



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AT
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May 25, 2011

AGENDA ITEM

MEMORANDUM

TO: The Commission

For Meeting of 5-26-11

FROM: Christopher Hughey *ch*
Acting General Counsel

SUBMITTED LATE

Rosemary C. Smith *RS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Neven F. Stipanovic *NFS*
Attorney

Subject: AO 2011-07 (Chuck Fleischmann for Congress) – Revised
Draft B

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 26, 2011.

Attachment

1 ADVISORY OPINION 2011-07

2
3 Randall B. Hebert

4 Treasurer

5 Chuck Fleischmann for Congress, Inc.

6 Henderson, Hutcherson, McCullough, PLLC

7 1200 Market Street

8 Chattanooga, TN 37402

REVISED DRAFT B

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10
11 Dear Mr. Hebert:

12 We are responding to your advisory opinion request on behalf of Chuck
13 Fleischmann for Congress, Inc. (the “Committee”), concerning the application of the
14 Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission
15 regulations to the use of campaign funds to pay legal fees and expenses of a former
16 campaign consultant.

17 The Commission concludes that the Committee may use campaign funds to pay
18 the legal fees and expenses described in this request because such payment would not
19 constitute personal use under the Act and Commission regulations.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 April 21, 2011, and public disclosure reports filed with the Commission.

23 Chuck Fleischmann is the U.S. Representative from the Third District of
24 Tennessee. The Committee is Representative Fleischmann’s principal campaign
25 committee. In the 2010 primary election, Representative Fleischmann won the
26 Republican Party nomination for the Third District of Tennessee over his opponent, Ms.
27 Robin T. Smith.

1 During the 2010 campaign, Mr. John Bruce Saltsman, Jr. was a consultant
2 employed by S&S Strategies LLC. *See* Request at 1; Committee’s July 2010 Quarterly
3 Report, FEC Form 3, Schedule A. Through S&S Strategies LLC, Mr. Saltsman provided
4 campaign advice to then-candidate Fleischmann. *See* Request at 1. Mr. Saltsman is
5 currently Chief of Staff for Representative Fleischmann’s Congressional office.

6 Mr. Saltsman has been sued by Mr. Mark A. Winslow for tortious interference
7 with a contractual relationship and defamation. Mr. Winslow was a campaign staffer for
8 then-candidate Robin T. Smith during the 2010 Republican Party primary election. *See*
9 Complaint at 1, *Winslow v. Saltsman*, No. 11-C229 (Davidson County, Tenn. Cir. Ct.
10 filed Jan. 18, 2011).

11 Mr. Winslow’s complaint alleges that “ in his compensated role with Mr.
12 Fleischmann’s congressional campaign, Mr. Saltsman acted as a message and media
13 consultant and assisted with shaping and creating campaign advertisements, or attack ads,
14 directed at Ms. Smith” and “improperly obtained” and disseminated to the press a
15 confidential employment agreement between Mr. Winslow and his former employer, the
16 Tennessee Republican Party. *See* Complaint at 5. Further, the complaint alleges that
17 then-candidate Fleischmann used the employment agreement that Mr. Saltsman obtained
18 during the campaign to attack his opponent, Ms. Smith, including in a television
19 advertisement and during a radio interview. *Id.* at 5 and 6. Moreover, during the same
20 radio program, Mr. Saltsman allegedly made defamatory statements about Mr. Winslow
21 regarding the same issue. *Id.* at 6. Lastly, the complaint alleges Ms. Smith was defeated
22 “in large part due to” Mr. Saltsman’s actions. *Id.*

1 ***Question Presented***

2 *May the Committee use campaign funds to pay legal fees and expenses of a*
3 *campaign consultant arising from a civil suit against the campaign consultant brought by*
4 *an employee of the candidate's opponent during the 2010 election?*

5 ***Legal Analysis and Conclusions***

6 Yes, the Committee may use campaign funds to pay these legal fees and expenses
7 because such payment is for a lawful purpose that would not constitute personal use
8 under the Act and Commission regulations.

9 The Act identifies six categories of permissible uses of contributions accepted by
10 a Federal candidate. They include: (1) otherwise authorized expenditures in connection
11 with the candidate's campaign for Federal office; (2) ordinary and necessary expenses
12 incurred in connection with the duties of the individual as a holder of Federal office; and
13 (3) any other lawful purpose not prohibited by 2 U.S.C. 439a(b). 2 U.S.C. 439a(a);
14 11 CFR 113.2(a)-(e).

15 Under the Act and Commission regulations, contributions accepted by a candidate
16 may not be converted to "personal use" by any person. 2 U.S.C. 439a(b)(1);
17 11 CFR 113.2(e). The Act specifies that conversion to personal use occurs when a
18 contribution or amount is used "to fulfill any commitment, obligation, or expense of a
19 person that would exist irrespective of the candidate's election campaign or individual's
20 duties as a holder of Federal office." 2 U.S.C. 439a(b)(2); *see also* 11 CFR 113.1(g).

21 The Act and Commission regulations provide a non-exhaustive list of items that
22 would constitute personal use *per se*, none of which applies here. For items not on this
23 list, the Commission determines on a case-by-case basis whether an expense would fall

1 within the definition of “personal use.” 11 CFR 113.1(g)(1)(ii). Commission regulations
2 specifically provide that “legal expenses” are subject to a case-by-case determination.
3 11 CFR 113.1(g)(1)(ii)(A).

4 The Commission has long recognized that if a candidate “can reasonably show
5 that the expenses at issue resulted from campaign or officeholder activities, the
6 Commission will not consider the use to be personal use.” Explanation and Justification
7 for Final Rules on Expenditures; Reports by Political Committees; Personal Use of
8 Campaign Funds, 60 FR 7862, 7867 (Feb. 9, 1995). Legal fees and expenses, however,
9 “will not be treated as though they are campaign or officeholder related merely because
10 the underlying proceedings have some impact on the campaign or the officeholder’s
11 status.” *Id.* at 7868. Thus, the Commission has concluded that the use of campaign funds
12 for legal fees and expenses does not constitute personal use when the legal proceedings
13 involve allegations directly relating to the candidate’s campaign or duties as a Federal
14 officeholder. *See, e.g.*, Advisory Opinions 2009-20 (Visclosky), 2009-10 (Visclosky),
15 2008-07 (Vitter), 2006-35 (Kolbe), 2005-11 (Cunningham), and 2003-17 (Treffinger).
16 On the other hand, “legal expenses associated with a divorce or charges of driving under
17 the influence of alcohol will be treated as personal, rather than campaign or officeholder
18 related.” Explanation and Justification for Final Rules on Expenditures; Reports by
19 Political Committees; Personal Use of Campaign Funds, 60 FR 7862, 7867 (Feb. 9,
20 1995).

21 Here, the Committee seeks to use campaign funds to pay the legal expenses of a
22 person who was working as a campaign consultant for the candidate, namely Mr.
23 Saltsman. In Advisory Opinion 2009-20 (Visclosky), the Commission approved the use

1 of campaign funds for the legal fees of persons other than the candidate. In that instance,
2 Representative Visclosky's current and former congressional staff members had received,
3 or expected to receive, grand jury subpoenas to produce documents related to a Federal
4 investigation of Representative Visclosky for alleged improper receipt of campaign
5 contributions and obtaining earmarked appropriations for clients of a lobby group. The
6 Commission concluded the staffers' expenses "would not exist irrespective of
7 Representative Visclosky's campaign or duties as a Federal officeholder."¹

8 The facts presented in the request differ in one important element from those
9 presented in Advisory Opinion 2009-20 (Visclosky). Although the Commission
10 approved the use of campaign funds for the legal fees of persons other than
11 Representative Visclosky, it was Representative Visclosky's activity that was the subject
12 of the investigation. Here, the basis of the lawsuit is the alleged activity of Mr. Saltsman,
13 not Representative Fleischmann. Nonetheless, it appears that the legal fees and expenses
14 involve allegations directly relating to campaign activities engaged in by Mr. Saltsman.

15 The civil lawsuit arises from the alleged conduct of Mr. Saltsman in his role as a
16 campaign consultant for Representative Fleischmann's campaign. The complaint alleges
17 that Mr. Saltsman acted as the campaign's message and media consultant and participated
18 in the creation of campaign ads directed at Ms. Smith. In that capacity, Mr. Saltsman
19 allegedly acquired and publicized plaintiff's employment agreement, including in the

¹ In one other instance, the Commission has approved use of campaign funds for legal expenses related to media inquiries and allegations concerning both a candidate and the candidate's spouse. Advisory Opinion 1996-24 (Cooley). Although the campaign funds paid for conferences between the candidate, his spouse, and the candidate's legal counsel, the campaign funds were primarily used to pay legal fees of the candidate. On the other hand, in Advisory Opinion 1998-01 (Hilliard), the Commission concluded that campaign funds may not be used to pay legal expenses that are primarily for the purposes of representing persons other than the candidate. In that case, the Commission reached that conclusion specifically with respect to allegations that did not relate directly to the campaign or Representative Hilliard's duties as a Federal officeholder. *See* Advisory Opinion 1998-01 (Hilliard) at 6 & n.4.

1 form of a campaign ad, which provides the basis of the lawsuit. Moreover, according to
2 the complaint, Mr. Fleischmann allegedly used the materials Mr. Saltsman obtained as
3 the basis for many of the attacks that Mr. Fleischmann made himself as a candidate
4 against Ms. Smith. In fact, the complaint attributes Mr. Fleischmann's primary victory
5 over Ms. Smith "in large part" to Mr. Saltsman's actions. As a result, the lawsuit against
6 Mr. Saltsman would not exist irrespective of Representative Fleischmann's campaign.

7 Accordingly, the Commission concludes that, to the extent that the legal
8 proceedings derive from allegations directly relating to campaign activity, the Committee
9 may use campaign funds to pay legal fees described in this request.

10 The Commission expresses no opinion regarding the application of the rules of
11 the United States House of Representatives or any tax law ramifications of the matters
12 presented in your request, because those are not within the Commission's jurisdiction.

13 This response constitutes an advisory opinion concerning the application of the
14 Act and Commission regulations to the specific transaction or activity set forth in your
15 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
16 of the facts or assumptions presented, and such facts or assumptions are material to a
17 conclusion presented in this advisory opinion, then the requestor may not rely on that
18 conclusion as support for its proposed activity. Any person involved in any specific
19 transaction or activity which is indistinguishable in all its material aspects from the
20 transaction or activity with respect to which this advisory opinion is rendered may rely on
21 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
22 conclusions in this advisory opinion may be affected by subsequent developments in the
23 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

1 The cited advisory opinions are available on the Commission's Web site, www.fec.gov,
2 or directly from the Commission's Advisory Opinion searchable database at
3 <http://saos.nictusa.com/saos/searchao>.

4 On behalf of the Commission,
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6
7 Cynthia L. Bauerly
8 Chair