



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: Rosemary Smith
Acting Associate General Counsel

FROM: Office of the Commission Secretary *M.oto*

DATE: July 9, 2003

SUBJECT: *Ex Parte Communication regarding*
Advisory Opinion 2003-17

Attached is an email received by Chair Ellen Weintraub from Christopher J. Christie, United States Attorney, District of New Jersey.

Attachment:

cc: Commissioners
Staff Director
General Counsel
Press Office
Public Disclosure



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U.S. Department of Justice

United States Attorney
District of New Jersey
Civil Division

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Via Fax and Federal Express

July 9, 2003

Ms. Ellen Weintraub
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Draft Advisory Opinion 2003-17

Dear Madame Chairwoman:

This letter represents a comment on the above Draft Advisory Opinion, issued by the Federal Election Commission ("F.E.C.") on July 3, 2003. This Draft Opinion was issued in response to a request by counsel for James Treffinger for an interpretation of 2 U.S.C. § 439a, to determine whether he may use surplus campaign funds to pay for his legal defense in a federal corruption case brought in New Jersey. Mr. Treffinger has pled guilty to conspiring to hinder a federal investigation into his conduct as Essex County Executive and to commission of mail fraud to defraud the County of Essex and its citizens of money, property and the honest services of Mr. Treffinger and two Essex County employees.

The Draft Opinion correctly concluded that Mr. Treffinger's legal fees are personal expenses, incurred irrespective of his campaign, because his criminal acts were committed in his capacity as County Executive and constituted an abuse of that position of public trust. In making this determination, the FEC observed that "legal expenses" are not a *per se* personal use of campaign funds, but must be examined on a case by case basis to determine whether the expense arose irrespective of the candidate's election campaign. The FEC rightly determined that the charges against Mr. Treffinger arose from his wrongdoing as a county official, or from activities intertwined with such wrongdoing. Absent his abuse of that position, the fraud and extortion could not have occurred.

This determination is entirely consistent with the FEC's prior decisions regarding legal expenses and with the statutory language of 2 U.S.C. § 439a. Prior advisory opinions have only addressed payment of legal fees resulting from civil or public relations matters that directly arose from the candidate's campaign. See Advisory Opinion 1995-23 (dealing with a \$3,000 legal bill for resolving a civil dispute over removal of signs during a campaign); Advisory Opinion 1997-12 (addressing bills for legal and public relations work necessitated by the indictment of an office

holder's close friend); Advisory Opinion 1998-1 (addressing legal bills for crafting responses to media allegations and a House Ethics Inquiry into the impropriety of a congressman's official conduct). Certainly, the "irrespective" standard has never been applied to permit a former candidate to use surplus campaign funds to pay for legal representation of that candidate in a criminal proceeding, when the proceeding established both the candidate's malfeasance in local public office and the illegality of certain of the surplus campaign funds in question.

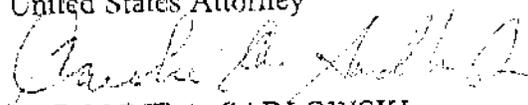
Furthermore, this application of the "irrespective test" is sound public policy. It tracks the fundamental distinction between criminal and civil charges. Civil charges may be brought by any individual, and so may be an appropriate way to resolve disputes over campaign activities like the posting of signs and the accuracy of campaign materials. In contrast, criminal charges may only be brought by the government, and such charges are subject to a high standard of proof, and which necessarily involve a public/societal victim. Any view that such charges are part of the ordinary political process or are otherwise politically motivated is extremely cynical, at best.

Most importantly, the foundation of any criminal charge is that an individual is not engaged in campaign activity but in illegal activity. Attempting to characterize criminal activity as motivated by a campaign or in furtherance of a campaign does not make it campaign activity. Although Mr. Treffinger's actions vividly illustrates this principle, it would be true regardless of the particular criminal charges alleged. Candidates should never expect to provide for their criminal legal defense by alleging that they acted in furtherance of their political campaigns.

Finally, fundraising and reporting violations are fundamentally different from extortion and fraud. The legal expenses of any individual who engages in such activities must be personal. According to his plea, conspiring to hinder a federal investigation and commission of mail fraud were part of Mr. Treffinger's *modus operandi* in that position, and constituted criminal dereliction of his duties to Essex County for which he would have been legally accountable regardless of his federal campaign. Therefore, the F.E.C. correctly concluded that Mr. Treffinger should not be permitted to use his campaign funds in defense of these charges, and we respectfully request that the Advisory Opinion be issued without amendment.

Very truly yours,

CHRISTOPHER J. CHRISTIE
United States Attorney

By: 
CAROLINE A. SADLOWSKI
Assistant U.S. Attorney

Of Counsel: CRAIG DON SANTO
Director, Elections Crimes Branch
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cc: Karin Riecker, Esq.