



FEDERAL ELECTION COMMISSION  
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July 3, 2003

**AGENDA ITEM**  
For Meeting of: 7-10-03

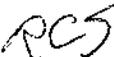
MEMORANDUM

TO: The Commission

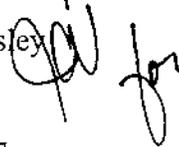
THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence H. Norton   
General Counsel

James Kahl   
Deputy General Counsel

Rosemary C. Smith   
Acting Associate General Counsel

John C. Vergelli   
Acting Assistant General Counsel

Cheryl A.F. Hemsley   
Staff Attorney

Subject: Draft AO 2003-17

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 10, 2003.

Attachment

1 ADVISORY OPINION 2003-17

2

3 Karin S. Riecker, Esq.  
4 Klingeman Turano, LLC  
5 230 Maine Street  
6 Second Floor  
7 Madison, NJ 07940

**DRAFT**

8 Dear Ms. Riecker:

9 This responds to your letter dated May 8, 2003, as supplemented by your electronic

10 mail dated May 12, 2003, requesting an advisory opinion on behalf of your client, Mr.

11 James W. Treffinger, concerning the application of the Federal Election Campaign Act of

12 1971, as amended ("the Act"), and Federal Election Commission regulations, to the use of

13 campaign funds to pay for legal expenses related to criminal charges against him.

14 ***Background***

15 Mr. Treffinger was a candidate from New Jersey in the primary elections for the

16 nomination for United States Senator in 2000 and 2002. Mr. Treffinger's principal

17 campaign committee for both 2000 and 2002 is Treffinger for Senate, Inc. ("the

18 Committee"). At the time of his candidacies, Mr. Treffinger was also the County

19 Executive for Essex County, New Jersey. You certify that Mr. Treffinger is not currently a

20 candidate for Federal office, nor does he contemplate running for Federal office again in

21 the future.

22

1 Mr. Treffinger was indicted in the District of New Jersey on 20 counts of criminal  
2 activity. You aver that 19 of the counts directly relate to his candidacies for U.S. Senate.  
3 The Commission has learned that Mr. Treffinger has entered a plea agreement with the  
4 U.S. Attorney in which Mr. Treffinger agreed to plead guilty to two counts (7 and 14).

5 The counts in the indictment against Mr. Treffinger are summarized as follows:

6 Counts 1 through 5 allege that Mr. Treffinger and others “knowingly and willfully  
7 did devise and intend to devise a scheme and artifice to defraud the County of Essex and its  
8 citizens of the right to [Treffinger’s] honest services in the affairs of Essex County  
9 Government and of money and property by means of materially false and fraudulent  
10 pretenses, representations and promises.”

11 “The object of this scheme and artifice to defraud was to award contracts to [United  
12 Gunite Construction (“UGC”)] in exchange for approximately \$15,000 in political  
13 contributions from UGC that were illegally funneled to [Mr. Treffinger’s] 2000 Senate  
14 campaign and to take steps to affirmatively conceal this material information from other  
15 Essex County Government officials and employees and the public.”

16 Count 6 alleges that Mr. Treffinger knowingly and willfully obstructed, delayed and  
17 affected interstate commerce by extortion by obtaining campaign contributions from UGC  
18 with consent and under color of official right.

19 Count 7 alleges that Mr. Treffinger knowingly and willfully conspired with others  
20 to corruptly persuade other persons and engage in misleading conduct toward other  
21 persons, with the intent to hinder, delay and prevent the communication to law

1 enforcement officers of information relating to the possible commission of bribery,  
2 extortion and fraud by:

3 A) Coaching others to provide false and misleading information,

4 B) Creating and causing the creation of misleading and backdated documents  
5 related to contact with, and the award of contracts to, UGC,

6 C) Instructing others to destroy documents in anticipation of a grand jury subpoena  
7 for Treffinger for Senate records,

8 D) Failing to produce documents in response to grand jury subpoenas,

9 E) Seeking appointment to the office of U.S. Attorney for the District of New  
10 Jersey in order to favorably terminate the investigation into his activities as Essex County  
11 Executive; and

12 F) Making personnel decisions designed to coax Essex County employees to remain  
13 loyal to Mr. Treffinger.

14 Counts 8 and 9 allege that Mr. Treffinger “did knowingly, willfully and corruptly  
15 attempt to persuade another person, with the intent to hinder, delay and prevent the  
16 communication to a law enforcement officer of information relating to the commission and  
17 possible commission of federal offense by coaching others to provide false and misleading  
18 information.”

19 Count 10 alleges that Mr. Treffinger, aided and assisted by others, “did knowingly  
20 and willfully engage in misleading conduct toward other persons, with the intent to hinder,  
21 delay and prevent the communication to a law enforcement officer of information relating

1 to the commission and possible commission of federal offenses, by causing the creation of  
2 misleading and backdated documents to be placed in Essex County files to deceive others,  
3 in violation of 18 U.S.C. 1512(b)(2) and (3).”<sup>1</sup>

4 Count 11 alleges that Mr. Treffinger “knowingly and willfully did attempt to  
5 obstruct, delay and affect interstate commerce by extortion in attempting to obtain  
6 approximately \$5,000 in campaign contributions from a contractor with consent induced by  
7 wrongful and threatened use of fear and under color of official right.”

8 Counts 12 through 14 allege that Mr. Treffinger and others “knowingly and  
9 willfully did devise and intend to devise a scheme and artifice to defraud and to obtain  
10 money and property from the county of Essex and its citizens and to deprive the County of  
11 Essex and its citizens of [Mr. Treffinger’s] and two Essex County employees’ honest  
12 services by means of materially false and fraudulent pretenses and promises.” The alleged  
13 object of this scheme and artifice to defraud was that Mr. Treffinger hired two individuals  
14 as Essex County employees and paid them with Essex County funds but used them to staff  
15 his 2000 campaign committee.

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<sup>1</sup> 2 U.S.C. 1512(b)(2) and (3) read as follows:

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(2) cause or induce any person to--

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings;

1           Counts 15 through 18 allege that Mr. Treffinger “knowingly and willfully aided,  
2 assisted and caused another to make materially false, fictitious and fraudulent statements  
3 and representations and to make and use false writings and documents knowing the same to  
4 contain materially false, fictitious and fraudulent statements and entries.” Namely, the  
5 indictment alleges that Mr. Treffinger aided and assisted the Treffinger for Senate treasurer  
6 in making declarations that the reports filed with the Commission in connection with the  
7 2000 campaign were true, correct and complete when, certain contributions from caterers  
8 were intentionally omitted.

9           Count 19 alleges that Mr. Treffinger did knowingly and willfully conspire with his  
10 hair stylist and others to embezzle, steal, obtain by fraud and otherwise without authority  
11 convert to their own use, and to intentionally misapply money and property using the Essex  
12 County payroll to pay the hairstylist for no meaningful services.

13           Count 20 charges that Mr. Treffinger did knowingly and willfully conspire with  
14 others to fraudulently misrepresent himself and a committee and organization acting under  
15 his control and speaking and otherwise acting for and on behalf of another candidate to  
16 place phone calls and cause recipients to form a negative opinion of that candidate and a  
17 third candidate. Mr. Treffinger is alleged to have agreed to develop a telephone message  
18 consisting of an attack ad against one candidate and purported to be sent by a third  
19 candidate.

20           You state that your law firm is defending the above charges against Mr. Treffinger.

1 ***Question Presented***

2 May Mr. Treffinger, a former candidate for Federal office, use campaign funds to  
3 pay for legal fees incurred in the defense of this criminal indictment?  
4

5 ***Legal Analysis and Conclusions***

6 Under the Act, there are four categories of permissible uses of campaign funds: (1)  
7 Otherwise authorized expenditures in connection with a candidate's campaign for Federal  
8 office; (2) Ordinary and necessary expenses incurred in connection with a Federal  
9 officeholder's duties; (3) Contributions to tax-exempt organizations; and (4) Transfers,  
10 without limitation, to national, state or local political party committees.<sup>2</sup> 2 U.S.C.  
11 439a(a).<sup>3</sup>

12 The Act generally prohibits the conversion of campaign funds to "personal use."  
13 2 U.S.C. 439a(b)(1). Specifically, 2 U.S.C. 439a(b)(2) states that funds are converted to  
14 personal use if they are used to fulfill any commitment, obligation or expense of a person  
15 that would exist "irrespective" of the candidate's election campaign or individual's duties  
16 as a holder of Federal office.<sup>4</sup> This "irrespective test," which as has long been part of the  
17 Commission's personal use regulations, was statutorily codified by BCRA.

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<sup>2</sup> Under 11 CFR 102.9(e)(3), if a candidate is not a candidate in the general election, any contributions made for the general election must be refunded to the contributors, redesignated in accordance with 11 CFR 110.1(b)(5) or 110.2(b)(5), or reattributed in accordance with 11 CFR 110.1(k)(3), as appropriate. As of the April 2003 quarterly report, Treffinger for Senate, Inc. had \$168,641.50 in cash-on-hand.

<sup>3</sup> Congress, in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), revised previous section 439a(a), by deleting "other lawful purposes" from the list of permissible uses.

<sup>4</sup> The Federal officeholder portions of the Act and Commission's regulations are irrelevant in this case as Mr. Treffinger is a County officeholder, not a Federal officeholder. The Commission notes that Mr. Treffinger's apparent decision not to run for Federal office again in the future distinguishes this situation from that of a Federal officeholder, who may be more likely to run for office again.

1 Commission regulations use the same "irrespective test" as does the Act. 11 CFR  
2 113.1(g). The regulations implementing 2 U.S.C. 439a(b)(2) list certain *per se* uses of  
3 campaign funds that will be considered *per se* personal use. 11 CFR 113.1(g)(1)(i). This  
4 list does not include legal fees. If a particular use of campaign funds is not *per se* a  
5 personal use, it will be examined on a case-by-case basis using the irrespective test. 11  
6 CFR 113.1(g)(1)(ii). Certain types of uses automatically trigger a case-by-case  
7 examination.

8 Expenses for attorney services are among those uses that are automatically  
9 examined on a case-by-case basis. 11 CFR 113.1(g)(1)(ii)(A).<sup>5</sup> The Commission has  
10 previously opined that legal expenses in defense of allegations that relate directly to  
11 campaign activities may be paid entirely with campaign funds. AOs 1998-1, 1997-12,  
12 1996-24, 1995-23 and 1993-15. Therefore, the use of campaign funds to pay for Mr.  
13 Treffinger's defense against allegations that are not directly related to his campaign activity  
14 would be a conversion to personal use.

15 The Commission concludes that the criminal proceedings stemming from the  
16 indictment, when viewed in their entirety, overwhelmingly relate to alleged breaches of  
17 public trust and public fraud. The essence of the allegations is the defrauding of the county  
18 of its money and property, and a scheme to cover up such activity. Accordingly, the

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<sup>5</sup> The recently promulgated regulations implementing the Bipartisan Campaign Reform Act ("BCRA") did not change the case-by-case analysis as to legal expenses. "Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds; Final Rules," 67 *Fed. Reg.* 76962, at 76970 (December 13, 2002). In promulgating the applicable rule in 1995, the Commission reaffirm[ed] its long-standing opinion that candidates have wide discretion over the use of campaign funds. If the candidate can reasonably show that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use. "Personal Use of Campaign Funds; Final Rules," 60 *Fed. Reg.* 7862, 7867 (February 9, 1995).

1 Commission concludes that the allegations of the indictment do not relate directly to  
2 campaign activity, as discussed above. Therefore, none of the legal fees for defending  
3 these allegations may be paid with campaign funds. While some of the benefit of the  
4 "scheme and artifice" alleged in the indictment may have benefited, or may have been  
5 intended to benefit, his campaign, the primary wrong alleged in the indictment is the  
6 defrauding of the non-federal polity (i.e., the county and its citizens).

7 While certain counts of the indictment appear to have a more direct relationship to  
8 campaign activities, the Commission concludes that these allegations are intertwined with  
9 the rest of the indictment and should not be viewed as providing a distinct basis for using  
10 campaign funds. In particular, counts 15 through 18 allege that Mr. Treffinger knowingly  
11 and willfully aided and assisted the treasurer of his campaign in making false statements to  
12 the government on committee reports filed with the Commission. These allegations are  
13 inextricably linked to the larger scheme to cover up the alleged breach of public trust and  
14 public fraud. Indeed, one of these counts is linked to campaign support from the two  
15 individuals discussed in counts 12 through 14. The counts allege violation of 18 U.S.C.  
16 1001.<sup>6</sup> The thrust of the allegations in counts 15 through 18 is that Mr. Treffinger

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<sup>6</sup> 18 U.S.C. 1001 reads as follows:

§ 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) Falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) Makes any materially false, fictitious, or fraudulent statement or representation; or

(3) Makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

1 knowingly and willfully aided his treasurer in making false statements to the United States.  
2 The Commission notes that the underlying filing obligations are obligations of the  
3 campaign committee and its treasurer under 2 U.S.C. 434, but are not obligations imposed  
4 on candidates themselves.

5 Count 20 charges that Mr. Treffinger knowingly and willfully conspired with others  
6 to fraudulently misrepresent himself and his committee (an organization acting under his  
7 control as the candidate) in speaking for and acting on behalf of another candidate to place  
8 phone calls and cause recipients to form negative views of that candidate and a third  
9 candidate. While this count in isolation appears directly related to campaign activity, the  
10 Commission concludes that the criminal proceedings arising from this count are not  
11 severable from the balance of the indictment. Therefore, campaign funds may not be used  
12 to pay for defense of this count, either.<sup>7</sup>

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(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to-

(1) Administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) Any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

<sup>7</sup> In Advisory Opinion 1993-15, the Commission opined that counts within an indictment could be severed, depending upon whether the counts were directly related to campaign activity, and on that basis allowed the use of campaign funds to pay for legal expenses related to some counts, but not to others. The present request is distinguishable from Advisory Opinion 1993-15 in several important respects. First, in Advisory Opinion 1993-15, a significant number of the counts, thirty-seven of forty-seven, were determined to be campaign-related; in contrast, only one of twenty counts in this case is directly campaign-related. Second, in this case, the primary wrong alleged is an abuse of public office and public fraud by the candidate; in contrast, in Advisory Opinion 1993-15, the campaign itself was the victim of alleged wrongdoing by a campaign fundraiser who allegedly misappropriated funds. Based on these distinctions in the analysis in Advisory Opinion 1993-15 is not applicable here.

1           The Commission expresses no opinion as to the possible applicability of Federal or  
2 State laws, including tax laws to the matters presenting in your request as those issues are  
3 not within its jurisdiction.

4           This response constitutes an advisory opinion concerning the application of the Act  
5 and Commission regulations to the specific transaction or activity set forth in your request.  
6 *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the  
7 facts or assumptions presented, and such facts or assumptions are material to a conclusion  
8 presented in this opinion, then the requestor may not rely on that conclusion as support for  
9 its proposed activity.

10           The Commission notes that this advisory opinion analyzes the Act, as amended by  
11 the Bipartisan Campaign Reform Act of 2002 ("BCRA"), and Commission regulations,  
12 including those promulgated to implement the BCRA amendments, as they pertain to your  
13 proposed activities. On May 2, 2003, a three-judge panel of the United States District  
14 Court for the District of Columbia ruled that a number of BCRA provisions are  
15 unconstitutional and issued an order enjoining the enforcement, execution, or other  
16 application of those provisions. *McConnell v. FEC*, 251 F.Supp.2d 176 (D.D.C. May 2,  
17 2003); *stay granted by* 2003 WL 21146609 (D.D.C. May 19, 2003); *appeal docketed*, No.  
18 02-1674 (U.S. May 16, 2003), *probable jurisdiction noted*, No. 02-1674 et al. (U.S. June 5,  
19 2003). Subsequently, the district court stayed its order and injunction. *Id.* The District  
20 Court ruling is on appeal to the United States Supreme Court and probable jurisdiction has  
21 been noted. *Id.* The Commission has determined that your request for advice is not  
22

1 affected by *McConnell v. FEC* because the provisions of the Act underlying this advisory  
2 opinion are not challenged in that litigation.

3 Sincerely,

4

5 Ellen L. Weintraub  
6 Chair  
7

8 Enclosures: (AOs 1998-1, 1997-12, 1996-24, 1995-23, 1993-15)