mr. Kilpatrick was charged with eight felony counts of perjury, misconduct in office, obstruction of justice, and conspiracy to obstruct justice based on perjured testimony he gave in the case of *Brown v Mayor of Detroit*. The perjured testimony pertained to the existence of an extra-marital relationship between Mr. Kilpatrick and his Chief of Staff. When questioned by the plaintiffs’ counsel in *Brown* about the nature of their relationship Mr. Kilpatrick lied under oath during a deposition and at trial, denying the relationship was intimate. These lies form the basis of the charges brought against Mr. Kilpatrick in March 2008.

The conduct from which the criminal charges originate, or the source of the legal claims against Mr. Kilpatrick, is this perjured testimony about a personal, private relationship. Mr. Kilpatrick deceived the court in order to cover up the romantic relationship with his Chief of Staff. Had Mr. Kilpatrick committed these same offenses as a private citizen rather than an elected official, he would have placed himself in the same legal jeopardy.

Charges of perjury may be brought when “[a]ny person authorized by any statute of this state to take an oath, or any person of whom an oath shall be required by law ... shall willfully swear falsely, in regard to any matter or thing, respecting which such oath is authorized or required [.]” MCL 750.423. Likewise, charges of obstruction of justice, a crime at common law, may be brought against any individual who “interfere[s] with the orderly administration of justice,” or who “imped[es] or obstruct[s] those who seek justice in a court” through perjury or otherwise. *People v Thomas*, 438 Mich 448, 455,

457 n.5 (1991). An elected official is not uniquely susceptible to charges of perjury or obstruction – the obligation to testify truthfully applies with equal force to a Mayor and an ordinary citizen. Additionally, the testimony on which the criminal charges were based deals with a personal, private matter – not to the execution of Mr. Kilpatrick’s public duties or duties of office.

In short, the charges arising from Mr. Kilpatrick’s deceit were brought irrespective of his position as Mayor of Detroit. Lying under oath to conceal an affair plainly does not fall within the scope of an elected official’s legitimate public duties. Because the criminal charges did not “arise in the course of carrying out the business of being a public official [,]” the incidental expenses paid by the respondent (i.e., the legal fees) were improper and unauthorized. Op Atty Gen No 7240 at p. 6 (December 15, 2009) (Exhibit 5).

Moreover, Mr. Kilpatrick has acknowledged that his motivation for committing these offenses was personal. Referring to the *Brown* case, Mr. Kilpatrick recently testified:

Q: What did you lie about in that deposition?

A: ...There was one or two questions about having an affair with my then-chief of staff. And in a moment where I wanted to protect my wife and my family and not utterly embarrass my wife and family, I lied and said that I was not having an affair.

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Q: What did you lie about at the jury trial in the Brown/Nelthrope lawsuit?

A: ...in that particular instance, it was the same thing – I think even more profound at this time, wanting to protect my wife and my family...I did not tell the truth, to protect my wife, my family, my kids, and all of that embarrassment that I thought it would cause.

Q: At trial in the Brown/Nelthrope lawsuit, were you asked anything about why Gary Brown was fired?

A: I believe I was, yes.

Q: Did you testify truthfully as to why he was fired?

A: ...everything that I said in that trial was absolutely truthful except for the moment where I was asked directly about the affair, and in that moment ...I thought it was more important to protect my wife, and so I did not tell the truth about that.

Deposition of Kwame Kilpatrick, March 9, 2011, *Kilpatrick v SkyTel, et al.*, at p. 6-8 (Exhibit 1). Mr. Kilpatrick's personal desire to avoid disclosing the affair with his Chief of Staff drove him to lie under oath. According to Mr. Kilpatrick's testimony, it is the *only* lie he told: "I was not truthful about a romantic relationship, I was on the stand for six, seven hours, nothing else I said was determined to be untruthful. Nothing. Not one word." *Id.* at p. 146-147. The gravamen of the March 2008 charges is perjury. The source of the legal claim against Mr. Kilpatrick is this solitary lie about an affair. The legal fees paid to defend Mr. Kilpatrick in that proceeding were *not* "paid or incurred in carrying out the business of an elective office [,]" because testifying falsely to cover up a personal, private relationship falls beyond the scope of his public duties as Mayor of Detroit. MCL 169.209(1).

Mr. Kilpatrick faced a second set of felony charges later that year. In August 2008, Mr. Kilpatrick was charged with two felony counts of assaulting law enforcement officials who attempted to serve a subpoena on a witness in the perjury case. With respect to these charges, the Attorney General wrote,

Utilizing the test set forth in this opinion, the source of the claim or charge in the [*People v*] *Kilpatrick* case was the defendant's interference with an attempt made by a detective and investigator from the Wayne County Sheriff's Department to serve a subpoena on a witness in a pending criminal case. The facts underlying the charge were that the defendant, while yelling obscenities, grabbed the detective by both shoulders and shoved him into the investigator, knocking both of them off balance. These charges cannot reasonably be regarded as arising out of the office-related activities of an elected official. Thus, any campaign funds used to defend against the charges brought in [this case] would constitute improper expenditures under the MCFA.



Op Atty Gen No 7240 (December 15, 2009) at n.23 (Exhibit 5). Therefore, to the extent that the respondent's 2008 payments for legal fees relate to the assault case, such payments are unauthorized and do not qualify as incidental expenses for the same reasons discussed above.

While a felony conviction may have resulted in Mr. Kilpatrick's removal from public office,<sup>6</sup> the Attorney General has opined "it is the origin of the claim, rather than its ultimate consequences to the official, that forms the basis of the relevant test." *Id* at p. 5. Thus, the primary factor in determining whether the respondent's payment of Mr. Kilpatrick's legal fees constitutes a proper incidental expense is the source of the legal claim against him, not the potential consequences occasioned by his conviction. Whether Mr. Kilpatrick would have been subjected to a forfeiture or removal proceeding is simply irrelevant in assessing the validity of the respondent's claim that the legal fees it paid constitute legitimate incidental expenses.

The source of all ten felony charges brought against Mr. Kilpatrick, or the character of the conduct from which those charges originate, is personal in nature. Mr. Kilpatrick lied under oath to cover up a private, personal relationship, was charged with perjury and related offenses, and later assaulted two law enforcement officials who attempted to serve a subpoena on a witness in the perjury case. These activities do not arise from his official duties.<sup>7</sup> The criminal charges originate from his personal behavior,

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<sup>6</sup> MI Const Art V, §10, Art VII, §33; MCL 168.327.

<sup>7</sup> The term "official duties" is defined in section 13-11-1 of the Detroit City Code as follows: Official duties shall mean acts done pursuant to authority conferred by law or within the scope of employment or in relation to matters committed by law to the officer or employee's control or supervision ... Where there is willful misconduct or lack of good faith in the doing of any such acts, the same shall not constitute the performance of the official duties of any appointive officer or employee of the city within the operation or effect of this article.

rather than official or public duties. Therefore, the respondent's payment of \$976,493.29 of legal fees does not satisfy the statutory definition of a lawful incidental expense under MCL 169.209(1).<sup>8</sup>

**II. The respondent's disclosure of the purposes of these payments, to date, is insufficient.**

The MCFA requires a candidate committee to publicly disclose the purpose of each expenditure, including an expenditure for an incidental expense. MCL 169.226(1)(j). The purpose must be stated with sufficient specificity to allow the designated filing official to evaluate whether the payment is ordinary, necessary, and paid or incurred in carrying out the business of an elective office. MCL 169.209(1). Incidental expenses are reported separately from a candidate committee's other expenditures on Schedule 1C – Incidental Office Expense Disbursements. The statute plainly "require[s] a clear demonstration that the expense was business-related and not personal." Op Atty Gen No 7240 (December 15, 2009) at p. 5 (Exhibit 5).

The respondent entered "legal fees" as its description of the purpose of 24 payments it claims are incidental expenses during 2008. This description does not explain the basis for asserting that these payments represent legitimate incidental expenses. Meaningful disclosure is a prerequisite to the "case-by-case" analysis of "the particular facts involved" contemplated by the Attorney General. *Id.* At a minimum, the

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Available at <http://library.municode.com/index.aspx?clientID=10649&stateID=22&statename=Michigan>.

<sup>8</sup> It merits note that under section 13-11-3(5) of the Detroit City Code, in order for an employee to obtain legal representation at city expense, "[t]he city council must find and determine that the claim, demand or suit against the officer or employee arises out of or involves the performance in good faith of the official duties of the officer or employee involved." Furthermore, under state civil service rules, "[t]he appointing authority is not required to provide legal services at state expense in connection with prosecution of a criminal suit against an employee." MI Civil Service R 2-19.

respondent must disclose the purpose of retaining counsel by referring to a specific case or legal issue.

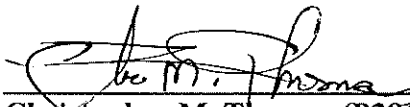
### **CONCLUSION AND RELIEF SOUGHT**

The evidence demonstrates that the respondent, Kwame M. Kilpatrick for Mayor, violated MCL 169.221a by making numerous illegal expenditures for incidental expenses. These payments were made to defend Mr. Kilpatrick against ten felony charges originating from lies he told under oath to cover up an extra-marital affair, not in the performance of his official duties as Mayor of Detroit.

The Secretary of State respectfully requests that the Hearing Officer find that the respondent violated the MCFA and issue an order requiring the respondent to disclose the precise purpose for which each legal fee was paid with reference to a specific charge, case, or other legal proceeding involving Mr. Kilpatrick by filing an amended annual campaign statement for calendar year 2008, and pay a civil fine equal to the amount of its unauthorized incidental expenses, \$976,493.29, to the State of Michigan, or such other relief that the Hearing Officer may deem appropriate. The maximum fine which may be assessed by the Hearing Officer is "the amount of the improper contribution or expenditure plus not more than \$1,000.00 for each violation." MCL 169.215(11).

**RUTH JOHNSON  
SECRETARY OF STATE**

7/7/2011

  
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**Christopher M. Thomas (P38664)**  
**Duly Authorized Representative**  
**Bureau of Elections**  
**Richard H. Austin Building, 1<sup>st</sup> Floor**  
**430 West Allegan Street**  
**Lansing, Michigan 48918**  
**(517) 335-5456**