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FEDERAL ELECTION COMMISSION

Washington, DC 20463

February 5, 1998

AGENDA ITEM

For Meeting of: 2-12-98

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina *Chw for JCS*
Staff Director

FROM: Lawrence M. Noble *L*
General Counsel

N. Bradley Litchfield *NBL by SSP*
Associate General Counsel

Jonathan M. Levin *JL*
Senior Attorney

Subject: Draft AO 1997-27

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for February 12, 1998.

Attachment

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DRAFT

1 **ADVISORY OPINION 1997-27**

2
3 **Jan Witold Baran**
4 **Wiley, Rein & Fielding**
5 **1776 K Street, N.W.**
6 **Washington, D.C. 20006**

7
8 **Dear Mr. Baran:**

9
10 **This responds to your letter dated December 19, 1997, as supplemented by your**
11 **letter dated January 15, 1998, on behalf of Congressman John Boehner and Friends of**
12 **John Boehner, requesting an advisory opinion concerning the application of the Federal**
13 **Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to**
14 **the use of campaign funds to pay legal expenses incurred in evaluating and pursuing civil**
15 **remedies in a lawsuit.**

16 **Mr. Boehner is the Representative from the Eighth District of Ohio. Friends of**
17 **John Boehner ("the Boehner Committee") is his principal campaign committee for re-**
18 **election to the House. You state that, on December 21, 1996, Mr. Boehner, as Chairman**
19 **of the House Republican Conference, participated in a conference call with several other**
20 **members of the House via cellular telephone. The conversation entailed a discussion of**
21 **the House Republican leadership's response to findings about to be issued by the House**
22 **Ethics Committee with respect to the conduct of Speaker Newt Gingrich. Shortly**
23 **thereafter, Mr. Boehner discovered through press accounts that his cellular phone**
24 **conversation had been intercepted, taped, and released to several individuals, including**
25 **members of the media, without the knowledge or consent of any of the participants in the**
26 **call.**

27 **The interception, taping, or release of the call may be in violation of the**
28 **Electronics Communications Privacy Act of 1986 ("ECPA"), at 18 U.S.C. §2510 et seq.**
29 **Although the incident is the subject of a criminal investigation, you explain Mr.**
30 **Boehner's concern that the pace and direction of the investigation may prejudice his legal**
31 **rights. Because of this concern, Mr. Boehner intends to retain legal counsel to investigate**
32 **and pursue legal remedies available under 18 U.S.C. §2520. This statute generally**
33 **provides that a person whose electronic communication is intercepted, disclosed, or**

1 intentionally used in violation of ECPA may recover, in a civil action, from the person
2 who engaged in the violation. Mr. Boehner wishes to pay the expenses incurred in
3 pursuit of these claims with Boehner Committee funds.

4 Any damages that he receives from the suit will first be used to defray the costs of
5 the litigation (including repayments to the Boehner Committee for the amounts it paid),
6 and any additional damages will be donated to a tax exempt charitable organization. You
7 anticipate that none of the damages awarded to Mr. Boehner will be taxable as income. If
8 any part of the award is taxable, then Mr. Boehner intends to take any charitable
9 contribution deductions only against that taxable income. You also state that, "[i]n any
10 event, Mr. Boehner will ensure that his financial activities are structured so that he does
11 not receive any direct or indirect tax or other financial benefit from the damage award."

12 Under the Act and Commission regulations, a candidate and the candidate's
13 committee have wide discretion in making expenditures to influence the candidate's
14 election, but may not convert campaign funds to the personal use of the candidate or any
15 other person. 2 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and 113.2(d); see also
16 Advisory Opinions 1997-12, 1997-2, 1996-45, and 1996-24. A specific exemption to the
17 ban on personal use, however, permits the use of campaign funds to defray any ordinary
18 and necessary expenses incurred in connection with a person's duties as a holder of
19 Federal office. 2 U.S.C. §439a; 11 CFR 113.2(a) and (d). In addition, Commission
20 regulations define personal use as "any use of funds in a campaign account of a present or
21 former candidate to fulfill a commitment, obligation, or expense of any person that would
22 exist irrespective of the candidate's campaign or duties as a Federal officeholder." 11
23 CFR 113.1(g).

24 Commission regulations list a number of expense categories that would constitute
25 personal use. 11 CFR 113.1(g)(1)(i).¹ Where a specific use is not listed as personal use,
26 the Commission makes a determination on a case-by-case basis, using the regulation's

¹ Under section 113.1(g)(1)(i), personal use includes, but is not limited to, funds used for the following purposes: household food items; funeral, cremation or burial expenses; clothing; tuition payments not associated with training campaign staff; mortgage, rent or utility payments for the personal residence of a candidate; tickets to non-campaign or non-officeholder entertainment; dues, fees or gratuities to nonpolitical organizations, unless related to a specific fundraising event on the organization's premises; and salary payments to family members, unless paid for *bona fide*, campaign-related services.

1 definition of personal use. 11 CFR 113.1(g)(1)(ii).² Legal expenses are among those
2 uses to be analyzed on a case-by case basis. 11 CFR 113.1(g)(1)(ii)(A). See Advisory
3 Opinions 1997-12, 1996-24, and 1995-23.

4 The private right of action being exercised by Mr. Boehner is available to any
5 person, regardless of whether he is a candidate or Member of Congress. However, the
6 type of activity that he engaged in, and for which he seeks a judicial remedy of
7 compensation for the allegedly unlawful interception or disclosure, resulted directly from
8 the pursuit of his duties as a Federal officeholder. The conversation pertained specifically
9 to the business of the House, particularly its Republican leadership and the actions of the
10 House Ethics Committee. His involvement in the conversation was in pursuit of his
11 duties as a Member of Congress and as a member of the House Republican leadership.
12 The recording and dissemination of the conversation occurred as a result of interest in its
13 content and in the fact that the participants in this type of conversation were House
14 Republican leaders. The Commission concludes, therefore, that the legal expenses at
15 issue would not exist irrespective of Mr. Boehner's duties as a Federal officeholder, and
16 that he may use funds of the Boehner Committee to pay the legal expenses incurred in
17 evaluating and pursuing the lawsuit.

18 You state that any damages that Mr. Boehner receives from the suit will first be
19 used to defray the costs of the litigation, that the additional amounts will be donated to a
20 tax exempt charity, and that he will take charitable deductions only against the part of the
21 award that is taxable income. The Commission conditions its approval of this proposal
22 on your representation that there will be no direct or indirect tax or other financial benefit
23 to Mr. Boehner as a result of the award and use of such damages. For example, to the
24 extent that the effect of the charitable deduction would provide more than a 100 percent

² In explaining the application of the case-by-case approach, 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.

Explanation and Justification, Commission Regulations on Personal Use of Campaign Funds, 60 *Fed. Reg.*
7862, 7867 (February 9, 1995).

1 offset to the additional taxable income and result in tax liability that is lower than if there
2 were no additional taxable income, that part of the deduction may not be taken.³

3 Because the Boehner Committee's disbursements for legal expenses will not be
4 campaign-related, they should be reported within the category of "other disbursements,"
5 with the purpose of the disbursements noted. 11 CFR 104.3(b)(2)(vi) and (4)(vi). See
6 Advisory Opinions 1996-45 and 1996-14. More specifically, the disbursements for the
7 legal expenses will be an advance or loan to Mr. Boehner and should be reported as a
8 loan to him on Schedule C of the Boehner Committee's reports. 11 CFR 104.3(d). If Mr.
9 Boehner does recover an award, the proceeds he uses to repay his committee should be
10 reported as a loan repayment receipt and reflected on Schedule C. 11 CFR
11 104.3(a)(3)(x), 104.3(a)(4)(vi) and 104.3(d). If there is no recovery or if the size of the
12 recovery is not sufficient for full repayment to the Boehner Committee, it should disclose
13 the forgiveness of that part of the loan owed by Mr. Boehner. 11 CFR 104.3(d).

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14 The Commission expresses no opinion regarding the application of any rules of
15 the U.S. House of Representatives or any tax ramifications of the proposed activity
16 because those issues are not within its jurisdiction.

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

20 Sincerely,

21
22 Joan D. Aikens
23 Chairman
24

*Circulate for
tally.*

25 Enclosures (AOs 1997-12, 1997-2, 1997-1, 1996-45, 1996-40, 1996-24, 1996-14,
26 1995-23, and 1983-27)

³ The Commission assumes that the charitable organizations receiving your donations will not use those funds to provide any compensation to Mr. Boehner, a member of his family, or a member of his staff. See Advisory Opinions 1997-1, 1996-40, and 1983-27.