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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**AGENDA DOCUMENT NO. 18-18-B**  
**AGENDA ITEM**  
**For meeting of April 26, 2018**  
**SUBMITTED LATE**

April 25, 2018

**MEMORANDUM**

TO: The Commission

FROM: Lisa J. Stevenson *LJS*  
Acting General Counsel

Erin Chlopak *EC*  
Acting Associate General Counsel

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Assistant General Counsel

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Attorney

Subject: AO 2018-03 (Committee to Elect Michael Gilmore) Draft B

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on April 26, 2018.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>

Attachment

1 ADVISORY OPINION 2018-03

2

3 Michael A. Gilmore, Esq.  
4 Committee to Elect Michael Gilmore  
5 6055 Oakman Blvd  
6 Detroit, MI 48228

**DRAFT B**

7

8 Dear Mr. Gilmore:

9         We are responding to your advisory opinion request on behalf of your principal campaign  
10 committee, the Committee to Elect Michael Gilmore (the “Committee”), concerning the  
11 application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and  
12 Commission regulations to your proposed use of campaign funds to pay certain legal expenses of  
13 a lawsuit concerning the date of a special election, and proposed voluntary services in support of  
14 the lawsuit. The Commission concludes that the Committee may not use campaign funds to pay  
15 such legal expenses because such use would constitute an impermissible personal use of  
16 campaign funds. The Commission further concludes that the Committee would not be required  
17 to report the value of the proposed volunteer services for the lawsuit as an in-kind contribution.

18 ***Background***

19         The facts presented in this advisory opinion are based on your letter received on February  
20 28, 2018, and publicly available information.

21         In April 2017, you registered as a candidate for the United States House of  
22 Representatives in Michigan’s 13th Congressional District.<sup>1</sup> You state that you are licensed to  
23 practice law in the state of Maryland and in the United States District Court for the Eastern  
24 District of Michigan. Advisory Opinion Request at AOR001. Although you have some

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<sup>1</sup> Gilmore, Michael, Statement of Candidacy, FEC Form 2 (Apr. 10, 2017), <http://docquery.fec.gov/pdf/743/201704109052052743/201704109052052743.pdf>; Committee to Elect Michael Gilmore, Statement of Organization, FEC Form 1, Amended (Feb. 26, 2018), <http://docquery.fec.gov/pdf/241/201802269095591241/201802269095591241.pdf>.

1 experience as a political activist working on issues dealing with elections, your legal practice  
2 “generally” encompasses veterans law. *Id.* You do not practice with any law firm registered  
3 with a state, but you maintain malpractice insurance through the “Law Office of Michael  
4 Gilmore” and plan to register that entity, “although the structure is not certain at this time.” *Id.*

5 On December 5, 2017, the Member of Congress then representing Michigan’s 13th  
6 Congressional District retired, and a few days later the governor announced special primary and  
7 general elections to fill that vacancy, to be held on the same days as the next regular primary and  
8 general elections for that seat, in August and November 2018, respectively. AOR001. In  
9 response to that decision, you circulated an internet petition asking members of the community  
10 to sign “if they wanted to demand a quick special election.” AOR002. You then contacted  
11 various signers to ask them whether they would serve as plaintiffs in a lawsuit against the  
12 governor seeking the same. *Id.*

13 On December 27, 2017, you, as attorney of record, filed a lawsuit on behalf of five  
14 registered voters in the district, who allege that the governor’s “failure to hold a timely, real, and  
15 actual special election” violates their rights under the United States Constitution and the  
16 Michigan state constitution. AOR001; *see also* First Amended Complaint ¶¶ 11-15, Dkt. No. 10,  
17 *Rhodes, et al. v. Snyder*, No. 2:17-cv-14816 (E.D. Mich.) (Feb. 21, 2018) (“First Am. Compl.”)  
18 (describing each plaintiff as “duly-registered voter of the 13th Congressional District”). You are  
19 not a party to the lawsuit. AOR001. You assert, however, that the suit would not exist absent  
20 your candidacy and that no other candidate, attorney, or social organization was interested in  
21 joining or advancing it. AOR002.

22 You state in your request that you wish to use campaign funds for the expenses of the  
23 lawsuit, including fees paid to your law firm for your legal representation of the plaintiffs,

1 reimbursements to you personally for paying the filing fees, and any costs associated with  
2 interrogatories, depositions, and expert witnesses. AOR003. Regarding the proposed use of  
3 campaign funds to pay your legal fees, you assert that you endeavor to charge the prevailing  
4 market rate for your services (at a rate not to exceed \$352 per hour), and that any contract  
5 between the campaign and the law firm would accord with usual and normal business practices.  
6 See AOR002. No other attorney will be paid for services on the lawsuit, but you state that other  
7 attorneys, in their individual capacities and on their personal time, may volunteer their “nominal  
8 advisory services.” AOR001.

9 ***Questions Presented***

10 1. *May campaign funds be used to pay the legal expenses of the lawsuit, including fees*  
11 *based on an hourly market rate to your law firm for your work as an attorney representing the*  
12 *plaintiffs, reimbursement to you personally for paying the filing fees, and costs associated with*  
13 *interrogatories, depositions, and expert witnesses?*

14 2. *Does the value of the candidate’s, or other individual’s, provision of voluntary services*  
15 *toward the lawsuit constitute a “contribution” such that rules on reporting and limitations*  
16 *apply?*

17 ***Legal Analysis and Conclusions***

18 1. *May campaign funds be used to pay the legal expenses of the lawsuit, including fees*  
19 *based on an hourly market rate to your law firm for your work as an attorney representing the*  
20 *plaintiffs, reimbursement to you personally for paying the filing fees, and costs associated with*  
21 *interrogatories, depositions, and expert witnesses?*

22 No, the Committee may not use campaign funds to pay the legal expenses of the lawsuit,  
23 because such expenses would exist irrespective of your campaign for federal office, and thus

1 using campaign funds for such purposes would result in an impermissible personal use of  
2 campaign funds.

3 The Act and Commission regulations permit a candidate or federal officeholder to use  
4 campaign funds for a variety of enumerated purposes, and “any other lawful purpose” that does  
5 not constitute conversion of campaign funds to “personal use.” 52 U.S.C. § 30114(a)-(b); 11  
6 C.F.R. §§ 113.1(g), 113.2. Conversion to personal use occurs when campaign funds are used “to  
7 fulfill any commitment, obligation, or expense of a person that would exist irrespective of the  
8 candidate’s election campaign or individual’s duties as a holder of Federal office.” 52 U.S.C.  
9 § 30114(b)(2); *see also* 11 C.F.R. § 113.1(g).

10 The Act and Commission regulations provide a non-exhaustive list of items that would  
11 constitute a prohibited personal use *per se*, none of which applies here. *See* 52 U.S.C.  
12 § 30114(b)(2)(A)-(I); 11 C.F.R. § 113.1(g)(1)(i)(A)-(J). For items not on this list, such as  
13 payments for “legal expenses,” the Commission determines on a case-by-case basis whether such  
14 expenses would fall within the definition of “personal use.” 11 C.F.R. § 113.1(g)(1)(ii)(A). The  
15 Commission has long recognized that if a candidate “can reasonably show that the expenses at  
16 issue resulted from campaign or officeholder activities, the Commission will not consider the use  
17 to be personal use.” *Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995).

18 In the context of legal expenses, the Commission has explained that “campaign funds  
19 may be used to pay for legal expenses incurred in proceedings that directly relate to the  
20 candidate’s campaign activities or officeholder duties.” *Advisory Opinion 2013-11 (Citizens for*  
21 *Joe Miller)* at 3 (concluding that use of campaign funds for legal expenses incurred in lawsuit by  
22 media outlets seeking to obtain information relevant to candidacy would not constitute  
23 impermissible personal use); *see also, e.g., Advisory Opinion 2011-07 (Chuck Fleischmann for*

1 Congress) (reaching same conclusion regarding use of campaign funds to pay legal expenses of  
2 campaign consultant in connection with alleged conduct regarding his role on the campaign);  
3 Advisory Opinion 2009-20 (Visclosky for Congress) (reaching same conclusion regarding use of  
4 campaign funds to pay legal expenses of former congressional staffers relating to federal  
5 investigation of officeholder’s campaign).

6 On the other hand, the “use of campaign funds to pay for [legal expenses] that are not  
7 directly related to . . . campaign activity would be a conversion to personal use.” Advisory  
8 Opinion 2003-17 (James W. Treffinger) at 6, 7 (concluding that using campaign funds to defend  
9 against criminal allegations that candidate defrauded county of its money and property would  
10 constitute impermissible personal use). As the Commission has explained, “legal expenses will  
11 not be treated as though they are campaign or officeholder related merely because the underlying  
12 proceedings have some impact on the campaign or officeholder’s status.” Personal Use of  
13 Campaign Funds, 60 Fed. Reg. at 7868.

14 You propose to use campaign funds to pay yourself for legal expenses incurred by certain  
15 voters in connection with your representation of them in their lawsuit concerning their alleged  
16 constitutional right to have a special election held on a date earlier than that chosen by the  
17 governor. The plaintiffs allege that such delays are depriving them and “similarly situated  
18 voters” of their constitutional rights to congressional representation, to vote, and to equal  
19 protection. First Am. Compl. ¶ 17. Neither you nor your committee is a party to the lawsuit, and  
20 the lawsuit contains no allegations regarding your candidacy. You assert, however, that the  
21 plaintiffs in the lawsuit “are not traditional clients, who would have been organically interested  
22 in filing a lawsuit,” that you “went out and found” the plaintiffs by circulating an internet  
23 petition, and that the lawsuit would not exist absent your candidacy. AOR002.

1           Neither the request nor the complaint provides any facts upon which the Commission can  
2 conclude that the legal expenses for the lawsuit would not exist irrespective of your campaign for  
3 federal office. Indeed, your role in the litigation is “not in [your] capacity” as a candidate,  
4 *see* Advisory Opinion 2009-20 (Visclosky for Congress) at 4, but is, instead, in your professional  
5 capacity as plaintiffs’ counsel. Moreover, even if the relief being sought by the plaintiffs, if  
6 granted, would benefit your campaign, such incidental benefit does not establish that the legal  
7 expenses would not exist irrespective of your campaign. *See* Advisory Opinion 2003-17 (James  
8 W. Treffinger) at 7 (“While some of the benefit of the ‘scheme and artifice’ alleged in the  
9 indictment may have inured, or may been intended to inure, to Mr. Treffinger’s campaign, the  
10 primary wrong alleged in the indictment is the defrauding of the non-Federal polity (i.e., the  
11 county and its citizens).”). *Cf.* Advisory Opinion 1997-27 (Congressman John Boehner &  
12 Friends of John Boehner) at 3 (concluding that an officeholder could use campaign funds to  
13 exercise private right of action regarding conduct that “resulted directly from the pursuit of his  
14 duties as a Federal officeholder”). Instead, the available facts indicate that the plaintiffs’ legal  
15 expenses would exist irrespective of your campaign. Accordingly, the use of campaign funds to  
16 pay you for such expenses would constitute an impermissible conversion to personal use.

17       2.       *Does the value of the candidate’s, or other individual’s, provision of voluntary services*  
18 *toward the lawsuit constitute a “contribution” such that rules on reporting and limitations*  
19 *apply?*

20           No, the value of the proposed voluntary services toward the lawsuit would not constitute  
21 an in-kind contribution because there is no indication that such services would be for the purpose  
22 of influencing a federal election.

23           The Act and Commission regulations impose certain limitations and reporting

1 requirements on “contributions,” which include anything of value “made by any person for the  
2 purpose of influencing” a federal election. 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a).  
3 “Anything of value” includes in-kind contributions, such as the provision of services without  
4 charge or at a charge that is less than the usual and normal charge for such services. 11 C.F.R.  
5 § 100.52(d)(1); *see* Advisory Opinion 2006-22 (Wallace for Congress) (concluding that  
6 incorporated law firm’s preparation of amicus brief, free of charge, for candidate’s authorized  
7 committee constituted impermissible corporate contribution).

8         Here, as described above, the proposed voluntary services would be rendered in support  
9 of certain individual plaintiffs’ lawsuit asserting *their* alleged constitutional rights; the requestor  
10 does not propose any voluntary services for the purpose of influencing a federal election.  
11 *Cf.* Advisory Opinion 2003-15 (Committee to Re-Elect Congresswoman Denise Majette)  
12 (concluding that candidate’s costs of defending against and monitoring lawsuit seeking special  
13 primary and general elections — and to overturn the primary and general elections that the  
14 candidate had won — were not “in connection with” election); Advisory Opinion 1996-39  
15 (Heintz for Congress) (reaching same conclusion for funds raised and spent on pre-election legal  
16 challenge to sufficiency of candidate’s nomination petitions to qualify for primary ballot). Thus,  
17 the Commission concludes that the Committee would not be required to report the value of the  
18 proposed volunteer services as an in-kind contribution.

19         This response constitutes an advisory opinion concerning the application of the Act and  
20 Commission regulations to the specific transaction or activity set forth in your request.  
21 *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts  
22 or assumptions presented, and such facts or assumptions are material to a conclusion presented in  
23 this advisory opinion, then the requestors may not rely on that conclusion as support for its

1 proposed activity. Any person involved in any specific transaction or activity which is  
2 indistinguishable in all its material aspects from the transaction or activity with respect to which  
3 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.  
4 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be  
5 affected by subsequent developments in the law including, but not limited to, statutes,  
6 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available  
7 on the Commission's website.

8 On behalf of the Commission,

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11  
12 Caroline C. Hunter  
13 Chair