



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

September 9, 2008

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2008-07

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

Dear Messrs. Baran and Burns:

We are responding to your advisory opinion request on behalf of Senator David Vitter and David Vitter for U.S. Senate (the "Committee") concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), 2 U.S.C. 431 et seq., and Commission regulations to the use of campaign funds for the payment of certain legal fees and expenses incurred by Senator Vitter. The Commission concludes that the Committee may use campaign funds to pay, or reimburse Senator Vitter for his prior payment of, some, but not all, of the legal fees and expenses identified in the request.

***Background***

The facts presented in this advisory opinion are based on your letter received on July 3, 2008, your telephone conversations with Commission staff, your email of July 9, 2008, and publicly available information.

Senator David Vitter of Louisiana is a candidate for reelection in 2010. The Committee is the principal campaign committee of Senator Vitter.

Ms. Deborah Palfrey was indicted by a Federal grand jury in March, 2007 on criminal charges, including money laundering and racketeering. Media reports in the months following Ms. Palfrey's indictment indicated that Senator Vitter's telephone number was in Ms. Palfrey's telephone records. Because of a perception that Ms. Palfrey had a "strategy of dragging public figures into her legal proceedings," Senator Vitter retained counsel ("Subpoena Counsel") in April, 2007 to monitor the Palfrey criminal proceedings (the "Palfrey matter").

On July 5, 2007, the court lifted its prohibition against Ms. Palfrey's release of her telephone records. Media reports indicate that Ms. Palfrey posted her telephone records on the Internet on July 9, 2007. That same day, Senator Vitter issued a public statement concerning the presence of his telephone number in Ms. Palfrey's records.

On July 19, 2007, Citizens for Responsibility and Ethics in Washington requested that the Senate Select Committee on Ethics ("Senate Ethics Committee") investigate Senator Vitter for possible violation of the Senate Rules of Conduct by allegedly soliciting for prostitution. Senator Vitter retained separate counsel ("Ethics Counsel") to defend himself against the Senate Ethics Committee complaint.<sup>1</sup> You represent that Subpoena Counsel periodically consulted with Ethics Counsel and informed Ethics Counsel about the Palfrey matter to assist Ethics Counsel in representing Senator Vitter before the Senate Ethics Committee. The Senate Ethics Committee dismissed the complaint without prejudice on May 8, 2008.

On November 13, 2007, Ms. Palfrey subpoenaed Senator Vitter to testify at a pre-trial hearing. You state that Senator Vitter and another potential witness were the only witnesses subpoenaed for this hearing whose involvement in the case was limited to the presence of their telephone numbers in Ms. Palfrey's records. Specifically, you state that Senator Vitter's phone number was "one of approximately 15,000 numbers that appeared in the records," and that Senator Vitter and another public official were "two of only six people subpoenaed as potential defense witnesses by Ms. Palfrey at her trial." Subpoena Counsel attempted to quash the subpoena. Ultimately, Senator Vitter never had to testify because the court cancelled the hearing.

On March 3, 2008, Ms. Palfrey again subpoenaed Senator Vitter, this time as a trial witness. Although efforts by Subpoena Counsel to quash this second subpoena were unsuccessful, Ms. Palfrey did not call Senator Vitter as a witness. In the attempts to quash both subpoenas, Subpoena Counsel's work included consulting with government attorneys and appearing in court.

In addition to work related to monitoring the trial, quashing the subpoenas, and consulting with Ethics Counsel, Subpoena Counsel also consulted with Senator Vitter and his public relations professional. Senator Vitter also incurred legal fees through Subpoena Counsel's review of press releases.

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<sup>1</sup> The Ethics Counsel's fees are not the subject of this advisory opinion request.

You represent that media coverage of the Senator's involvement with Ms. Palfrey was extensive; that the media coverage included scrutiny of Senator Vitter's political and policy positions as a U.S. Senator; and that the press also discussed the possible effects of Senator Vitter's involvement in the Palfrey matter on his candidacy in 2010.

To date, Subpoena Counsel has billed approximately \$85,322 in legal fees for work relating to quashing the subpoenas; \$31,341.25 in legal fees for Subpoena Counsel's "consultations with the Senator and his advisors," including Ethics Counsel and a public relations professional; \$75,212.75 in legal fees for monitoring the Palfrey matter; and \$15,301.50 for miscellaneous expenses such as transportation and photocopying. Senator Vitter has personally already paid \$70,000 to Subpoena Counsel. You anticipate that Senator Vitter may incur additional legal fees and expenses related to consultations regarding media relations if the Palfrey matter again comes up in the press as Senator Vitter's 2010 reelection campaign progresses.

### ***Question Presented***

*May the Committee use campaign funds to pay counsel for the legal services identified in the advisory opinion request in connection with the Palfrey matter and reimburse Senator Vitter for amounts he has already paid for legal services rendered in connection with the same matter?*

### ***Legal Analysis and Conclusions***

For the reasons discussed below, the Commission concludes that the Committee may use campaign funds to pay for, and reimburse Senator Vitter for his prior payment of, legal fees and expenses incurred by Subpoena Counsel in assisting Ethics Counsel and in press relations in connection with the Palfrey matter. The Commission could not approve a response by the required four affirmative votes with regard to the use of campaign funds to pay legal fees and expenses incurred by Subpoena Counsel in monitoring the Palfrey matter or in Subpoena Counsel's efforts to quash the subpoenas. *See* 2 U.S.C. 437c(c) and 437d(a)(7).

The Act identifies six permissible uses of contributions accepted by a Federal candidate, including otherwise authorized expenditures in connection with the candidate's campaign for Federal office; ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office; and any other lawful purpose that is not "personal use." *See* 2 U.S.C. 439a(a); *see also* 2 U.S.C. 439a(b); 11 CFR 113.2. "[C]andidates have wide discretion over the use of campaign funds." Final Rule and Explanation and Justification, Personal Use of Campaign Funds, 60 Fed. Reg. 7867 (Feb. 9, 1995) ("1995 Personal Use E&J").

Contributions accepted by a candidate may not be converted to personal use by any person. 2 U.S.C. 439a(b)(1); 11 CFR 113.2(e). “Personal use” is “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); *see also* 2 U.S.C. 439a(b)(2). The Commission analyzes, on a case-by-case basis, whether the use of funds in a campaign account for the payment of legal fees and expenses constitutes personal use. *See* 11 CFR 113.1(g)(1)(ii)(A).

The Commission has long recognized that if a 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.” 1995 Personal Use E&J at 7,867. Legal fees and expenses, however, “will not be treated as though they are campaign or officeholder related merely because the underlying proceedings have some impact on the campaign or the officeholder’s status.” *Id.* at 7,868. The Commission has identified legal expenses associated with a divorce or charges of driving under the influence of alcohol as examples of expenses that are personal, rather than campaign or officeholder related. *Id.*

#### *1. Assisting in the Defense of a Senate Ethics Committee Complaint*

Senator Vitter seeks to use campaign funds to pay legal fees for Subpoena Counsel’s consultations with Ethics Counsel, including informing Ethics Counsel about the Palfrey criminal proceeding.

The Commission has previously concluded that efforts to respond to the House Committee on Standards of Official Conduct (“House Ethics Committee”) are directly related to an individual’s duties as a Federal officeholder, and that legal fees and expenses incurred in responding to a House Ethics Committee inquiry or investigation are ordinary and necessary expenses incurred in connection with the duties of a Federal officeholder. *See* Advisory Opinions 2006-35 (Kolbe) and 1998-01 (Hilliard). Accordingly, the Commission has concluded that political committees may use campaign funds to pay legal fees and expenses incurred in responding to inquiries by the House Ethics Committee, even if the allegations before the House Ethics Committee concerned activities unrelated to candidacy and the duties of an officeholder and predated candidacy and holding office. *See* Advisory Opinion 1998-01 (Hilliard); *see also* Advisory Opinion 2006-35 (Kolbe).

The Commission concludes that legal fees incurred in responding to the Senate Ethics Committee should be treated no differently. Just as the Committee could use campaign funds to pay Ethics Counsel for representing Senator Vitter before the Senate Ethics Committee, the Committee could also use campaign funds to pay Subpoena Counsel for assisting Ethics Counsel in that endeavor, particularly given the nexus between the Senate Ethics Committee inquiry and the Palfrey matter. Accordingly, the Commission concludes that the Committee may use campaign funds to pay Subpoena Counsel for legal services described above in connection with the Senate Ethics Committee inquiry. Such use would not be a conversion to personal use because these

legal fees would not exist irrespective of Senator Vitter's duties as a U.S. Senator. *See* Advisory Opinions 2006-35 (Kolbe) and 1998-01 (Hilliard).

*2. Making Informed Decisions about How to Address the Palfrey Matter Publicly*

Senator Vitter wishes to use campaign funds to pay legal fees and expenses incurred when Subpoena Counsel consulted with him and his public relations professional regarding press management and press statements.

The Commission has recognized that "the activities of candidates and officeholders may receive heightened scrutiny and attention in the news media because of their status as candidates and officeholders." Advisory Opinion 1998-01 (Hilliard). The Commission has found that a candidate or officeholder's need to respond to media allegations that result from this elevated scrutiny would not exist irrespective of the candidate's campaign or officeholder status. *Id.* (citing Advisory Opinions 1997-12 (Costello) and 1996-24 (Cooley)). Thus, the Commission has determined that a candidate's authorized committee may use campaign funds to pay certain legal fees and expenses<sup>2</sup> incurred in responding to press inquiries and news stories regarding allegations both related and unrelated to campaign activities and duties as an officeholder. *See* Advisory Opinions 2006-35 (Kolbe), 2005-11 (Cunningham), 1998-01 (Hilliard), 1997-12 (Costello), and 1996-24 (Cooley).

As noted above, you represent that the press closely scrutinized Senator Vitter's involvement in the Palfrey matter. Although the allegations underlying the media's scrutiny were unrelated to Senator Vitter's duties as an officeholder and status as a candidate, you represent that the media scrutinized the Senator's political and policy positions as an officeholder and status as a candidate in 2010 in light of the Palfrey allegations. Senator Vitter's need to respond to the intense media scrutiny regarding the Palfrey allegations would not exist irrespective of his campaign or officeholder duties. The Commission concludes that the Committee may use campaign funds to pay Senator Vitter's legal fees and expenses incurred by Subpoena Counsel in press relations related to the Palfrey matter, including the review of press releases and consultations with a public relations professional.

*3. Monitoring and Participating in Ms. Palfrey's Trial / Quashing the Subpoenas Issued to Senator Vitter*

The Commission could not approve a response by the required four affirmative votes with regard to the use of campaign funds to pay legal fees and expenses incurred in monitoring the Palfrey matter and quashing the subpoenas issued to Senator Vitter. *See* 2 U.S.C. 437c(c) and 437d(a)(7).

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<sup>2</sup> The Commission has allowed a candidate's campaign committee to pay legal fees incurred in preparing press releases, appearing at press conferences, meeting or talking with reporters, reviewing and monitoring media allegations, responding to media requests for comment, and conferring with the candidate or officeholder regarding media allegations. *See* Advisory Opinion 1998-01 (Hilliard).

#### *4. Miscellaneous Expenses*

Senator Vitter also seeks to use campaign funds to pay certain miscellaneous expenses, including transportation and copying. To the extent that Senator Vitter incurred the miscellaneous expenses in connection with assisting Ethics Counsel, and in connection with press relations, as described above, the miscellaneous expenses also may be paid with campaign funds. To the extent that Senator Vitter incurred the miscellaneous expenses in connection with monitoring the Palfrey matter or quashing the subpoenas, the Commission is unable to approve a response by the required four affirmative votes.

#### *5. Reimbursing Senator Vitter for Subpoena Counsel Fees and Expenses*

Senator Vitter seeks reimbursement from the Committee for his personal payment to Subpoena Counsel of \$70,000 of the legal fees and expenses encompassed in this advisory opinion request. The Commission concludes that the Committee may reimburse Senator Vitter for his payment to Subpoena Counsel of those legal fees and expenses that the Commission has determined the Committee could pay with campaign funds. *See, e.g.*, Advisory Opinion 2000-02 (Hubbard).

#### *6. Documentation and Reporting*

The Committee must maintain appropriate documentation of any disbursements made to pay permissible legal expenses in accordance with this advisory opinion. *See* 2 U.S.C. 432(c)(5); *see also* 11 CFR 102.9(b) and 104.11. The Committee must report all funds disbursed for legal fees and expenses as operating expenditures, noting the payee's full name, address, and a detailed description of the purpose of the payment. *See* 11 CFR 104.3(b)(2) and 104.3(b)(4). For legal fees and expenses paid by Senator Vitter and to be reimbursed by the Committee, the Committee must amend its prior reports for the reporting periods during which Senator Vitter made the payments and report Senator Vitter's payments as entries on Schedule D, describing the nature of the debt and the purpose as legal fees to be reimbursed, and including in that description the name and address of Senator Vitter's payee. When the Committee reimburses Senator Vitter, it must report the expenditures on Schedule B, noting the purpose as reimbursement for legal fees and cross-referencing the descriptions on Schedule D.

The Commission expresses no opinion regarding the application of Federal tax law, other law, or the rules of the U.S. Senate to the proposed activities, because those questions are not within the Commission's jurisdiction. The Commission expresses no opinion as to whether Senator Vitter could pay the legal fees and expenses through a legal expense trust established in accordance with the rules of the United States Senate. *See* 11 CFR 113.1(g)(6)(i).

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. All cited advisory opinions are available on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)  
Donald F. McGahn II  
Chairman