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FEDERAL ELECTION COMMISSION
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AGENDA ITEM
For Meeting of: 07-24-03

July 17, 2003

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

James Kahl
Deputy General Counsel

Rosemary C. Smith *RCS*
Acting Associate General Counsel

John C. Vergelli *JCV*
Acting Assistant General Counsel

Cheryl A.F. Hemsley *CH*
Staff Attorney

Subject: Draft AO 2003-17

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 24, 2003.

Attachment

1 ADVISORY OPINION 2003-17

2
3 Karin S. Riecker, Esq.
4 Klingeman Turano, LLC
5 230 Maine Street
6 Second Floor
7 Madison, NJ 07940

DRAFT

8 Dear Ms. Riecker:

9 This responds to your letter dated May 8, 2003, as supplemented by your electronic
10 mail dated May 12, 2003, requesting an advisory opinion on behalf of your client, Mr.
11 James W. Treffinger, concerning the application of the Federal Election Campaign Act of
12 1971, as amended ("the Act"), and Commission regulations to the use of campaign funds to
13 pay for legal expenses related to criminal charges against him.

14 ***Background***

15 Mr. Treffinger was a candidate from New Jersey in the primary elections for the
16 nomination for United States Senator in 2000 and 2002. Mr. Treffinger's principal
17 campaign committee for both 2000 and 2002 is Treffinger for Senate, Inc. ("the
18 Committec"). At the time of his candidacies, Mr. Treffinger was also the County
19 Executive for Essex County, New Jersey. You state that Mr. Treffinger is not currently a
20 candidate for Federal office, nor does he contemplate running for Federal office again in
21 the future.

22 Mr. Treffinger was indicted in the District of New Jersey on 20 counts of criminal
23 activity. You assert that 19 of the counts directly relate to his candidacies for U.S. Senate.

1 Mr. Treffinger entered a plea agreement with the U.S. Attorney in which Mr. Treffinger
2 agreed to plead guilty to two counts (7 and 14).

3 The counts in the indictment against Mr. Treffinger are summarized as follows:

4 Counts 1 through 3 and 5 allege that Mr. Treffinger and others "knowingly and
5 willfully did devise and intend to devise a scheme and artifice to defraud the County of
6 Essex and its citizens of the right to [Treffinger's] honest services in the affairs of Essex
7 County Government and of money and property by means of materially false and
8 fraudulent pretenses, representations and promises."

9 "The object of this scheme and artifice to defraud was to award contracts to [United
10 Gunite Construction ("UGC")] in exchange for approximately \$15,000 in political
11 contributions from UGC that were illegally funneled to [Mr. Treffinger's] 2000 Senate
12 campaign and to take steps to affirmatively conceal this material information from other
13 Essex County Government officials and employees and the public."

14 Count 4 alleges that Mr. Treffinger's campaign committee submitted a false
15 quarterly report to the FEC. The indictment alleges that the report concealed the true
16 source of the \$15,000 contributions, which had been made by individuals who were then
17 reimbursed by UGC, a corporation, which is a prohibited source of Federal campaign
18 contributions.

19 Count 6 alleges that Mr. Treffinger knowingly and willfully obstructed, delayed and
20 affected interstate commerce by extortion by obtaining campaign contributions from UGC
21 with consent and under color of official right.

1 **Count 7 alleges that Mr. Treffinger knowingly and willfully conspired with others**
2 **to corruptly persuade other persons and engage in misleading conduct toward other**
3 **persons, with the intent to hinder, delay and prevent the communication to law**
4 **enforcement officers of information relating to the possible commission of bribery,**
5 **extortion and fraud by:**

6 **A) Coaching others to provide false and misleading information,**

7 **B) Creating and causing the creation of misleading and backdated documents**
8 **related to contact with, and the award of contracts to, UGC,**

9 **C) Instructing others to destroy documents in anticipation of a grand jury subpoena**
10 **for Treffinger for Senate records,**

11 **D) Failing to produce documents in response to grand jury subpoenas,**

12 **E) Seeking appointment to the office of U.S. Attorney for the District of New**
13 **Jersey in order to favorably terminate the investigation into his activities as Essex County**
14 **Executive; and**

15 **F) Making personnel decisions designed to coax Essex County employees to remain**
16 **loyal to Mr. Treffinger.**

17 **Counts 8 and 9 allege that Mr. Treffinger "did knowingly, willfully and corruptly**
18 **attempt to persuade another person, with the intent to hinder, delay and prevent the**
19 **communication to a law enforcement officer of information relating to the commission and**
20 **possible commission of a federal offense by coaching others to provide false and**
21 **misleading information."**

1 **Count 10** alleges that Mr. Treffinger, aided and assisted by others, "did knowingly
2 and willfully engage in misleading conduct toward other persons, with the intent to hinder,
3 delay and prevent the communication to a law enforcement officer of information relating
4 to the commission and possible commission of federal offenses, by causing the creation of
5 misleading and backdated documents to be placed in Essex County files to deceive others,
6 in violation of 18 U.S.C. 1512(b)(2) and (3)."¹

7 **Count 11** alleges that Mr. Treffinger "knowingly and willfully did attempt to
8 obstruct, delay and affect interstate commerce by extortion in attempting to obtain
9 approximately \$5,000 in campaign contributions from a contractor with consent induced by
10 wrongful and threatened use of fear and under color of official right."

11 **Counts 12 through 14** allege that Mr. Treffinger and others "knowingly and
12 willfully did devise and intend to devise a scheme and artifice to defraud and to obtain
13 money and property from the county of Essex and its citizens and to deprive the County of
14 Essex and its citizens of [Mr. Treffinger's] and two Essex County employees' honest

15 _____
¹ 2 U.S.C. 1512(b)(2) and (3) read as follows:

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(2) cause or induce any person to--

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings;

1 services by means of materially false and fraudulent pretenses and promises." The alleged
2 object of this scheme and artifice to defraud was that Mr. Treffinger hired two individuals
3 as Essex County employees and paid them with Essex County funds but used them to staff
4 his 2000 campaign committee.

5 Counts 15 through 18 allege that Mr. Treffinger "knowingly and willfully aided,
6 assisted and caused another to make materially false, fictitious and fraudulent statements
7 and representations and to make and use false writings and documents knowing the same to
8 contain materially false, fictitious and fraudulent statements and entries." Namely, the
9 indictment alleges that Mr. Treffinger aided and assisted the Treffinger for Senate treasurer
10 in making declarations that the reports filed with the Commission in connection with the
11 2000 campaign were true, correct and complete when, certain contributions from caterers
12 were intentionally omitted. These counts allege violations of 18 U.S.C. 1001.²

13

² 18 U.S.C. 1001 reads as follows:

§ 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) Falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) Makes any materially false, fictitious, or fraudulent statement or representation; or

(3) Makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) Administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) Any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

1 **Count 19** alleges that Mr. Treffinger knowingly and willfully conspired with his
2 hair stylist and others to embezzle, steal, obtain by fraud and otherwise without authority
3 convert to their own use, and to intentionally misapply money and property using the Essex
4 County payroll to pay the hairstylist for no meaningful services.

5 **Count 20** charges that Mr. Treffinger knowingly and willfully conspired with others
6 to fraudulently misrepresent himself and a committee and organization acting under his
7 control and speaking and otherwise acting for and on behalf of another candidate to place
8 phone calls and cause recipients to form a negative opinion of that candidate and a third
9 candidate. Mr. Treffinger is alleged to have agreed to develop a telephone message
10 consisting of an attack ad against one candidate and that is purported to be sent by a third
11 candidate.

12 You state that your law firm is defending the above charges against Mr. Treffinger.

13 ***Question Presented***

14 May Mr. Treffinger, a former candidate for Federal office, use campaign funds to
15 pay for legal fees incurred in the defense of this criminal indictment?

16 ***Legal Analysis and Conclusions***

17 Under the Act, there are four categories of permissible uses of campaign funds: (1)
18 otherwise authorized expenditures in connection with a candidate's campaign for Federal
19 office; (2) ordinary and necessary expenses incurred in connection with a Federal
20 officeholder's duties; (3) contributions to organizations described in 26 U.S.C. 170(c); and

1 (4) transfers, without limitation, to national, state or local political party committees. 2

2 U.S.C. 439a(a).³

3 The Act generally prohibits the conversion of campaign funds to "personal use."
4 2 U.S.C. 439a(b)(1). Specifically, 2 U.S.C. 439a(b)(2) states that funds are converted to
5 personal use if they are used to fulfill any commitment, obligation or expense of a person
6 that would exist "irrespective" of the candidate's election campaign or individual's duties
7 as a holder of Federal office.⁴ This "irrespective test," which had been part of the
8 Commission's personal use regulations, was statutorily codified by BCRA.

9 Commission regulations use the same "irrespective test" as does the Act. 11 CFR
10 113.1(g). The regulations implementing 2 U.S.C. 439a(b)(2) list certain uses of campaign
11 funds that will be considered *per se* personal use. 11 CFR 113.1(g)(1)(i). This list does
12 not include legal fees. If a particular use of campaign funds is not *per se* a personal use, it
13 will be examined on a case-by-case basis using the irrespective test.

14 11 CFR 113.1(g)(1)(ii). Commission regulations provide a non-exclusive list of uses that
15 are subject to a case-by-case examination. Legal expenses are among the listed uses to be

16

³ Congress, in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), revised previous section 439a by deleting "other lawful purposes" from the list of permissible uses.

⁴ The Federal officeholder portions of the Act and Commission regulations are irrelevant in this case as Mr. Treffinger is a county officeholder, not a Federal officeholder. The Commission notes that Mr. Treffinger's apparent decision not to run for Federal office again in the future distinguishes this situation from that of a Federal officeholder, who may be more likely to run for office again.

1 examined on a case-by-case basis. 11 CFR 113.1(g)(1)(ii)(A).⁵ The Commission has
2 previously concluded that legal expenses in defense of allegations relating directly to the
3 candidate's campaign activities or status as a Federal officeholder may be paid for with
4 campaign funds. AOs 1998-1, 1997-12, 1996-24, and 1995-23; *see also* AO 1993-15. The
5 use of campaign funds to pay for Mr. Treffinger's defense against allegations that are not
6 directly related to his campaign activity would be a conversion to personal use.

7 In Advisory Opinion 1993-15, the Commission determined that counts within an
8 indictment could be severed, depending upon whether the counts were related to campaign
9 activity. The Commission concluded that amounts raised to defray the legal expenses as to
10 the counts related to campaign activity would be contributions to the principal campaign
11 committee and amounts raised to defray the other counts would not be.

12 *Status of Charges as Directly Related to the Campaign*

13 You assert that nineteen of the twenty counts against Mr. Treffinger in the
14 indictment are directly related to his 2000 and 2002 campaigns. The Commission agrees
15 with your assessment in part, and disagrees in part, concluding that some counts relate
16 directly to conduct that would have occurred irrespective of the Senate campaigns, and
17 other counts do not.

⁵ The recently promulgated regulations implementing the Bipartisan Campaign Reform Act ("BCRA") did not change the case-by-case analysis as to legal expenses. "Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds; Final Rules," 67 *Fed. Reg.* 76962, at 76970 (December 13, 2002). In promulgating the applicable rule in 1995, 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. "Personal Use of Campaign Funds; Final Rules," 60 *Fed. Reg.* 7862, 7867 (February 9, 1995).

1 Specifically, the Commission agrees that counts 4, 12 through 18, and 20 directly
2 relate to Mr. Treffinger's campaign. However, counts 1 through 3, 5 through 11, and 19
3 (as you correctly stated in your request) do not arise directly from campaign activity.

4 Count 4 and counts 15 through 18 relate directly to Mr. Treffinger's campaign
5 because they are comprised of allegations of false reports made to the Commission. Since
6 the reports allegedly falsified were filed pursuant to the requirements of the Act and
7 Commission regulations (see 2 U.S.C. 434 and 11 CFR Part 104), these reports would not
8 have been filed absent Mr. Treffinger's campaign for Federal office.

9 Counts 12 through 14 relate directly to Mr. Treffinger's campaign because they
10 allege that Mr. Treffinger placed two individuals on the county payroll but used them to
11 provide services to his campaign. Absent Mr. Treffinger's campaign for Federal office,
12 these individuals presumably would have worked for the county or would not have been
13 hired by Mr. Treffinger at all.

14 Count 20 relates directly to Mr. Treffinger's Federal campaign because, allegedly,
15 he knowingly and willfully participated in or conspired to participate in a plan, scheme or
16 artifice to fraudulently misrepresent himself or his committee in phone calls as speaking or
17 acting for or on behalf of another candidate on a matter that is damaging to the other
18 candidate. See 2 U.S.C. 441h(2). Absent Mr. Treffinger's campaign, the telephone calls at
19 issue would not have been made.

20 The Commission finds that counts 1 through 3, 5 through 11 and 19, relate to the
21 alleged breaches of public trust and public fraud in the abuse of Mr. Treffinger's county
22 office. The essence of these allegations is the defrauding of the county of its money and

1 property, and a scheme to cover up such activity. While some of the benefit of the
2 "scheme and artifice" alleged in the indictment may have inured, or may been intended to
3 inure, to Mr. Treffinger's campaign, the primary wrong alleged in the indictment is the
4 defrauding of the non-federal polity (i.e., the county and its citizens). Thus, these counts
5 are not directly related to campaign activity.

6 *Use of Campaign Funds to Pay for Legal Expenses in Defense of the Indictment*

7 Having made the requisite showing that counts 4, 12 through 18 and 20 relate
8 directly to the Federal campaign, Mr. Treffinger may use campaign funds to pay for a
9 portion of the legal fees incurred in defense of the indictment. Thus, since nine of the
10 twenty counts in the indictment against Mr. Treffinger are payable using campaign funds,
11 Mr. Treffinger may pay up to 45% (9/20) of the legal expenses incurred in his defense of
12 this indictment using campaign funds. In accordance with 11 CFR 102.9(b) and 104.14(b),
13 the Committee must maintain the appropriate documentation of any disbursements made to
14 pay these legal fees.

15 The Commission notes that Mr. Treffinger is required to pay Essex County \$29,471
16 in restitution under his plea agreement with the U.S. Attorney. This restitution amount is
17 composed of funds that were unlawfully obtained by the Committee; moreover, it appears
18 that the amount consists of in-kind contributions from Essex County, which is a municipal
19 corporation. Consistent with 11 CFR 103.3(b), which requires the refund of illegal
20 contributions, the Committee must pay this amount within thirty days of your receipt of

1 this advisory opinion. *Cf.* 11 CFR 103.3(b)(2). This restitution payment must take priority
2 over the payment of legal fees by the Committee.⁶

3 The Committee must report all funds disbursed for legal fees in defense of the
4 indictment against Mr. Treffinger as operating expenditures, with the purpose noted. 11
5 CFR 104.3(b)(2) and (b)(4)(k); Advisory Opinions 1998-1, 1997-12 and 1996-24.

6 The Commission expresses no opinion as to the possible applicability of Federal or
7 State laws, including tax laws to the matters presenting in your request as those issues are
8 not within its jurisdiction.

9 This response constitutes an advisory opinion concerning the application of the Act
10 and Commission regulations to the specific transaction or activity set forth in your request.
11 *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the
12 facts or assumptions presented, and such facts or assumptions are material to a conclusion
13 presented in this opinion, then the requestor may not rely on that conclusion as support for
14 its proposed activity.

15 The Commission notes that this advisory opinion analyzes the Act, as amended by
16 the Bipartisan Campaign Reform Act of 2002 ("BCRA"), and Commission regulations,
17 including those promulgated to implement the BCRA amendments, as they pertain to your

18

⁶ The Commission further notes that the Committee accepted contributions for the general election campaigns in 2000 and 2002, but did not participate in either of these elections. To the extent that the Committee must still make refunds to its general election contributors under 11 CFR 102.9(e)(3), any funds needed for this purpose must not be used to pay the legal expenses permitted by this advisory opinion.

1 proposed activities. On May 2, 2003, a three-judge panel of the United States District
2 Court for the District of Columbia ruled that a number of BCRA provisions are
3 unconstitutional and issued an order enjoining the enforcement, execution, or other
4 application of those provisions. *McConnell v. FEC*, 251 F.Supp. 2d 176 (D.D.C. 2003),
5 *probable jurisdiction noted*, 123 S.Ct. 2268 (U.S. 2003). Subsequently, the District Court
6 stayed its order and injunction in *McConnell v. FEC*, 253 F.Supp. 2d 18 (D.D.C. 2003).
7 The District Court ruling is on appeal to the United States Supreme Court. *Id.* The
8 Commission has determined that your request for advice is not affected by *McConnell v.*
9 *FEC* because the provisions of the Act underlying this advisory opinion are not challenged
10 in that litigation.

11 Sincerely,

12
13 Bradley A. Smith
14 Vice Chairman
15

16 Enclosures (AOs 1998-1, 1997-12, 1996-24, 1995-23, and 1993-15)