



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1996-24

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Dear Mr. DiLorenzo:

This responds to your letter dated May 13, 1996, as supplemented by your letter dated May 22, requesting an advisory opinion on behalf of U. S. Representative Wester S. Cooley and his authorized campaign committee regarding application of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), to the use of campaign funds to pay certain legal expenses.

Your law firm represents Mr. Cooley and his authorized campaign committee. Your letters indicate that Mr. Cooley has recently been the subject of press allegations regarding his conduct, and that your law firm has provided various advisory services (as to both legal and political issues) to Mr. Cooley in connection with these allegations. Mr. Cooley wishes to use campaign funds to defray some or all of the fees and expenses associated with these services. You ask whether this would be permissible under the Act and Commission regulations.

Your letters indicate that allegations have been made about Mr. Cooley regarding (1) statements made in voter pamphlets regarding the date of his marriage; (2) county building permit requirements; (3) the receipt of Veterans benefits; (4) tax benefits received under a farm land tax deferral program; (5) tax deductions claimed for dependents living on Mr. Cooley's ranch; and (6) statements made about his war record. You further state that all of these allegations have become campaign issues.

Your May 13 letter lists 22 services you have provided to Mr. Cooley. Your May 22 letter provides additional information on some of these services. The services include:

1. Preparation of affidavits relating to information for release to the press;
2. Communication with the press and, in particular, fielding press inquiries concerning allegations involving the Congressman;
3. Research on Oregon law relating to defamation and retractions for false statements made in the press;
4. Drafting and revision of press releases;
5. Demands for retraction of false statements made in various newspaper articles relating to the Congressman;
6. Research regarding establishment of a legal defense trust fund and the applicability of the Act and Commission regulations thereto;
7. Drafting of the legal defense trust fund agreement;
8. Representation of the Congressman in a legal proceeding in which a newspaper is attempting to obtain confidential information;
9. Research regarding county building permit requirements to respond to newspaper allegations of wrongdoing relating to the Congressman;
10. Research regarding laws and Veterans Administration [Department of Veterans Affairs] regulations regarding the receipt of Veterans Administration benefits to respond to newspaper allegations of wrongdoing relating to the Congressman and his spouse;
11. Review of daily news clippings;
12. Political advice given to the Congressman;
13. Research regarding the disclosability of certain information under the Freedom of Information Act;
14. Research regarding Oregon law relating to other newspaper allegations concerning the Congressman;
15. Communication with the Veterans Administration [Department of Veterans Affairs] directly related to an inquiry requested by the Congressman into newspaper allegations concerning the Congressman and his spouse;

16. Conversations with various office holders and political activists regarding campaign strategy and responding to allegations made by the media;
17. Factual investigations relating to newspaper allegations of wrongdoing by the Congressman;
18. Communications with the House Committee on Standards of Official Conduct and with the Commission regarding the establishment of a legal defense fund and the use of campaign funds for legal and other expenses;
19. Research regarding the use of campaign funds for legal expenses;
20. Research regarding the Oregon tax deferral for farm land in response to newspaper allegations relating to the Congressman;
21. Discussions with county tax officials to respond to and demand a retraction from the newspapers which alleged wrongdoing by the Congressman culminating in a retraction by the Bend Bulletin newspaper;
22. Conferences with the Congressman and his spouse regarding the above matters.

For convenience, these services are grouped by category in the following discussion.

The majority of these services can be characterized as efforts to respond to the press allegations made about Mr. Cooley. These services generally fall into three categories: (a) direct communications with the press, including responses to press inquiries concerning Mr. Cooley's positions on the allegations made; (b) research, investigations and communications with government officials directed at refuting the allegations made; and (c) research on Oregon law relating to defamation and false statements made by the press, and subsequent demands for retractions of false statements. They also include researching the possibility of establishing a legal defense trust fund on Mr. Cooley's behalf, and representing Mr. Cooley in legal proceedings in which a newspaper is attempting to obtain confidential information.

As your correspondence notes, the Commission has historically recognized that candidates have wide discretion in making expenditures to influence their election. See, e.g., Advisory Opinion 1995-42. However, the Act at 2 U.S.C. 439a prohibits the conversion of campaign funds to personal use. Commission regulations at 11 CFR 113.1(g) define personal use for the purposes of this prohibition. Generally, personal use is any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder. The rules list certain uses of campaign funds that will be considered per se personal use. Other uses of campaign funds will be examined on a case by case basis using the general definition of personal use. 11 CFR 113.1(g)(1).

Your law firm serves as legal counsel to Mr. Cooley and his authorized campaign committee. Under the personal use rules, expenses for attorney services are among those uses that will be examined on a case by case basis using the general definition of personal use. 11 CFR

113.1(g)(1)(ii)(A). Thus, the use of campaign funds for attorney fees and expenses ("legal expenses") that would exist even if Mr. Cooley were not a candidate or Member of Congress would be a conversion to personal use. Conversely, the use of campaign funds to pay legal expenses that would not exist absent his candidacy or officeholder status would be permissible.

Ordinarily, legal expenses associated with marriage, county building permit requirements, the receipt of Veterans benefits, farm land tax deferrals and other tax deductions would be considered personal in nature, since, standing alone, these matters are unrelated to campaign or officeholder activity. However, the need for the services you have provided appears to have arisen only indirectly out of the cited matters themselves. Instead, the services result more directly from the need for the campaign to respond to allegations of wrongful conduct related to these matters that appeared in the press during Mr. Cooley's past and current Congressional election campaigns.

Although these expenses could be incurred by any person who is subjected to similar allegations, and in that sense could exist irrespective of candidacy or officeholder status, the Commission recognizes that the activities of candidates and officeholders may receive heightened scrutiny and attention because of their status as candidates and officeholders. The obvious need for a candidate to respond to allegations that result from this elevated scrutiny would not exist irrespective of the candidate's campaign or officeholder status. The Commission approved the use of campaign funds to pay certain specific legal expenses incurred in connection with a campaign in Advisory Opinions 1995-23 and 1995-21.¹

Consequently, the Commission concludes that if allegations of improper or wrongful conduct are made about a candidate in a campaign context, the candidate is entitled to use campaign funds for the purpose of publicly responding to those allegations, even if the underlying activities that are the subject of the allegations were not campaign or officeholder related. This conclusion enables Mr. Cooley to use campaign funds for the expenses associated with your efforts to respond to the press allegations that fall into categories (a), (b), and (c), described above, subject to the limitation described below. Specifically, this allows Mr. Cooley to use campaign funds to pay for expenses numbered 1 through 5, 9 through 11, 14, 15, 17, 20 and 21.

The Commission regards it as significant that your efforts to respond to these press allegations appear to have been limited to attempting to refute them. With one exception to be discussed below, your letters state that there are no pending legal proceedings regarding any of the matters that have been the subject of the press allegations. Thus, Mr. Cooley does not appear to propose the use of campaign funds for legal expenses incurred to rectify, remedy, or present a legal defense to, possible liabilities or violations of law that are unrelated to his campaign or officeholder status.

The possible exception relates to items 10 and 15, involving Mr. Cooley's request for an inquiry by the Department of Veterans Affairs ("VA") into the allegations regarding his spouse's receipt of Veterans benefits. By itself, Mr. Cooley's request for an inquiry could be regarded as an attempt to confirm that he has complied with the law and, therefore, as an effort to refute press allegations made during the course of his campaign. However, if this inquiry results in an adverse finding or determination by the VA regarding the receipt of Veterans benefits, any

efforts to respond to such a finding or determination would be treated differently. The need to respond to such a finding would arise not out of press allegations of misconduct, but out of the Cooleys' obligation to comply with the eligibility requirements for receipt of Veterans benefits, an obligation that would exist irrespective of Mr. Cooley's status as a candidate or a Federal officeholder. Thus, the use of campaign funds for expenses incurred in responding to the VA's finding, such as by presenting a legal defense, attempting to reach a financial settlement, or rectifying noncompliance by returning benefits previously received, would be a conversion to personal use. This would be true even if the VA discovered the facts upon which its findings are based solely as a result of the press allegations and Mr. Cooley's subsequent request for an inquiry, because, notwithstanding the reason for the discovery, the obligation to comply with VA eligibility requirements would exist even if Mr. Cooley were not a candidate or officeholder.

The Commission notes that other allegations addressed in your request may, in time, also lead to legal proceedings that could have arisen irrespective of Mr. Cooley's status as a candidate or officeholder. Under the same reasoning set forth above, Mr. Cooley could not use campaign funds to pay the costs incurred in connection with any such proceeding.

On the other hand, your supplemental letter indicates that the Oregon Secretary of State is investigating press allegations that Mr. Cooley's 1994 voter pamphlet contained inaccuracies relating to his war record, although there are no formal proceedings pending at this time. Since the alleged false statements were made in voter pamphlets Mr. Cooley produced in the course of his campaign for Congress in 1994, he may use campaign funds for any expenses incurred in the course of this investigation.

In addition to your efforts to respond to the press allegations, you have also provided other services to Mr. Cooley. Numbers 6, 7, 18 and 19 of your May 13 letter involve research, drafting and communications associated with the establishment of a legal expense trust fund, and other research regarding the use of campaign funds for legal expenses. Legal expense trust funds provide candidates and Members of Congress with a mechanism for receiving donations to defray their legal expenses without having those donations treated as contributions under the Act. Thus, the expenses of establishing such a fund would not be incurred if Mr. Cooley were not a candidate or officeholder. This is also true of expenses for research regarding the use of campaign funds for legal expenses. Therefore, Mr. Cooley may use campaign funds to pay these expenses.

Number 8 involves representation you provided to Mr. Cooley in a proceeding in which a newspaper is trying to obtain confidential information. Number 13 involves research regarding the disclosure of information under the Freedom of Information Act. The Commission has considered these activities and concludes that it has insufficient information to determine whether the use of campaign funds for these expenses would be permissible under the Act. You have indicated that your ability to provide additional information is limited by your confidentiality obligations to your client. Therefore, the Commission expresses no opinion regarding the permissibility of using campaign funds for these expenses.

Numbers 12 and 16 involve providing political or campaign advice to Mr. Cooley, and communication with other officeholders and political activists regarding strategy for responding

to the allegations made by the media. Since the advice you provided and the strategic communication you engaged in were part of your efforts to respond to the media allegations during Mr. Cooley's candidacy for Congress, Mr. Cooley may use campaign funds for the expenses associated with these activities.

In number 22, you refer to conferences with both Mr. Cooley and his spouse regarding the various matters described in your letter. The use of campaign funds for the expenses associated with these conferences is permissible to the extent that the conferences involved discussions of the press allegations made during Mr. Cooley's Congressional campaigns. This would include discussions of press allegations of wrongful conduct by Mr. Cooley's spouse, since her alleged improprieties also appear to have become issues in his reelection campaign.

However, this would not include conferences for the purposes of discussing any adverse findings or determinations made by the Veterans Administration regarding Veterans benefits. Nor would it include conferences to discuss other efforts to rectify, remedy, or present a legal defense to, possible liabilities or violations of law that are unrelated to Mr. Cooley's status as a candidate or officeholder. Since these matters would exist irrespective of Mr. Cooley's status, the use of campaign funds for conferences to discuss these matters would be personal use.

Finally, the Commission notes Mr. Cooley's assertion that these expenses are campaign-related because they are tied to his status as a candidate who is actively seeking re-election.² The Commission expresses no opinion on any use of campaign funds for legal expenses that are incurred at a time when Mr. Cooley is not seeking election to Federal office. The Commission would consider the use of campaign funds for post-campaign legal expenses in response to another advisory opinion request that fully describes the specific purposes and circumstances of the services provided.

The cost of legal expenses consistent with this advisory opinion should be reported as an operating expenditure by the Committee, with the purpose noted. See 11 CFR 104.3(b)(2) and (b)(4)(i); see also Advisory Opinions 1995-23 and 1995-21.

The Commission expresses no opinion as to the possible applicability of state and Federal tax or other laws, or rules of the House of Representatives, to the matters presented in your request, since those issues are not within its jurisdiction.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Lee Ann Elliott
Chairman

Enclosures (AOs 1995-42, 1995-23, 1995-21)

1 Advisory Opinion 1995-23 authorized a candidate who had been charged with illegally taking down his opponent's campaign signs to use campaign funds to pay the cost of his defense.

Advisory Opinion 1995-21 authorized a campaign committee to use campaign funds to challenge a sheriff's office's seizure of committee property to enforce a prior debt against the candidate.

2 Mr. Cooley won the Republican nomination to retain his seat in the May 21, 1996, Oregon primary election.