



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2004 SEP 24 A 8:47

September 24, 2004

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN (by JAP)*
General Counsel

Rosemary C. Smith *RC*
Associate General Counsel

Mai T. Dinh *MTD*
Assistant General Counsel

Albert J. Kiss *ATK*
Attorney

Subject: Draft AO 2004-29

AGENDA ITEM
For Meeting of: 9-30-04

SUBMITTED LATE

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 30, 2004.

Attachment

1 ADVISORY OPINION 2004-29

2
3 Cleta Mitchell, Esq.
4 Foley & Lardner LLP
5 3000 K Street, N.W., Suite 500
6 Washington, DC 20007-5143
7

DRAFT

8 Dear Ms. Mitchell:
9

10 This responds to your letters dated July 20, 2004, and August 6, 2004, requesting an
11 advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as
12 amended (“the Act”), and Commission regulations, to the involvement of Representative Todd
13 Akin and Todd Akin for Congress (“the PCC”) in support of, and opposition to, certain Missouri
14 ballot initiatives.
15

16 ***Background***

17 Representative Todd Akin is a member of Congress, and is a candidate for reelection in
18 the November 2, 2004 general election.

19 In Missouri, citizens may use the ballot initiative process to change State laws and the
20 State Constitution. Mo. Const., Art. III, Sec. 49, 50, 51, 52(a), 52(b), and 53; Art. XII, Sec. 2(b).
21 The August 3, 2004 primary ballot in all Missouri Congressional districts included two ballot
22 initiatives. These two ballot initiatives proposed to amend the State Constitution to expand
23 gambling in Missouri (“the Gambling Amendment”) and to state that for a marriage to be valid
24 and recognized in Missouri, it must be between a man and a woman (“the Defense of Marriage
25 Amendment”). The Gambling Amendment did not pass while the Defense of Marriage
26 Amendment did. You state that initiatives on these issues are likely to be on Missouri ballots

1 again. Representative Akin opposes the Gambling Amendment and supports the Defense of
2 Marriage Amendment.

3 You indicate that both as a member of the Missouri legislature and subsequently as a
4 member of Congress, Representative Akin has been known within Missouri as the leader of
5 efforts to enact the Defense of Marriage Amendment. Representative Akin is also one of the
6 primary sponsors of H.J. Res. 56, 108th Cong. (2003), known as the Federal Marriage
7 Amendment, and H.R. 3313, the Marriage Protection Act of 2003. You state that Representative
8 Akin's constituents and campaign supporters called upon him to lead the effort to help promote
9 passage of the Defense of Marriage Amendment on the August 3, 2004 primary ballot, and
10 Representative Akin did so.

11 Similarly, you state that Representative Akin has been a long time opponent of expanded
12 casino gambling in Missouri and is known as the primary anti-gambling leader in Missouri. You
13 state that Representative Akin is dedicated to his positions on gambling and marriage and he
14 pledged his ongoing and visible involvement with these issues during his campaigns for
15 Congress.

16 You state that Representative Akin was not involved in establishing any of the ballot
17 initiative committees now in existence that oppose the Gambling Amendment or support the
18 Defense of Marriage Amendment.¹ You state that none of these ballot initiative committees are
19 political committees under the Act and Commission regulations.

20
21 ***Legal Analysis and Conclusions***

¹ For discussion of a candidate or officeholder's involvement with a ballot initiative committee that he has established, financed, maintained or controlled, see Advisory Opinion 2003-12.

1 (1) *Is it permissible under 2 U.S.C. 439a for Representative Akin to use contributions accepted*
2 *by the PCC to make donations to a ballot initiative committee established to support the*
3 *Defense of Marriage Amendment, or to oppose the Gambling Amendment, or to other ballot*
4 *initiative committees that focus on the defense of marriage or on gambling in Missouri?*

5 Yes, these donations are permissible because in the situation you describe, these uses of
6 contributions by Representative Akin will be in connection with his campaign for reelection.

7 The Act, as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L.
8 No. 107-155, 116 Stat. 81 (2002), lists four categories of permissible uses of contributions
9 received by a Federal candidate: (1) otherwise authorized expenditures in connection with the
10 candidate's campaign for Federal office; (2) ordinary and necessary expenses incurred in
11 connection with the duties of the individual as a holder of Federal office; (3) contributions to
12 organizations described in 26 U.S.C. 170(c); and (4) transfers, without limitation, to national,
13 State or local political party committees. 2 U.S.C. 439a; *see also* 11 CFR 113.2(a), (b), and (c).²

14 As described in your request, Representative Akin's support for the Defense of Marriage
15 Amendment and opposition to the Gambling Amendment were integral parts of his reelection
16 campaign. Representative Akin's donating campaign funds to ballot initiative committees on the
17 defense of marriage and on gambling are in connection with his campaign for Federal office.³

18

² Such uses must not, however, result in the conversion of campaign funds to "personal use" by any person. 2 U.S.C. 439a(b)(1) and (2).

³ Compare this advisory opinion with Advisory Opinion 2003-26, where refunds of improper contributions originally made to a candidate's State campaigns for governor from Federal contributions were found impermissible because the committee that received the contributions was terminated, because the proposed refunds would not be in connection with any of the candidate's campaigns for Federal office, and because there was no legal obligation to make the refunds.

1 Thus, these donations are permissible under 2 U.S.C. 439a(a)(1).⁴ Because these donations are
2 permissible as disbursements in connection with Representative Akin's campaign for Federal
3 office, it is not necessary to analyze whether the donations are "ordinary and necessary expenses
4 incurred in connection with the duties of the individual as a holder of Federal office." See 2
5 U.S.C. 439a(a)(2).

6
7 *(2) May Representative Akin solicit contributions for the PCC if the solicitation indicates that*
8 *funds received may be donated to ballot initiative committees that supported his positions on*
9 *the Defense of Marriage Amendment, or on the Gambling Amendment or that will address*
10 *ballot initiatives on marriage or gambling?*

11 Yes, Representative Akin may solicit contributions for the PCC in a solicitation that
12 indicates that funds received may be donated to ballot initiative committees that support his
13 position on the Defense of Marriage Amendment, or on the Gambling Amendment, or that will
14 address ballot initiatives on marriage or gambling. The contributions received in response to the
15 solicitation must be treated like any other contribution to the PCC and thus must comply with the
16 amount limitations, source prohibitions, and reporting requirements of the Act. See 2 U.S.C.
17 434, 441a, 441b, 441c and 441e.

18
19 *(3) May Representative Akin appear in newspaper, radio or television advertisements*
20 *disseminated in his district before the November 2, 2004 general election that are paid for by*
21 *Missourians for Marriage, the Coalition to Protect Marriage in Missouri or another ballot*

⁴ The Commission assumes that Representative Akin's donations to each organization will not be in amounts that are so large or in amounts that comprise such a substantial percentage of the organization's receipts that the

1 *initiative committee in Missouri where the advertisements focus on ballot initiatives involving the*
2 *defense of marriage? Does it make a difference if the PCC has contributed to the organization*
3 *sponsoring the advertisements?*

4 Representative Akin may appear in the advertisements but as explained below, the PCC
5 will likely have to pay for the advertisements in order to avoid a violation of the Act's
6 contribution limitations or prohibitions by Missourians for Marriage, the Coalition to Protect
7 Marriage in Missouri or another ballot initiative committee in Missouri that may pay for the
8 advertisements.

9 The Act has long defined as an in-kind contribution an expenditure made by any person
10 "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his
11 authorized political committees, or their agents." 2 U.S.C. 441a(a)(7)(B)(i). The "coordinated
12 communication" regulation at 11 CFR 109.21 implements section 441a(a)(7)(B) through a single
13 three-pronged test: (1) the communication must be paid for by a person other than a Federal
14 candidate, a candidate's authorized committee, or political party committee, or any agent of any
15 of the foregoing; (2) one or more of the four "content standards" set forth in 11 CFR 109.21(c)
16 must be satisfied; and (3) one or more of the six "conduct standards" set forth in 11 CFR
17 109.21(d) must be satisfied. *See* 11 CFR 109.21(a). A payment for a communication satisfying
18 each of the three prongs is made for the purpose of influencing a Federal election, and is an in-
19 kind contribution to the candidate, authorized committee, or political party committee with
20 whom or which it is coordinated, and must be reported as an expenditure made by that candidate,
21 authorized committee or political party committee. 11 CFR 109.21(b)(1). Like other
22 contributions, in-kind contributions must comply with the Act's amount limitations, source

organization would be considered one that is "financed" by Representative Akin. *See* 2 U.S.C. 441i(e)(1); 11 CFR

1 prohibitions and reporting requirements. *See, e.g.*, 2 U.S.C. 434, 441a(a), 441b, 441c, 441e, and
2 441f. The Commission explained that a payment for a “coordinated communication” “satisfies
3 the statutory requirements for an expenditure in the specific context of coordinated
4 communications, and thereby constitutes a contribution under 2 U.S.C. 441a(a)(7)(B)(i) and (ii).”
5 Explanation and Justification for Coordinated and Independent Expenditures; Final Rules, 68
6 Fed. Reg. 421, 427 (Jan. 3, 2003).

7

8 *A. Coordinated Communications – Payment source*

9 The first prong of the definition of “coordinated communication” specifies that a
10 communication is coordinated with a candidate or an authorized committee when the
11 communication is paid for by “a person other than that candidate [or] authorized committee.” 11
12 CFR 109.21(a)(1). Payments by Missourians for Marriage, the Coalition to Protect Marriage in
13 Missouri or another ballot initiative committee focused on marriage for the contemplated
14 advertisements would satisfy the “payment source” test.

15

16 *B. Coordinated Communications – Conduct*

17 The second prong of the “coordinated communication” test is a “conduct standard”
18 focusing on the interactions between the person paying for the communication and the candidate,
19 an authorized committee, a political party committee, or agents of the foregoing. 11 CFR
20 109.21(a)(3). The conduct standards are set forth in 11 CFR 109.21(d)(1) through (5). The
21 conduct standard is satisfied if, among other things, the Federal candidate, the candidate’s
22 authorized committee, or one of their agents is materially involved in a decision regarding the

1 content of the communication. 11 CFR 109.21(d)(2)(i). You state that Representative Akin
2 wishes to appear in advertisements that will be paid for by a ballot initiative committee, and that
3 he will “retain control over his appearance in any radio or television advertisement” and would
4 either submit to the ballot committee any statement to be attributed to him, or would review any
5 statement attributed to him. Recently, the Commission concluded that the conduct standard is
6 met where a Federal candidate appears and speaks in a communication. The Commission stated:

7 Given the importance of and potential campaign implications for each public
8 appearance by a Federal candidate, it is highly implausible that a Federal
9 candidate would appear in a communication without being materially involved in
10 one or more of the listed decisions regarding the communication ... To suggest
11 that a candidate may personally approve the content of an advertisement without
12 satisfying the conduct standard in 109.21(d)(2) would be to obviate that section of
13 the regulations.
14

15 Advisory Opinion 2003-25; *accord* Advisory Opinion 2004-1 (stating that involvement by agents
16 of the President in reviewing "the final script in advance of the President's appearance in the
17 advertisements for legal compliance, factual accuracy, quality, consistency with the President's
18 position and any content that distracts from or distorts the 'endorsement' message that the
19 President wishes to convey" constitutes involvement by the President's agents, whenever it
20 occurs, and constitutes material involvement for purposes of the conduct standard).

21 Representative Akin will likewise be materially involved in decisions regarding the proposed
22 communication because he retains control over his appearance in the advertisements and will
23 either submit to the ballot committee any statement to be attributed to him, or will review any
24 statement to be attributed to him. Thus, the conduct standard is met.

25

26 *C. Coordinated Communications – Content*

1 The third prong of the definition of “coordinated communication” provides four “content
2 standards.” 11 CFR 109.21(c)(1) through (4). The fourth content standard in 11 CFR
3 109.21(c)(4) encompasses “public communications,” as defined in 11 CFR 100.26, that refer to a
4 clearly identified candidate for Federal office, are publicly distributed or disseminated within 120
5 days of an election for Federal office, and are directed to voters within the jurisdiction of the
6 clearly identified candidate.⁵ 11 CFR 109.21(c)(4). The advertisements in which Representative
7 Akin appears will meet the definition of “public communication,” and will refer to a clearly
8 identified candidate for Federal office (Representative Akin). Those advertisements distributed
9 on or after July 5, 2004 will be distributed within 120 days of the November 2, 2004 general
10 election. Further, the proposed advertisements are directed to voters within Representative
11 Akin’s Congressional district for purposes of section 109.21(c)(4). The fact that the
12 advertisements will appear in media markets that include areas both within and outside
13 Missouri’s second Congressional district does not impact this element of the fourth content
14 standard. In promulgating this standard, the Commission stated that

15 [t]he “directed to voters” requirement focuses on the intended audience of the
16 communication, rather than a quantitative analysis of the number of possible
17 recipients or the expected geographic limits of a particular media, that will be
18 determined on a case-by-case basis from the content of the communication, its
19 actual placement, and other objective indicators of the intended audience.
20

21 Explanation and Justification for Coordinated and Independent Expenditures; Final Rules, 68
22 Fed. Reg. at 431.

⁵ The communications may also meet one or more of the other content standards. For example, an advertisement will meet the content standard if it is (1) a communication that is an electioneering communication under 11 CFR 100.29; (2) a public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing, unless excepted; or (3) a public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office. 11 CFR 109.21(c)(1) to (3).

1 Therefore, the definition of “coordinated communication” is met and consequently,
2 payments for the advertisements will be in-kind contributions to the PCC.⁶ Because the cost of
3 advertisements will likely exceed the contribution limits in 2 U.S.C. 441a(a) (and may also be
4 from prohibited sources), the PCC must reimburse the sponsor of the advertisement for the
5 attributable portion of the cost of these coordinated communications to avoid receiving an
6 excessive or prohibited contribution. *See* Advisory Opinion 2004-1 (discussing a permissible
7 allocation and attribution formula under 11 CFR 106.1(a)).⁷ Amounts that the PCC donates to
8 the sponsor organization may be treated as payment for the advertisements if the PCC
9 specifically indicates that this is the purpose of the donations.

10

11 *(4) May Representative Akin appear in television, radio, or newspaper advertisements or other*
12 *public communications before the November 2, 2004 general election in support of or in*
13 *opposition to ballot initiatives on marriage or gambling where (1) such advertisements are*
14 *both sponsored and paid for by the PCC, and are independent of any other organization or*
15 *candidate; and where (2) the advertisements are disseminated in media markets that include*
16 *areas both within and outside of his Congressional district? Must the advertisement include*
17 *a reference to Representative Akin’s candidacy for reelection or is a reference to his position*
18 *as a member of the House of Representatives sufficient?*

⁶ The district court decision in *Shays v. FEC*, Civil Action No. 02-1984 (D.D.C. Sept. 18, 2004), would not change the result in this advisory opinion.

⁷ The cost of the coordinated communication may be attributed to another candidate under the space or time method of 11 CFR 106.1(a) if one or more clearly identified Federal or non-Federal candidates appears in the advertisement with Representative Akin.

1 Payments by the PCC for these advertisements featuring Representative Akin are
2 permissible uses of campaign contributions under section 439a(a), provided that the
3 advertisements contain appropriate disclaimers and statements as discussed below.

4 Under the Act, all “public communications” by political committees must include a clear
5 and conspicuous disclaimer indicating who paid for the communication and whether or not a
6 candidate authorized it. *See* 2 U.S.C. 441d(a) and 11 CFR 110.11. There are no geographical
7 conditions on the operation of section 441d. Thus, whether communications appear only in
8 media markets entirely within Missouri’s second Congressional district, or in media markets
9 partly within and partly outside that district, does not affect the application of section 441d. As
10 noted above, these advertisements will be “public communications” and thus must include
11 disclaimers.

12 In addition to section 441d(a) disclaimers, Representative Akin is also required to “stand
13 by his ad.” *See* 2 U.S.C. 441d(d)(1). Specifically, television and radio communications that are
14 authorized by a candidate must feature the voice (and image for television) of the candidate
15 identifying himself or herself and stating that he or she has approved the communication.

16 Consequently, because these advertisements would be paid for and authorized by the
17 PCC, the advertisements must include clear and conspicuous statements indicating that the PCC
18 paid for the communication. 2 U.S.C. 441d(a) and 11 CFR 110.11. The advertisements must
19 also include the voice, and image of Representative Akin if a television advertisement, stating
20 that he approved the advertisement.⁸ Representative Akin may identify himself in the
21 advertisements as a Member of Congress instead of as a candidate for reelection.

⁸ Television advertisements authorized by a candidate are required to include a candidate appearing in an unobscured, full screen view making a statement that identifies the candidate and states his or her approval of the communication or a voice-over of a photograph of the candidate to a similar effect. 11 CFR 110.11(c)(3)(ii).

1 (5) *May Representative Akin donate funds from the PCC to State and local candidates in*
2 *Missouri to support his positions on marriage and gambling? If such donations are not*
3 *permissible, must Representative Akin seek and obtain a refund of his prior donations?*

4 Yes, Representative Akin may use contributions received by the PCC to make donations
5 to candidates for State and local office in Missouri. Such donations in the situation you describe
6 will be in connection with Representative Akin's reelection campaign, and therefore will be
7 permissible as "otherwise authorized expenditures in connection with the campaign for Federal
8 office" for Representative Akin. 2 U.S.C. 439a(a)(1).⁹ Because these donations are permissible,
9 Representative Akin need not seek or obtain refunds of his prior donations.

10 The Commission expresses no opinion regarding whether the activities you propose are
11 permissible under Missouri law. The Commission also expresses no opinion regarding
12 qualification by the ballot initiative committees for tax-exempt status under 26 U.S.C. 501(c)(4)
13 or 527, or other ramifications of the proposed activities under the Internal Revenue Code because
14 these questions are outside the Commission's jurisdiction.

15 This response constitutes an advisory opinion concerning the application of the Act and
16 Commission regulations to the specific transaction or activity set forth in your request. *See*
17 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any of the facts or
18 assumptions presented and such facts or assumptions are material to a conclusion presented in
19 this advisory opinion, then the requesters may not rely on that conclusion as support for their
20 proposed activity.

21

⁹ The situation you describe is distinguishable from Advisory Opinion 2004-03 because, unlike Representative Akin, the requestor in that Advisory Opinion is a retiring Member of Congress who will not be running for reelection when seeking to make donations to non-Federal candidates and other non-party committees for State and local elections.

1
2
3
4
5
6
7

Sincerely,

Bradley A. Smith
Chairman

Enclosures (AOs 2004-25, 2004-3, 2004-01, 2003-26, 2003-25, and 2003-12)