



FEDERAL ELECTION COMMISSION
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Nov 9 4 29 PM '98

AGENDA ITEM

For Meeting of: 11-12-98

MEMORANDUM

TO: Marjorie Emmons
Commission Secretary

FROM: Commissioner Mason

DATE: November 9, 1998

A handwritten signature in dark ink, appearing to be "Mason", written over the "FROM:" line of the memorandum.

SUBMITTED LATE

I would request that the attached alternate version of Advisory Opinion 1998-22 be included for consideration at the November 12 meeting.

1 **ADVISORY OPINION 1998-22 (Mason alternate)**

2
3 **Leo Smith**
4 **1060 Mapleton Avenue**
5 **Suffield, CT 06078**

6
7 **Dear Mr. Smith:**

8
9 **This refers to your letters dated September 18, September 23, and October 2,**
10 **1998, which request advice concerning the application of the Federal Election Campaign**
11 **Act of 1971, as amended ("the Act"), and Commission regulations to the creation of a**
12 **web site which supports the election of a Federal candidate.**

13 **FACTUAL BACKGROUND**

14 **You state that you are registered as an independent voter in Suffield, Connecticut.**
15 **You are also the sole owner of Capital Ventures Group, LLC ("CVG") and have been**
16 **involved in creating web sites for different clients as well as one for your own**
17 **enterprises.¹ You also indicate that, in order to protest House Republican efforts against**
18 **President Clinton, you have created an Internet web site advocating the defeat of the**
19 **Republican candidate, Representative Nancy Johnson, in the Sixth Congressional District**
20 **of Connecticut. The site also advocates the election of her opponent, Democratic**
21 **candidate Charlotte Koskoff.² You state that the web site is currently active and has been**
22 **up since September 17, 1998.**

¹ You have in the past created web sites for such organizations as the Connecticut State Dental Association and the Connecticut Dental Hygienist Association.

² The web site address is <http://www.e-source.com/koskoff>.

1 You assert that no funds were received or expended to create the Web site. The
2 site is administered and maintained by you personally from your computer.³ You also
3 state that, as a result of a prior business transaction, you pay no cost for your Internet
4 connection.⁴ The domain name web site is E-SOURCE.COM and is registered with
5 InterNIC in 1996 for a fee of \$100 for the first two years. You state that the fees are now
6 \$35 per year.⁵

7 You have provided documentation depicting the content of the web site. As you
8 originally constructed it, the site urged viewers to “defeat Nancy Johnson” and “Work to
9 elect Koskoff for Congress.” The site also offered the choice to contribute money or
10 volunteer time to the Koskoff campaign by choosing options on the screen. The option to
11 contribute would lead to an additional screen with the address of the Koskoff campaign to
12 which contributions would be sent. An additional screen also included a form that would
13 allow the viewer to state the amount of the contribution he or she would like to make, as
14 well the type of volunteer work the viewer could choose. When filled out, the form could
15 be sent directly from your web site to the official Koskoff campaign.⁶ Your site also
16 contained the statement: “This web site is posted by a registered Independent voter in the
17 Sixth District. This site is not affiliated with or supported by the official Koskoff for

³ You state that you and CVG, the business entity through which you conduct various enterprises, jointly own the computer hardware used to create the site. All of the necessary coding was done by you directly using software that was included with the general “Windows” software package.

⁴ In exchange for promoting the services of JavaNet, as the officially recommended Internet service of the Connecticut State Dental Association and the Connecticut Chiropractic Association, you were provided a free Internet hook-up.

⁵ You explain that E-SOURCE.COM was originally established in 1996 as a web site address for overseeing the web sites constructed by you for several trade associations within Connecticut. Later, each association purchased their own URL. Currently the E-SOURCE is used by CVG to display information regarding its services. The \$35 fee to InterNIC for 1998 was paid by CVG. You state that there is no cost or charge for any additional sublistings off the E-SOURCE.COM URL.

1 Congress campaign.” The web site also has a link to the electronic mail (“e-mail”)
2 address of Friends of Charlotte Koskoff (“the Koskoff Committee”), the principal
3 campaign committee of Ms. Koskoff.

4 Your request includes documents indicating some communication between you
5 and the Koskoff Committee regarding its apparent request that you remove the web site.
6 You deny that such a request was made. You do, however, state that Koskoff campaign
7 personnel asked you to correct the spelling of the candidate’s name and to remove
8 references to the use of credit cards for making contributions to the Koskoff campaign.
9 You state that you complied with these requests.

10 Given the above factual background, you ask whether the Act and Commission
11 regulations require that you include a statement on your web site that identifies you as the
12 sponsor of the web site or the payor of costs related to the site. You also seek advice as
13 to any other reporting obligations that apply to your activity. In summary, the response to
14 your principal question is yes; a statement disclosing your sponsorship of the web site is
15 required to be placed on the site itself. A definitive answer to your other question is not
16 possible, given the status of factual representations made at this time.

17 **ACT AND COMMISSION REGULATIONS**

18 The definition of “expenditure” in 2 U.S.C. §431(9) includes “any purchase,
19 payment, distribution, loan, advance, deposit, or gift of money or anything of value, made
20 by any person for the purpose of influencing any election for” Federal office. See also 11
21 CFR 100.8(a)(1). Whenever any person makes an expenditure to finance

⁶ Since your first submission, the form regarding the level of monetary or voluntary support has been removed.

1 communications expressly advocating the election or defeat of a clearly identified
2 candidate or soliciting any contribution, and does so through various types of mass media
3 (e.g., a broadcasting station) or via "any other type of general public political
4 advertising," the communication is required to include a statement of sponsorship or
5 disclaimer. 2 U.S.C §441d, 11 CFR 110.11. The disclaimer must clearly state if the
6 communication has been paid for and authorized by a candidate, or the candidate's
7 authorized political committee. If the communication is paid for by other persons but
8 authorized by a candidate (including an authorized political committee of a candidate or
9 its agents), the disclaimer shall clearly state that the communication is paid for by those
10 other persons and authorized by such authorized political committee. On the other hand,
11 if the communication is not authorized by a candidate (including an authorized political
12 committee of a candidate or its agents), the disclaimer shall clearly state the name of the
13 person who paid for the communication and state that it is not authorized by any
14 candidate or the candidate's committee. 2 U.S.C §441d; see 11 CFR 109.3, 110.11(a)(1)
15 and 110.11(a)(5).

16 **APPLICATION TO WEB SITE**

17 *Disclaimer requirements*

18
19 Because of the general availability of access to the Internet, the Commission has
20 concluded that communication via a web site would be considered a form of
21 communication to the general public. See Advisory Opinions 1997-16, 1996-16, 1995-
22 35, 1995-33 and 1995-9. In the past, the Commission has issued advisory opinions
23 requests which entailed the use of the Internet for the endorsement of candidates

1 (Advisory Opinion 1997-16) and the solicitation of political contributions (Advisory
2 Opinions 1995-33 and 1995-9).

3 The web site would be viewed as something of value because it expressly
4 advocates the election of a Federal candidate, and the defeat of another Federal
5 candidate.⁷ Therefore, it meets the requirements of 2 U.S.C. §431(9) and 11 CFR
6 100.8(a)(1). The Commission concludes that the costs associated with the creation and
7 maintaining of the web site, as described in your request, would be considered an
8 expenditure under the Act and Commission regulations.

9 The Commission has required political advertisements located on a web site to
10 have the proper disclaimer as required by the Act and Commission regulations. See
11 Advisory Opinions 1995-35 and 1995-9. Your web site both expressly advocates the
12 candidacy of Ms. Koskoff and solicits contributions on her behalf. Therefore, it is
13 required to have a disclaimer that meets the requirements of 2 U.S.C §441d and 11 CFR
14 110.11. As part of this disclaimer your statement must indicate your full name. Your
15 statement on the web site that identifies that you as an "independent voter" is insufficient
16 and must be modified to include your full name. It must also include a truthful statement
17 as to whether or not your communication via the web site is authorized by any candidate.

18 *Constitutional considerations*

19 You cite the United States Supreme Court decision in *McIntyre v. Ohio Elections*
20 *Commission*, 515 U.S. 334 (1995) which, you state, "offered no support for any FEC
21 requirement that disallows anonymous political publications." Generally, Federal

⁷ While 2 U.S.C. 431(9) is not restricted to express advocacy in every circumstance, communications which do include express advocacy clearly fall with the definition of "expenditure."

1 administrative agencies are without power or expertise to pass upon the constitutionality
2 of legislative action. Advisory Opinions 1998-20 and 1992-35 (citing court decisions).

3 The Commission may, however, respond to your contention by explaining its view of the
4 cited opinion and its relevance to the Act or Commission regulations.

5 *McIntyre* is distinguishable in several ways from your situation. The *McIntyre*
6 Court ruled unconstitutional a broadly written Ohio statute banning the distribution of all
7 but handwritten anonymous campaign literature. While the decision contains broad
8 language on the constitutional protections afforded campaign-related speech, the case
9 involved issue, rather than candidate advocacy. The Court was careful to distinguish the
10 Ohio statute in question from the Act, which applies only to candidate elections.
11 *McIntyre* at 356, citing *Buckley v. Valeo*, 424 U.S. 1, 80 (1976). In this regard, the
12 Commission notes that 2 U.S.C §441d is more narrowly written to address only
13 communications expressly advocating the election or defeat of a Federal candidate or
14 those soliciting contributions using public media.⁸ Your web site concerns candidate
15 related material for a Federal election. Moreover, your web site also contains a
16 solicitation for contributions to a Federal candidate. Your situation is therefore factually
17 distinguishable from the circumstances in *McIntyre* which concerned the distributions of
18 anonymous leaflets expressing opposition to a proposed referendum.

⁸ Shortly after *McIntyre* was decided, the Supreme Court declined to review a decision of the California Supreme Court that upheld the constitutionality of a California disclaimer requirement that is very similar to that contained in section 441d. *Griset v. Fair Political Practices Commission*, 884 P.2d 116 (Cal. 1994), *cert. denied* 514 U.S. 1083 (1995). *Griset* had challenged a requirement in section 84305 of the California Government Code that candidates and their controlled committees include the candidate's name and address on each piece of mail in a mass mailing. The denial of petition of certiorari does not import as to the merits of a lower court decision. See *Griffon v. United States*, 336 U.S. 704, 176 (1949). Nonetheless, the fact that the Court failed to consider the case or remand it for reconsideration consistent with the

1 Lower courts have been careful to note differences similar to these when
2 examining the reach of the *McIntyre* opinion. For example, in *Kentucky Right to Life,*
3 *Inc. v. Terry*, 108 F.3d 637 (6th Cir.,1997), *cert denied*, 118 S.Ct. 162 (1997), the Sixth
4 Circuit distinguished *McIntyre* citing the difference between candidate-based and issue-
5 based elections and sustained a State disclaimer provision, similar to 2 U.S.C. §441d, as
6 it applied to independent expenditures. The Second Circuit declined to apply *McIntyre*
7 when it sustained the application of section 441d, to a communication that solicited
8 contributions. See *FEC v. Survival Education Fund*, 65 F. 3d 285 (2nd Cir., 1995).

9 *Possible reporting obligations*

10 Given the conclusion that your web site is an expenditure and requires a
11 disclaimer, the issue is also raised whether the Act or Commission regulations impose
12 any reporting obligations as a consequence of your expenditure. You assert that the
13 creation of the web site is without cost to you. The Commission, however, cannot agree
14 with this characterization.⁹ The Commission notes that there are minimal costs associated
15 with creating the web site. Some portion of the previous expenses described in your
16 request could be apportioned to each and every web site that you construct as part of your
17 business. These overhead costs would include, for example, the fee to secure the

McIntyre decision could be read as an indication that a majority of the Court does not believe the reasoning in *McIntyre* applies to the *Griset* situation (or would, by extension, apply to section 441d).

⁹ The Commission notes that a claim that political advertisement directed to the general public entails no cost to the maker would seem to run counter to the perception of the Supreme Court in *Buckley* at 635.

The Court observed:

virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

1 registration of domain name, the amounts you invested in your hardware, and the utility
2 costs to create the site.¹⁰

3 In the circumstances presented, the Commission advises that any reporting
4 requirements would be determined by the valuation of the expenditures. In addition, they
5 would also be determined by whether your website activity was completely independent
6 of the Koskoff campaign, or whether it was done in cooperation, consultation or concert
7 with that campaign. Assuming, the activity qualifies as an independent expenditure, you
8 would be required to file reports with the Commission if the total value of your
9 expenditures exceeds \$250 during 1998. 2 U.S.C. §§431(17), 434(c), 441a(a)(7)(B); 11
10 CFR 109.1, 109.2. In contrast, assuming your activity were not conducted completely
11 independent of the Koskoff campaign, your expenditures would be reportable by the
12 Koskoff Committee as an in-kind contribution from you. 2 U.S.C. §§431(8)(A)(i),
13 434(b)(2)(A), 434(b)(3)(A); 11 CFR 104.3(a)(3)(i), 104.3(a)(4)(i), 104.13.

14 Though there are differing accounts of the contacts between you and the Koskoff
15 campaign, the Commission notes that neither account would compromise the
16 independence of the web site expenditures. If contacts between you and the Koskoff
17 campaign were more extensive than presented, or if they occurred at an earlier stage in
18 preparation of the site, questions could arise as to whether expenditures for the web site

¹⁰ Looking at this from a slightly different perspective, the Commission notes that you have created web sites for various non-profit organizations as part of your business. Presumably, part of the fee you would charge your clients would consist of costs incurred in the preparation of these websites. This valuation would be relevant to a determination of the amount of the expenditure for your Koskoff website. Of course, you may exclude from the valuation, the amount representing only your personal services since you could volunteer your uncompensated services to a campaign without any contribution resulting. See 2 U.S.C. §431(8)(B)(ii).

1 are independent expenditures or whether they are in-kind contributions to the Koskoff
2 Committee.

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

6 Sincerely,

7
8 Scott E. Thomas
9 Acting Chairman

10
11 Enclosures (AOs 1997-16, 1996-16, 1995-35, 1995-33, and 1995-9)