



FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 23, 1998

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1997-27

Jan Witold Baran
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Baran:

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

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

The interception, taping, or release of the call may be in violation of the Electronics Communications Privacy Act of 1986 ("ECPA"), at 18 U.S.C. §2510 et seq. Although the incident is the subject of a criminal investigation, you explain Mr. Boehner's concern that the pace and direction of the investigation may prejudice his legal

rights. Because of this concern, Mr. Boehner intends to retain legal counsel to investigate and pursue legal remedies available under 18 U.S.C. §2520. This statute generally provides that a person whose electronic communication is intercepted, disclosed, or intentionally used in violation of ECPA may recover, in a civil action, from the person who engaged in the violation. Mr. Boehner wishes to pay the expenses incurred in pursuit of these claims with Boehner Committee funds.

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

Under the Act and Commission regulations, a candidate and the candidate’s committee have wide discretion in making expenditures to influence the candidate’s election, but may not convert campaign funds to the personal use of the candidate or any other person. 2 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and 113.2(d); see also Advisory Opinions 1997-12, 1997-2, 1996-45, and 1996-24. A specific exemption to the ban on personal use, however, permits the use of campaign funds to defray any ordinary and necessary expenses incurred in connection with a person’s duties as a holder of Federal office. 2 U.S.C. §439a; 11 CFR 113.2(a) and (d). In addition, Commission regulations define personal use as “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.” 11 CFR 113.1(g).

Commission regulations list a number of expense categories that would constitute personal use. 11 CFR 113.1(g)(1)(i).¹ Where a specific use is not listed as personal use, the Commission makes a determination on a case-by-case basis, using the regulation’s definition of personal use. 11 CFR 113.1(g)(1)(ii).² Legal expenses are among those

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.

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).

uses to be analyzed on a case-by case basis. 11 CFR 113.1(g)(1)(ii)(A). See Advisory Opinions 1997-12, 1996-24, and 1995-23.

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

You state that any damages that Mr. Boehner receives from the suit will first be used to defray the costs of the litigation, that the additional amounts will be donated to a tax exempt charity, and that he will take charitable deductions only against the part of the award that is taxable income. The Commission conditions its approval of this proposal on your representation that there will be no direct or indirect tax or other financial benefit to Mr. Boehner as a result of the award and use of such damages. For example, to the extent that the effect of the charitable deduction would provide more than a 100 percent offset to the additional taxable income and result in tax liability that is lower than if there were no additional taxable income, that part of the deduction may not be taken.³

Because the Boehner Committee's disbursements for legal expenses will not be campaign-related, they should be reported within the category of "other disbursements," with the purpose of the disbursements noted. 11 CFR 104.3(b)(2)(vi) and (4)(vi). See Advisory Opinions 1996-45 and 1996-14. If Mr. Boehner does recover an award, the proceeds repaid to the Boehner Committee should be reported under the category of "offsets to operating expenditures" with a statement of the purpose. 11 CFR 104.3(a)(3)(ix) and 104.3(a)(4)(v). Although the original committee disbursements will not be expenditures, the repayments would be more similar in nature to refunds or rebates than to receipts of dividends or interest. See 11 CFR 104.3(a)(3)(x) and 104.3(a)(4)(vi).

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

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.

This response constitutes an advisory opinion concerning the 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)

Joan D. Aikens

Chairman

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