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July 3, 2008

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AOR 2008-07

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RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
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BY HAND DELIVERY

Federal Election Commission
Office of General Counsel
999 E Street, NW
Washington, DC 20463

Re: Request for Advisory Opinion

Dear Commissioners:

On behalf of Senator David Vitter ("Senator") and his principal campaign committee, David Vitter for U.S. Senate ("Committee"), we respectfully request an advisory opinion from the Federal Election Commission ("FEC" or "Commission") pursuant to 2 U.S.C. § 437f of the Federal Election Campaign Act of 1971 ("FECA"), as amended. Our clients seek the Commission's confirmation that the Committee may pay and reimburse the Senator for legal expenses incurred in connection with legal proceedings that (1) involved Senator Vitter tangentially by virtue of his status as a federal officeholder, (2) were the basis of a complaint filed with the Senate Select Committee on Ethics, and (3) did and will continue to engender inquiries and require public responses because of the Senator's status as a federal officeholder and candidate for reelection.

FACTUAL BACKGROUND

On July 9, 2007, the Senator released a public statement regarding the appearance of his phone number in records maintained by Pamela Martin and Associates and Deborah Jeane Palfrey. *See Vitter on 'D.C. Madam' List*, New Orleans Times-Picayune, July 10, 2007. His phone number was one of approximately 15,000 numbers that appeared in the records. *Id.* The records surfaced in a federal prosecution of Ms. Palfrey. *Id.*

Though not a party to the case, the Senator was subpoenaed twice by Ms. Palfrey to testify at a pre-trial hearing and at the trial itself. *See Ana Radelat, Vitter Spared Court Appearance*, Monroe News-Star, Nov. 25, 2007; "Bill Walsh, 'Madam's Trial Opens with Vitter on List", New Orleans Times-Picayune, Apr. 8, 2008". The

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Senator and a military strategist who created the “shock and awe” concept of the Iraq war were the only witnesses subpoenaed to testify at the pretrial hearing whose involvement in the case was limited to the fact that their phone numbers were contained in Ms. Palfrey’s records. *See* Radelat, *supra*; Matt Apuzzo, *Sen. Vitter May Testify In Sex Case*, Associated Press, Apr. 8, 2008; *United States v. Palfrey*, No. 07-46 (GK), at n.5 (D.D.C. Nov. 21, 2007) (Memorandum Order denying motion to dissolve TRO and Protective Order and cancelling Nov. 28, 2007, hearing).¹ The Senator and another public official – a former Deputy Secretary of State – were two of only six people subpoenaed as potential defense witnesses by Ms. Palfrey at her trial. *See* Walsh, *supra*.

Ms. Palfrey’s subpoenas of the Senator and others fit what the Department of Justice called a pattern of “trying to intimidate potential witnesses by exposing them publicly.” Anne Gearan, *Bush Official Linked to Call-Girl Probe*, AP, Apr. 28, 2007; *see also* Carol D. Leonnig, *Alleged Madam Accused of Harassing Witnesses*, Wash. Post, Mar. 20, 2007. By naming them in court documents, Ms. Palfrey “made good on her threat to identify high-profile clients.” Gearan, *supra*. Ms. Palfrey was intent on increasing publicity by targeting her subpoenas to well-known public officials and “vow[ing] not to spend a day in jail ‘because I’m shy about bringing in the deputy secretary of whatever.’” Howard Kurtz, *Madam Story Keeps Mum on Clientele*, Wash. Post, May 5, 2007.

To this end, Ms. Palfrey was wildly successful. Even though the Senator never testified, a Google search conducted on June 12, 2008, of “David Vitter Deborah Palfrey” produced 79,200 hits. By contrast Google searches conducted on the same date of “Paul Huang Deborah Palfrey” and “Christopher Sorrow Deborah Palfrey” – referring to two witnesses who, unlike the Senator, actually testified at the trial – generated only 1,230 and 939 hits, respectively. *See* Paul Duggan, *Four Former Call Girls Testify at Palfrey Trial*, Wash. Post Apr. 9, 2008 (naming government witnesses).

The Senator was forced to retain counsel to defend against Ms. Palfrey’s publicity tactics. After months of monitoring the Palfrey case, the Senator’s counsel attempted to quash the subpoena issued to the Senator to testify at the pre-trial

¹ The other subpoenaed witnesses were individuals with a much more direct connection to the case itself including an attorney for another subpoenaed witness, the Assistant United States Attorney prosecuting the case, and a former employee of Ms. Palfrey’s escort service who was a defendant in a breach-of-contract suit filed by Ms. Palfrey. *Id.*

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hearing. Bill Walsh, *Vitter Is Spared Embarrassing D.C. Testimony*, New Orleans Times-Picayune, Nov. 22, 2007. The court ultimately cancelled the pre-trial hearing concluding that questioning of the subpoenaed witnesses would be improper. *Id.* The Senator's counsel subsequently attempted to quash the subpoena for the Senator's testimony at Ms. Palfrey's trial, but was unsuccessful. See "Bill Walsh, 'Madam's Trial Opens with Vitter on List", New Orleans Times-Picayune, Apr. 8, 2008". However, Ms. Palfrey's attorney did not call any of the six subpoenaed witnesses at the trial. See Bill Walsh, *Vitter Avoids 'Madam' Testimony*, New Orleans Times-Picayune, Apr. 15, 2008.

During this time, the Senator also was compelled to defend against a complaint filed by Citizens for Responsibility and Ethics in Washington ("CREW") with the U.S. Senate Select Committee on Ethics ("Ethics Committee") on July 19, 2007. See Letter from Ethics Committee to Senator Vitter (May 8, 2008) available at http://ethics.senate.gov/downloads/pdf/vitter_050808.pdf. The complaint stated that the Senator's alleged connection to Pamela Martin and Associates violated his official duties pursuant to the Senate ethics rules. *Id.* The Senator mounted a defense against the complaint that the Ethics Committee ultimately dismissed, but only after Ms. Palfrey's trial ended.² The Ethics Committee noted various events that occurred over the course of the trial including the fact that the Senator was not himself charged. *Id.* The Ethics Committee, nonetheless, reserved its "right to reopen an investigation should new allegations or evidence" surface. *Id.*

The legal expenses that are the subject of this advisory opinion request commenced in April 2007. It was at that time that the former Deputy Secretary of State's name surfaced in the connection with Ms. Palfrey's case. Gearan, *supra*. Ms. Palfrey's strategy of dragging public figures into her legal proceedings was evident. Accordingly, the Senator retained counsel to monitor Ms. Palfrey's legal proceedings. Subsequently, the Senator's counsel appeared in the case to quash the subpoenas that had been issued to the Senator.

The Senator's counsel also used the knowledge he obtained while monitoring and participating in the Palfrey legal proceedings to simultaneously assist the Senator and the additional attorneys that the Senator had retained³ in the defense against the

² The Senator retained a separate attorney to appear on his behalf before the Ethics Committee whose fees have already been paid by the Committee and are not the subject of this advisory opinion request.

³ See note *supra*.

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Ethics Committee complaint. The Ethics Committee complaint and investigation were clearly driven by the Palfrey trial. The Senator needed accurate and timely information regarding the trial to defend against the complaint. The legal expenses incurred by the Senator for monitoring and participating in the Palfrey legal proceedings served this purpose as well. Furthermore, the events of the Palfrey legal proceedings had a direct bearing on the outcome of the Ethics Committee investigation. Participation by the Senator's counsel in the legal proceedings was also necessary to attempt to control that outcome.

At the same time, the Senator was the subject of intense press scrutiny regarding both the Palfrey legal proceedings and the Ethics Committee complaint. Again, the Senator's counsel was best positioned to provide guidance on these matters by virtue of the fact that he was monitoring and directly participating in the Palfrey legal proceedings. As a result, the Senator also incurred the legal expenses for this reason.

All of these legal services provided by the Senator's counsel were interrelated both in time and substance. Nonetheless, the Senator has reviewed the bills submitted by his counsel and has determined that roughly \$85,322 in fees were billed to work related to quashing the pre-trial and trial subpoenas. \$31,341.25 in fees were billed to consultations with the Senator and his advisors, including a public relations professional and the attorney who appeared before the Ethics Committee. \$75,212.75 in fees were billed to monitor the Palfrey proceedings. An additional \$15,301.50 in fees was billed for other miscellaneous services provided in connection with representation.

The Senator has already personally paid \$70,000 and the remaining \$137,177.50 is now due. Legal expenses incurred by the other attorney who appeared before the Ethics Committee on the Senator's behalf, are not the subject of this advisory opinion request.

QUESTION PRESENTED

May the Committee pay and reimburse the Senator for the above-described legal fees?

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LEGAL ANALYSIS

The FECA generally permits the use of campaign funds by federal officeholders in connection with their campaigns for federal office, their duties as federal officeholders, or for any other lawful purpose provided that campaign funds are not expended for personal use. *See* 2 U.S.C. § 439a. The FECA explains that campaign funds will be deemed spent for personal use if used “to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate’s election campaign or individual’s duties as a holder of Federal office.” *Id.* § 439a(b)(2).

FEC regulations implementing these provisions specifically address the payment of legal expenses, but state that “[t]he Commission will determine, on a case-by-case basis” whether the legal expenses “would exist irrespective of the candidate’s campaign or duties as a Federal officeholder.” 11 C.F.R. 113.1(g)(1)(ii). In promulgating this regulation, the Commission explained that it would generally defer to the candidate’s or officeholder’s determination of what is a permissible use of campaign funds stating:

The Commission ... reaffirms its long-standing opinion that candidates have *wide discretion* over the use of campaign funds.

Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995) (emphasis added).

The Commission further explained that legal expenses could be paid with campaign funds even if the substance of the underlying dispute does not strictly relate to campaign or official activities, but involves a candidate or officeholder in his capacity as such. *Id.* at 7868 (explaining that campaign funds could be used to pay legal expenses in connection with a contract dispute with a campaign vendor or employment dispute with a staffer). Put another way, legal expenses that would not have been incurred but for an individual’s status as a candidate or officeholder may be paid with campaign funds. The Commission went on to explain that legal expenses incurred irrespective of whether an individual is a candidate or officeholder – even though the legal proceedings may affect his status as such – may not be paid with campaign funds. *Id.* (explaining that a candidate or officeholder’s legal fees in connection with divorce proceedings or charges of driving under the influence of alcohol could not be paid with campaign funds).

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Accordingly, legal expenses that are incurred by a candidate or public official that are predicated solely on the fact that the individual is a candidate or public official may be paid with campaign funds.

The Commission has further explained that legal expenses incurred as a result of an investigation by a congressional ethics committee into alleged violations of congressional rules – including violations that relate to personal conduct – may be paid with campaign funds because congressional committee action is per se related to an officeholder's official duties. *See* FEC Advisory Op. 2006-35 (Kolbe); FEC Advisory Op. 1998-1 (Hilliard).

Similarly, the Commission has concluded that expenses incurred by prominent public officials to manage public perception, develop and prepare public and press responses – including those that relate to events that are personal in nature and in the distant past – may be paid with campaign funds. *See* FEC Advisory Op. 2001-9 (Kerrey). This is true even if the expenses are incurred after a public official leaves office and is not seeking reelection, provided that the underlying issues were raised while the individual was still in office and/or a candidate for office. *Id.*

Lastly, the Commission has recognized that a campaign committee may reimburse a candidate for expenses that could have been otherwise paid by the campaign committee. *See* FEC Advisory Op. 2003-31 (Dayton).

DISCUSSION

1. The Committee may pay or reimburse the legal expenses because the Senator would not have incurred them but for his status as a federal official.

The legal expenses incurred for all of the activities listed above – monitoring the case and quashing subpoenas, assisting in the defense of an Ethics Committee complaint, or advising Senator Vitter in connection with managing press attention and public communications – are the direct result of the Senator holding office.

The Senator was targeted as a witness – and had to incur legal fees – because of his status as a public official. Ms. Palfrey could have subpoenaed any of the other 15,000 individuals whose phone numbers were in her records. Instead she focused on seeking testimony from those people who were public figures.

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Her motivation for doing so was obvious and consistent with her behavior throughout the case as previously noted by the Department of Justice. But for his public office, the Senator would have been in the same position as the thousands of others whose phone numbers were in her records, but who apparently did not possess the same potential to generate negative publicity – as demonstrated by the results of the Google search discussed *supra*. Had he not been a U.S. Senator, he would not have been subpoenaed to testify and would not have incurred the associated legal expenses. Based on the statute and the following FEC advisory opinions, the Committee may pay the legal expenses incurred to monitor and participate in the case because the Senator's involvement was solely predicated on his status as a federal officeholder.

The Senator's expenses are comparable to those incurred by former Senator Bob Kerrey in Advisory Opinion 2001-9. In that case, the former Senator incurred expenses after leaving office in connection with press reports about his conduct in the military during the Viet Nam war. The press coverage was stimulated by virtue of his position as a United States Senator even though the underlying conduct predated any candidacy or his duties as a Senator. The Commission concluded that all of Senator Kerrey's expenses for public relations advice could be paid by his then still existing campaign committee. As the Commission noted, "the recent publicity would not have occurred if Mr. Kerrey had not been a prominent Senator and prominent Federal candidate."

Senator Vitter's situation is nearly identical. The Senator's involvement in the subject-matter of Ms. Palfrey's prosecution was personal in nature and predated his position in the Senate. *See Vitter on 'D.C. Madam' List*, New Orleans Times-Picayune, July 10, 2007. Upon making his July 9, 2007, statement, the Senator's activity was immediately scrutinized vis-à-vis his political and policy positions as a prominent United States Senator. *Id.* The implications for his reelection prospects also became an immediate issue with the director of the state Democratic Party raising the Senator's personal activity in the context of previous campaign promises and other commentators discussing the impact on the Senator's next campaign. *See Mike Hasten, Vitter's Statement Raises More Questions*, Shreveport Times, July 17, 2007.

As the Kerrey Advisory Opinion recognized, officeholders can be the target of publicity solely because of their status. This was the case with Senator Vitter and the other two public figures. None of the other individuals implicated in Ms.

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Palfrey's records were a target of any investigation or a defendant. None of the other individuals were called as witnesses by Ms. Palfrey. As stated by an ABC news correspondent: "They just weren't newsworthy enough." See Kurtz, *supra*.

The Senator's situation differs from that of former Congressman Hilliard and Advisory Opinion 1998-1. In that opinion the Commission limited to 50% the payment of certain legal expenses because they did not "directly relate to allegations arising from campaign or officeholder activity." The legal fees in question were incurred in connection with investigations by government entities into alleged misconduct by businesses and charities associated with Congressman Hilliard. His continuing involvement in the investigations was not dependent on the fact that he was a candidate for office or a public official. In contrast, the Senator's involvement in the Palfrey matter was predicated solely on his status as a United States Senator. Other individuals whose phone numbers appeared in Ms. Palfrey's records who did not have a public profile like the Senator's were not dragged into the legal proceedings and did not incur the related legal fees. Accordingly, 100% of the legal expenses incurred on behalf of the Senator in connection with the Palfrey proceedings may be paid by the Committee.

Furthermore, the legal services provided in the Palfrey proceedings were a critical component to Senator Vitter's defense against the CREW complaint. As evidenced by its letter, the Ethics Committee was monitoring the legal proceedings and the Senator's role. The Senator required legal services to similarly monitor and participate in the proceedings to best defend himself and to respond to the Ethics Committee complaint. Because legal fees associated with an Ethics Committee complaint are *per se* officeholder-related and can, therefore, be paid with campaign funds, the Committee may pay or reimburse all of the legal fees on this basis as well. See FEC Advisory Op. 2006-35 (Kolbe); FEC Advisory Op. 1998-1 (Hilliard).

Finally, the legal services were critical to providing Senator Vitter the guidance necessary to communicate publicly about the case as he continued to serve in the United States Senate and as he prepares to run for reelection. The Senator's counsel monitored the case so the Senator could make informed decisions about how to address publicly the matter as a government official and candidate for reelection. Similarly, his counsel's participation in the case was an effort to respond to and manage the media attention. The Commission in Advisory Opinion 2001-9 allowed Senator Kerrey's campaign committee to expend its funds for the same public



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relations purposes. Accordingly, the Committee can justify paying or reimbursing the legal fees on this additional basis.

2. The Committee may reimburse the Senator for the legal expenses that he has already paid.

Reimbursement by a campaign committee to a candidate is allowed when the candidate is the source of the original payment and the payment could have been paid by the campaign committee in the first instance. See FEC Advisory Op. 2003-31 (approving “[p]ayments by Senator Dayton for other campaign expenses ... that are subsequently reimbursed by the Committee” that are reported “when Senator Dayton is actually reimbursed”). Assuming the Commission agrees with the analysis above that the Committee may pay legal expenses associated with monitoring and participating in the legal proceedings, the Committee may reimburse the Senator for fees already paid.

CONCLUSION

The Senator’s legal expenses for the purpose of (1) monitoring and participating in Ms. Palfrey’s trial and quashing the subpoenas issued to him; (2) assisting in the defense of a Senate Ethics complaint; and (3) making informed decisions about how to manage the case and address it publicly all flow directly from his status as a Senator and candidate. Accordingly, the Senator’s legal expenses were not incurred irrespective of his duties as a public officeholder and the Committee should be permitted to reimburse the Senator and otherwise pay those legal expenses. We respectfully request an advisory opinion confirming the propriety of such payments.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Witold Baran".

Jan Witold Baran
Caleb P. Burns



"Baran, Jan"
<JBaran@wileyrein.com>
07/09/2008 10:08 AM

To AROthstein@fec.gov, "Burns, Caleb"
<CBurns@wileyrein.com>
cc JSelinkoff@fec.gov, SShin@fec.gov
bcc
Subject RE: Advisory Opinion Request

Dear Ms. Rothstein,

Please see our responses below to the points raised in your message. I trust that this provides all the necessary information.

Jan Witold Baran
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006

202.719.7330 (Direct)

202.719.7207 (Fax)

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From: AROthstein@fec.gov [mailto:ARothstein@fec.gov]
Sent: Tuesday, July 08, 2008 2:34 PM
To: Baran, Jan; Burns, Caleb
Cc: JSelinkoff@fec.gov; SShin@fec.gov
Subject: Advisory Opinion Request

Dear Messrs. Baran and Burns:

In our telephone conversation earlier today, you provided us with additional information regarding Senator Vitter's request for an advisory opinion. We have set out below our understanding of certain points that you made during the conversation. Please review the statements below and either confirm their accuracy or correct any misperceptions.

(1) Senator Vitter was subpoenaed by Ms. Palfrey on November 13, 2007 and on March 3, 2008.

CORRECT.

(2) In an effort to quash the subpoenas, the work performed by Senator Vitter's counsel ("counsel") that is the subject of this advisory opinion request included consulting with government attorneys and appearing in court.

CORRECT.

(3) All press commentary and press releases were prepared and delivered by Senator

Vitter's public relations professional or by Senator Vitter after conferring with counsel. Counsel also reviewed all press releases and revised them as necessary.

WE HAVE BEEN ADVISED THAT COUNSEL WAS CONSULTED ABOUT PRESS RELEASES, INCLUDING WORDING, BUT DID NOT REVIEW THE RELEASES IN DOCUMENT FORM.

(4) No further description is available of the "miscellaneous" category of legal fees that appears on page 4 of the advisory opinion request.

WE HAVE BEEN ADVISED THAT THE "MISCELLANEOUS" CATEGORY REFERENCED IN THE REQUEST CONSTITUTES EXPENSES, SUCH AS TRANSPORTATION, PHOTOCOPYING, ETC., AND NOT TO FEES FOR SERVICES.

We would appreciate your response by email. Thank you very much for your cooperation.

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FEDERAL ELECTION COMMISSION

Washington, DC 20463

July 9, 2008

AOR 2008-07

Jan Witold Baran
Caleb P. Burns
Wiley Rein, LLP
1776 K Street, NW
Washington, DC 20006

Dear Messrs Baran and Burns:

Thank you for your letter received in this Office on July 3, 2008, and e-mail of July 9, 2008, requesting an advisory opinion on behalf of David Vitter for U.S. Senate concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations.

In light of the information that you provided to this Office in your e-mail, we find that your inquiry qualified as a complete advisory opinion request as of July 9, 2008. We have given your advisory opinion request a tracking number (AOR 2008-07) and assigned it to Jessica Selinkoff, an Attorney in this Office. Please call Ms. Selinkoff at 202/694-1650 if you have any questions.

This Office will ask the Commission to consider a response to your request at its earliest opportunity. Unless we notify you to the contrary, you can expect to receive a response from the Commission no later than 60 days after we found your advisory opinion request to be complete (that is, no later than September 8, 2008). We will contact you if we need additional information.

Section 437f of the Act (2 U.S.C. 437f) and Part 112 of the Commission's regulations (11 CFR Part 112) provide further information about the advisory opinion process. You can find both the Act and the regulations on the Commission's website, at www.fec.gov, under "Campaign Finance Law Resources."

Sincerely,

A handwritten signature in black ink, appearing to read "Rosemary C. Smith". The signature is stylized and cursive.

Rosemary C. Smith
Associate General Counsel