2003 MAY 20 P 2:17

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VIA FAX AND MAIL

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Comment on AOR 2003-15

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COMMISSION
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COUNSEL
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Re: Advisory Opinion Request 2003-15

Dear Mr. Norton:

I write on behalf of the Campaign Legal Center to provide comment on Advisory Opinion Request 2003-15, submitted on behalf of U.S. Representative Denise Majette and the Committee to Re-Elect Congresswoman Denise Majette. The Campaign Legal Center is a non-profit, non-partisan organization established to represent the public interest in strong enforcement of the nation's campaign finance laws. Through its legal staff, the organization participates in the administrative and legal proceedings in which campaign finance and campaign-related media laws are interpreted and enforced.

Congresswoman Majette is requesting that the Commission issue an Advisory Opinion indicating that she may establish a Legal Expense Fund which will raise and spend funds contributed by individuals, corporations, and labor organizations in amounts no greater than $5,000 per year per donor, to defray legal expenses already incurred and incurred in the future in relation to a lawsuit filed by supporters of the incumbent she defeated in last year's Democratic primary election for the 4th U.S. Congressional District of Georgia (hereinafter, "the 4th Congressional District"). According to correspondence from the Congresswoman's counsel in this matter, the $5,000 per year per donor contribution limit stems from the need for compliance with Legal Expense Fund Regulations promulgated by the U.S. House of Representatives Committee on Standards of Official Conduct – and not application of the Federal Election Campaign Act of 1971 (FECA), as amended. Letter from G. Scott Rafshoon to Federal Election Commission at 2 (Apr. 14, 2003) (hereinafter, "Letter from Counsel").

The lawsuit centers on the act of voting during the 4th Congressional District primary election in August of 2002. Specifically, the plaintiffs allege that "the crossover voting of Republicans in the August 2002 Democratic Primary in the Fourth Congressional District of Georgia impermissibly diluted, diminished, and interfered with the rights of African-American voters on account of race." Plaintiff's Amended Complaint at 1,

Osburn v. Georgia, 1:02-cv-2721 (N.D. Ga. Oct. 4, 2002). In the view of the plaintiffs, this "crossover voting" enabled Congresswoman Majette to defeat the incumbent in the Democratic primary election. The plaintiffs accordingly seek relief including a declaration that the results of last year's primary and general elections for the 4th Congressional District are void, an injunction on the use of an "open primary" in the 4th Congressional District, and the immediate holding of a special Democratic primary and thereafter a special general election for the 4th Congressional District. *Id.* at 7-8, 10-11, 12-13.

Congresswoman Majette was originally named as a defendant in the suit, but the complaint was subsequently amended to exclude her as a defendant. Letter from Counsel at 1. However, she "continues to incur modest legal fees related to monitoring the on-going litigation" and believes that it may be necessary to have money in a Legal Expense Fund in the event the suit is amended again. *Id.* at 1-2.

Congressman Majette's counsel in this matter filed the request for an Advisory Opinion on her behalf. In his correspondence, counsel cited various Advisory Opinions issued by the Commission in the past to support the argument that donations to, and spending by, the contemplated Legal Expense Fund would not be "contribution[s]" or "expenditure[s]" under the FECA, as amended. *See id.* at 2-3. As such, according to counsel, "donations to and disbursements from the Fund would not be subject to the restrictions and regulations of the Act, and nothing in the Act or Commission regulations would limit or prohibit the Trust from receiving donations from sources, such as corporations, that would be prohibited from contributing to [Congresswoman Majette's authorized committee]." *Id.* Likewise, counsel concludes that "the Trust would not be required to file disclosure reports under the Act or Commission regulations." *Id.* at 3.

Whether or not counsel correctly interprets Commission precedent in this area, however, his correspondence overlooks the recent addition of Sec. 323(e)(1) to FECA (referred to hereinafter by its U.S. Code citation, 2 U.S.C. § 441i(e)) by virtue of enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (amending FECA, codified at 2 U.S.C. §§ 431 et seq.). In relevant part, 2 U.S.C. § 441i(e) indicates:

> (1) A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individual holding Federal office, shall not—
>
> > (A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.

See also 11 C.F.R. §§ 300.60, 300.61. Notably, the prohibition of 2 U.S.C. § 441i(e)(1)(A) does not use the terms "contribution" or "expenditure" and is not limited to the raising or spending of funds "for the purpose of influencing any election for Federal office" (*i.e.*, the operative language in the statutory definitions of "contribution" and "expenditure" in 2 U.S.C. § 431(8)(A)(i) and 2 U.S.C. § 431(9)(A)(i), respectively). Rather, this prohibition encompasses the receipt, direction, transfer, solicitation, or disbursement of "funds in connection with an election for Federal office" (with 2 U.S.C. § 441i(e)(1)(B) covering the solicitation, receipt and spending of "funds in connection with any election other than an election for Federal office") – a wider scope of coverage, deliberately drafted broadly to safeguard against "any appearance that our Federal laws, policies, or activities can be inappropriately compromised or sold" or "any possibility that solicitations of large sums from corporations, unions, and wealthy private interests will corrupt or appear to corrupt our Federal Government or undermine our political system with the taint of impropriety." 148 CONG. REC. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). Accordingly, Advisory Opinions cited by counsel, deeming donations to and spending by candidate or political party Legal Expense Funds not to be "contribution[s]" or "expenditure[s]" under FECA, are not determinative here.[1] The Commission should instead apply 2 U.S.C. § 441i(e)(1) to the full extent of its coverage to ascertain the permissibility of the Legal Expense Fund contemplated in this Advisory Opinion request.

Applying 2 U.S.C. § 441i(e)(1), it is clear that the contemplated Legal Expense Fund would constitute "an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of" Congresswoman Majette. Counsel's correspondence indicates that "Representative Majette wishes to establish a Legal Expense Fund." Letter from Counsel at 1 (*see also*, "Representative Majette intends to establish a Legal Expense Fund . . . to raise money to defray these legal expenses." *Id.* at 2). It also notes that funds used to defray the legal expenses in question would be "raised and spent by Representative Majette." *Id.* at 1. The exclusive function of the contemplated Legal Expense Fund would be to act on the Congresswoman's behalf – *i.e.*, "'to defray the cost of certain litigation against Representative Majette.'" *Id.* at 2. As an entity "directly or indirectly established, financed, maintained or controlled by or acting on behalf of" a Federal officeholder, the contemplated Legal Expense Fund *itself* may not solicit, receive, spend, direct or transfer funds in connection with an election to Federal office, unless the funds are subject to the limitations, prohibitions, and reporting requirements of FECA. 2 U.S.C. § 441i(e)(1)(A).

It is likewise clear that the contemplated Legal Expense Fund's solicitation, receipt, and spending of funds would be "in connection with an election for Federal office." The roots of the perceived need for the Fund lie in an election for Federal office – the 4th Congressional District's August 2002 primary election. Indeed, the lawsuit that will be the focus of the Fund's fundraising and spending centers on how that Federal primary

[1] For the same reason, the Commission's regulation at 11 C.F.R. § 113.1(g)(6)(i), indicating that third-party payments to a legal expense trust fund established in accordance with the rules of the U.S. Senate or the U.S. House of Representatives would not by virtue of that paragraph be considered within the scope of a "contribution under subpart B of part 100 to the candidate," is not determinative here.

election was conducted (and particularly on the core act of voting in that primary election). Moreover, the outcome of the litigation in relation to which the Fund will raise and spend funds could directly determine the outcome of a Federal election. As noted above, plaintiffs in this lawsuit seek as relief, among other things, an invalidation of the 2002 Democratic primary and general election results for the 4th Congressional District and an immediate special primary election for that House seat (followed by a special general election). Indeed, the electoral connection and consequences of this lawsuit appear to be evident to the requestor. In a follow-up letter to the Commission (in response to the Commission's request for copies of all complaints for the lawsuit in question), the Congresswoman's counsel indicated:

> "Although Representative Majette has been dismissed from the case, the plaintiffs' [sic] continue to demand a special primary and special election for the seat currently held by Representative Majette. Accordingly, although technically no longer a defendant, Representative Majette would be the most seriously affected if the Court were to grant plaintiff's request."

Letter from G. Scott Rafshoon to Rosemary C. Smith, Acting Associate General Counsel, Federal Election Commission at 1-2 (Apr. 25, 2003). Spending in relation to litigation which could directly affect the outcome of a Federal election is patently spending "in connection with a Federal election."

Finally, it is clear that the Commission has understood the raising and spending of funds to defend against litigation arising out of a Federal campaign to have occurred in connection with a Federal election. The Commission's rules on the personal use of campaign funds prohibit Federal candidates from spending funds contributed to their authorized committees "to fulfill a commitment, obligation or expense of any person that would exist irrespective of that candidate's campaign or duties as a Federal officeholder." 11 C.F.R. §§ 113.1(g), 113.2(e)(3). It assesses on a case-by-case basis whether "[l]egal expenses" would exist irrespective of a candidate's campaign or duties as a Federal officeholder (and thus could not be defrayed from funds in a campaign account) or instead occurred because of a candidate's campaign or officeholder duties (and thus could be defrayed from funds in a campaign account). 11 C.F.R. § 113.1(g)(1)(ii)(A).

In undertaking this case-by-case assessment, the Commission previously confronted a request for an Advisory Opinion (A.O. 1995-23) from a Federal officeholder who, following re-election to the U.S. House of Representatives, was named as a defendant in a civil suit filed by one of his campaign opponents. The suit charged that he had taken down the opponent's campaign signs. The Federal officeholder had incurred a $3,000 bill for legal services in the discovery process relating to the lawsuit. He sought the Commission's approval to pay these expenses from his campaign account, explaining (as related by the Advisory Opinion) that "[his] role in the litigation arises solely out of [his] campaign for Federal office."

The Commission accepted this argument and accordingly allowed the Federal officeholder to pay the legal expenses in question from campaign funds. It stated:

> "The legal expenses descried in your request pertain to a law suit arising directly from campaign activity and your status as a candidate . . . *these expenses are clearly attributable to your campaign.*" (emphasis added)

A.O. 1995-23. In other Advisory Opinions applying the personal use rules to contemplated financing of legal expenses with campaign funds, the Commission has more generally noted that "any legal expense that relates directly to allegations arising from campaign or officeholder activity would qualify for 100% payment with campaign funds." *See, e.g.*, A.O. 1998-1; A.O. 1997-12. If the Commission permits candidates to use campaign funds to finance legal expenses relating to litigation arising directly from campaign activity, then it *must* consider these expenses to be "in connection with an election for Federal office."

Similarly, U.S. House of Representatives ethics rules permit House Members to establish Legal Expense Funds "*only* where the legal expenses arise *in connection with: the individual's candidacy for or election to federal office*; the individual's official duties or position in Congress (including legal expenses incurred in connection with an amicus brief filed in a Member's official capacity, a civil action by a Member challenging the validity of a law or federal regulation, or a matter before the Committee on Standards of Official Conduct); a criminal prosecution; or a civil matter bearing on the individual's reputation or fitness for office." Nancy L. Johnson, Chairman and Jim McDermott, Ranking Democratic Member, Committee on Standards of Official Conduct, Memorandum to All Members, Officers and Employees (Jun. 10, 1996), *available at* http://www.house.gov/ethics/Appendices_Gifts_and_Travel.htm (emphasis added). Clearly, the contemplated raising and spending of funds by the Legal Expense Fund proposed in this Advisory Opinion request falls into the first category of this list: to defray legal expenses that "arise in connection with . . . the individual's candidacy for or election to federal office." As such, this entity falls squarely under the prohibitions of 2 U.S.C. § 441i(e)(1)(A).

As the contemplated Legal Expense fund would be (i) "directly or indirectly established, financed, maintained or controlled by or acting on behalf of" a Federal officeholder (*i.e.*, Congresswoman Majette), and (ii) acting in connection with an election for Federal office, it may solicit, receive, direct, transfer, and spend *only* funds subject to the limitations, prohibitions, and reporting requirements of FECA. Contrary to counsel's suggestion, this would foreclose any possibility of this Fund's receiving even limited donations from corporations and labor organizations. Contributions from individuals to the Fund would be capped under FECA's amount limitations. Moreover, donations to and spending by this Legal Expense Fund would have to be reported to the FEC.

We appreciate the opportunity to offer comment on this Advisory Opinion request and hope that our views are helpful to the Commission as it develops a response.

Sincerely,

Glen Shor
Director, FEC Program