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Via Fax and Federal Express

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Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Comment on
AOR 2003-17

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2003 MAY 30 P 2:35

Re: Advisory Opinion Request 2003-17

Dear Mr. Norton:

This letter represents a comment on the above request for an Advisory Opinion, made by counsel on behalf of James Treffinger. Mr. Treffinger seeks an interpretation of 2 U.S.C. § 439a to determine whether he may use surplus campaign funds to pay for his legal defense in a federal corruption case brought in New Jersey. Mr. Treffinger has pled guilty to conspiring to hinder a federal investigation into his conduct as Essex County Executive and to commission of mail fraud to defraud the County of Essex and its citizens of money, property and the honest services of Mr. Treffinger and two Essex County employees. As a matter of public policy, the Federal Election Commission ("F.E.C.") should find that Mr. Treffinger's legal fees are personal expenses, incurred irrespective of his campaign, because his criminal acts were committed in his capacity as County Executive and constituted an abuse of that position of public trust. Moreover, with his plea, Mr. Treffinger acknowledged that \$29,471 of the funds in his campaign accounts were misappropriated from the Essex County payroll and constitute criminal proceeds, not campaign funds. Therefore, those funds should be safeguarded for restitution rather than spent on any campaign expense.

I. The Criminal Indictment and Guilty Plea

On October 24, 2002, Mr. Treffinger was charged in a twenty-count indictment, Cr. No. 02-795 (JWB), with several violations of federal law, including extortion, misappropriation, obstruction and mail fraud. Today, Mr. Treffinger has entered a plea of guilty to Counts Seven and Fourteen of the indictment. Count Seven charges that Mr. Treffinger conspired to corruptly persuade and engage in misleading conduct towards others with the intent to hinder the communication of information to federal law enforcement relating to the commission of federal offenses, contrary to Title 18 U.S.C. § 1512, in violation of 18 U.S.C. § 371. Count 14 charges that Mr. Treffinger used the mails to execute a scheme to defraud the citizens of Essex County of money and property in violation of 18 U.S.C. § 1341, in connection with his use of two Essex

County employees to provide support for his campaign for United States Senate for the calendar year 2000 Republican primary and the campaign of another candidate. Mr. Treffinger is scheduled to be sentenced on September 10, 2003.

II. The Cited Advisory Opinions Do Not Support This Use of Campaign Funds

No prior Advisory Opinion has interpreted Section 439a to permit a former candidate to use surplus campaign funds to pay for legal representation of that candidate in a criminal proceeding, when the proceeding established both the candidate's malfeasance in local public office and the illegality of certain of the surplus campaign funds in question. Nevertheless, Mr. Treffinger's counsel cites four opinions in support of his position. The first, Advisory Opinion 1977-39, involved payment of criminal charges but was decided prior to 1980 amendments in election law disallowing personal use of campaign contributions. See PL 96-187, Title I, §113. Therefore, its findings are not applicable under current law. Moreover, there is no indication that the funds at issue in AO 1977-39 were actually proceeds of the charged criminal conduct.

The other three opinions cited by Mr. Treffinger's counsel all addressed payment of legal fees resulting from civil or public relations matters. Advisory Opinion 1995-23 dealt with a \$3,000 legal bill for resolving a civil dispute over removal of signs during a campaign. Advisory Opinion 1997-12 addressed bills for legal and public relations work necessitated by the indictment of an office holder's close friend. The criminal investigation of the officeholder's friend resulted from his close ties to the office holder; however, the office holder himself was never the target of any criminal investigation. Finally, Advisory Opinion 1998-1 dealt with legal bills for crafting responses to media allegations and a House Ethics Inquiry into the impropriety of a congressman's official conduct. Again, in this matter, no criminal allegations were at issue. Moreover, the expenses were incurred by the congressman in his capacity as a federal office holder.

In contrast, Mr. Treffinger is not simply the subject of an investigation; he has entered a guilty plea to charges of conspiring to hinder a federal investigation and mail fraud. Furthermore, in every opinion cited by Mr. Treffinger, the expenses of a candidate or office holder were justified based on the wide discretion available to candidates in expenditures of funds to influence an election or based on their ongoing public relations obligations. However, Mr. Treffinger lacks such justification since he is no longer a candidate for federal office. As a result, Mr. Treffinger may not contend that his legal expenses are required by his campaign or that they resulted from it.

Most importantly, Mr. Treffinger is not a federal office holder, nor was he when he committed the illegal acts in question. Therefore, unlike the congressmen above, he may not use the funds pursuant to 2 U.S.C. §439a(a)(2) "for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office." Instead, he used his authority as County Executive to misappropriate County payroll funds, to counsel County employees to create false and misleading memos, to institute a phony County investigation and to lie to federal investigators to cover up illegally awarded County contracts. These actions were

possible because Mr. Treffinger was Essex County Executive and was inclined to abuse this position of trust.

III. Mr. Treffinger Accrued These Legal Expenses Irrespective of His Campaign Obligations

The legal costs arising from Mr. Treffinger's entry of a guilty plea to charges of conspiring to hinder a federal investigation and commission of mail fraud are an expense accrued irrespective of his legal campaign obligations and activities. As a matter of public policy, these costs should therefore be construed as personal, not campaign, expenses.

Pursuant to 2 U.S.C. § 439a(b), campaign funds may not be converted to personal use. F.E.C. regulations generally 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 a candidate's campaign or duties as a Federal officeholder." 11 C.F.R. § 113.1(g). The regulations list certain categories of expenses which are *per se* personal expenses and list other expenses, including legal expenses, which the F.E.C. may designate as personal or as campaign related, on a case-by-case basis.¹

In response to a very different inquiry than the one at issue in this matter, the F.E.C. outlined some parameters for determining whether a legal expense is personal, including that "any legal expense that relates directly to allegations arising from campaign or officeholder activity would qualify for 100% payment with campaign funds." See Advisory Opinion 1997-12. Mr. Treffinger seeks to employ this broad language to justify payment of his own legal expenses in defense of most of the criminal charges brought against him, since the proceeds from his criminal acts accrued to his campaign accounts.

However, in analyzing whether Mr. Treffinger's expenses constitute a personal or a campaign expense, it is essential to distinguish between expenses which arise because of legal campaign activities, and expenses which arise as a result of activities which are illegal regardless of their purported connection to a campaign. Mr. Treffinger pled guilty to wrongdoing as the Essex County Executive. According to his plea, conspiring to hinder a federal investigation and

¹Section 439a was amended in 2002 by Public Law 107-155, Title III, §301, effective November 6, 2002, to further restrict the permitted uses of contributed amounts. Replacing language which allowed for certain uses, including "any lawful purpose," of such funds, Section 439a now permits use of contributions "for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual," and for three other categories of expenses not relevant here, including expenses of an individual currently in Federal office; contributions under 26 U.S.C. § 170(c); or transfers to the committee of a political party. 2 U.S.C. § 439a (a)(2)-(4). 2 U.S.C. § 439a(a). Although this amendment became effective after the charged conduct, it provides guidance regarding future interpretations of Section 439a. Specifically, the amendment demonstrates Congress's intention to limit use of campaign funds to campaign or office holder's expenses, rather than permitting any non-personal, lawful expense.

commission of mail fraud were part of his *modus operandi* in that position, and constituted criminal dereliction of his duties to Essex County for which he would have been legally accountable regardless of his federal campaign.

The language of 439a should not be interpreted to mean that a candidate or holder of public office can commit a criminal act in furtherance of his campaign and designate the legal defense of that action as a campaign expense. For instance, a candidate should not be permitted to assert that he robbed a bank only to fill his campaign coffers and, therefore, that his legal defense against the bank robbery charges is a campaign expense. Likewise, a candidate who illegally obtained funds as a result of his local office and hindered a federal investigation into his activities should be forced to pay for his legal defense from his personal funds. Such expenses do not arise with respect to the candidate's campaign, but because he decided to act irrespective of both his campaign obligations and federal law, in abuse of his local office.

The current Advisory Opinions cited by Mr. Treffinger addressed payment for defense of a civil matter, cooperation with investigations of a third party, and a House Committee inquiry, respectively. Charges such as these could be the result of campaign or other political machinations. In contrast, conspiring to hinder a federal investigation and commission of mail fraud do not ordinarily or necessarily occur in the course of a political campaign. Instead, with these illegal actions, Mr. Treffinger circumvented campaign restrictions and violated federal law. Individuals making donations to a campaign in order to influence the outcome of an election cannot and should not expect that this influence should extend to legal defense of such actions.

Therefore, the F.E.C. should determine that Mr. Treffinger's legal defense is not a campaign expense, but is Mr. Treffinger's personal expense, to be paid from his own resources.²

IV. Mr. Treffinger Seeks to Use Proceeds of a Crime, Not Campaign Funds

Pursuant to Mr. Treffinger's Plea, certain of the funds Mr. Treffinger previously identified as "surplus" campaign funds are not campaign funds at all, but are the proceeds of violations of federal extortion law. These funds should not be made available for payment of campaign expenses, but should be set aside for payment of restitution. Still more of the funds may also be used for payment of criminal fines.

The violations of Title 18 U.S.C. § 371 and Title 18 U.S.C. § 1341 to which Mr. Treffinger pled guilty carry a statutory maximum prison sentence of 5 years and a statutory maximum fine equal to the greatest of (1) \$250,000, (2) twice the gross amount of any pecuniary gain that any persons derived from the offense; or (3) twice the gross amount of any pecuniary

² However, should the F.E.C. determine that Mr. Treffinger's legal expenses are a campaign expense and not a personal use of campaign funds, then to the extent Mr. Treffinger does not personally fund the balance of his legal fees, any provision of legal services or payment of such services on Mr. Treffinger's behalf constitutes a campaign contribution, subject to 2 U.S.C. § 441a(a)(1) and 11 C.F.R. § 110.1.

loss sustained by any victims of the offense. Therefore, Mr. Treffinger may be sentenced to fines of up to \$250,000.

In addition to these penalties, which are within the sole discretion of the sentencing judge, pursuant to 18 U.S.C. § 3663A, the sentencing judge shall order Mr. Treffinger to pay restitution to the victims of his crime. According to the Plea agreement, Mr. Treffinger owes \$29,741 in restitution as a result of his misappropriations from the Essex County payroll.

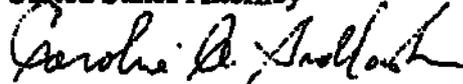
Therefore, even if Mr. Treffinger is permitted to spend any surplus campaign funds on his legal expenses, \$29,471 of the funds in his accounts do not constitute such campaign funds. As a matter of law and public policy, these funds should not be available for any expenditures by Mr. Treffinger's campaign committee. Instead, at sentencing, Mr. Treffinger will be required to return the funds to the people of Essex County. Likewise, at sentencing he may be responsible to pay up to \$250,000 in criminal fines as a penalty for his abuse of his elected position.

V. Conclusion

The F.E.C. should determine as a matter of public policy that a candidate who pleads guilty to conspiring to hinder a federal investigation into his conduct as Essex County Executive and to commission of mail fraud to defraud the County of Essex and its citizens of money, property and the honest services of Mr. Treffinger and two Essex County employees should be forced to pay for his legal defense from his personal funds, since he would have incurred such fees irrespective of his campaign. In any event, the F.E.C. should find that certain of the proceeds of Mr. Treffinger's crime are not campaign funds and, therefore, are not available for expenditure by Mr. Treffinger's campaign.

Very truly yours,

CHRISTOPHER J. CHRISTIE
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