



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2009-12

Benjamin L. Ginsberg, Esq.
William J. McGinley, Esq.
Kathryn Biber Chen, Esq.
Patton Boggs, LLP
2550 M Street, NW
Washington, DC 20037

Dear Messrs. Ginsberg and McGinley and Ms. Chen:

We are responding to your advisory opinion request on behalf of Senator Norm Coleman and Coleman for Senate 08 (the "Committee") concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the use of campaign funds for the payment of certain legal fees and expenses incurred by Senator Coleman. The Commission concludes that the Committee may use campaign funds to pay some, but not all, of the legal fees identified in the request.

Background

The facts presented in this advisory opinion are based on your letter received on April 3, 2009, your email of May 8, 2009, and publicly available information.

Senator Coleman ran for reelection as Senator from Minnesota in 2008. The Committee is Senator Coleman's principal campaign committee.

Texas Lawsuit

Most of the legal fees and expenses for which the Committee and Senator Coleman seek to use campaign funds were incurred in matters relating to facts first

alleged in a lawsuit filed in Texas on October 27, 2008 (the “Texas lawsuit”).¹ In the complaint in the Texas lawsuit, Mr. McKim asserts that he is the Chief Executive Officer of Deep Marine Technology, Inc. (“DMT”) and Deep Marine Holdings, Inc. (“DMH”). Mr. McKim, individually and derivatively, sued DMT; DMH; DMT and DMH’s controlling shareholder Nasser Kazeminy; and others. The complaint in the Texas lawsuit alleges that Mr. Kazeminy and others “utilized the companies and their assets as their own personal bank account.” Complaint at 8, *McKim v. Kazeminy*, No. 2008-64385. The complaint in the Texas lawsuit alleges that DMT and DMH’s controlling shareholders engaged in multiple acts of self-dealing, siphoning away tens of millions of dollars from DMH and DMT; disregarded corporate formalities; and ordered corporate funds to be paid to individuals and companies who provided no services, products, or benefit to DMT or DMH. This included an alleged payment of \$6,000 to one of Mr. Kazeminy’s relatives and an alleged payment of \$75,000 to the Hays Companies (“Hays”), an insurance brokerage company that allegedly employed Senator Coleman’s wife. Neither Senator Coleman nor his wife is a party to the Texas lawsuit.

The Texas lawsuit complaint alleges that payments to Hays were ordered in March, 2007, and were made (or attempted to be made) through December, 2007, “for the stated purpose of trying to financially assist United States Senator Norm Coleman.” *Id.* at 10. The complaint alleges that Mr. Kazeminy told DMT’s Chief Financial Officer “that ‘U.S. Senators don’t make [expletive deleted]’ and that he was going to find a way to get money to United States Senator Norm Coleman of Minnesota and wanted to utilize DMT in the process.” *Id.* The complaint in the Texas lawsuit alleges that DMT falsified its books regarding these payments.

Delaware Lawsuit

After the Texas lawsuit was filed, a shareholder derivative action was filed in Delaware on November 3, 2008, against certain officers, directors, and the controlling shareholders of DMH and DMT. *See* Complaint, *FLI Deep Marine LLC v. McKim*, No. 4138-VCN (Del. Ch. Nov. 3, 2008), 2008 WL 4843681 (the “Delaware lawsuit”). The Delaware lawsuit was dismissed on April 21, 2009, on procedural grounds. *See FLI Deep Marine*, No. 4138-VCN, 2009 WL 1204363 (Apr. 21, 2009). The plaintiffs in the Delaware lawsuit alleged that the controlling shareholders had “exploited and looted [DMT and DMH] for personal economic gain”; ignored corporate formalities and reasonable business practices; and breached their fiduciary duties. *Id.* at *1.

The complaint in the Delaware lawsuit, like the one in Texas, raised allegations concerning Senator Coleman. The complaint in the Delaware lawsuit alleged that “Kazeminy is a large donor to Senator Coleman’s campaign and that the two men have vacationed together at Kazeminy’s expense using Kazeminy’s private plane in 2004 and 2005.” Complaint at 6, *FLI Deep Marine*, 2008 WL 4843681 (No. 4138-VCN). Additionally, the complaint in the Delaware lawsuit alleged that news articles reported

¹ *See* *McKim v. Kazeminy*, No. 2008-64124 (129th Dist. Ct., Tex. dismissed Oct. 28, 2008). Although that lawsuit was dismissed the day after it was filed, the plaintiffs refiled their complaint on October 30, 2008. *See* *McKim v. Kazeminy*, No. 2008-64385 (129th Dist. Ct., Tex. filed Oct. 30, 2008).

that “Kazeminy may have paid large bills for clothing purchases at Neiman Marcus in Minneapolis by Senator Coleman and his wife.” *Id.* The complaint in the Delaware lawsuit alleged that Mr. Kazeminy instructed DMT’s Chief Financial Officer to have DMT send quarterly payments to Senator Coleman, stating, ““We have to get some money to Senator Coleman’ because the Senator ‘needs the money.’”” *Id.* The complaint in the Delaware lawsuit alleged that Mr. Kazeminy was informed that such payments to Senator Coleman would be improper and that Mr. Kazeminy then allegedly directed payment from DMT to Hays, the alleged employer of Senator Coleman’s wife. The complaint in the Delaware lawsuit alleged that DMT falsified its books regarding these payments.

Letter to FBI

On November 12, 2008, the Alliance for a Better Minnesota (“ABM”) posted to its website an undated letter it had sent to the FBI asking the FBI to investigate the allegations raised in the Texas lawsuit. ABM asserted that the Texas lawsuit complaint raised possible violations of Federal mail fraud, wire fraud, and money laundering statutes and requested investigation into whether Senator Coleman had “knowledge of the alleged scheme[,] received benefits from it, and properly disclosed and accounted for what might be a substantial gift.” Additionally, ABM requested that the FBI investigate whether Senator Coleman or his family received other undisclosed gifts of clothing, airfare, or other items of value from Mr. Kazeminy in the “alleged scheme [] purportedly to provide an unlawful benefit to a United States Senator.”

Senate Ethics Complaints

Also on November 12, 2008, ABM filed a complaint against Senator Coleman with the Senate Select Committee on Ethics (“Senate Ethics Committee”). ABM alleged that Senator Coleman may have violated Senate gift and disclosure rules and the Ethics in Government Act as a result of the alleged payments from DMT to Hays as described in the complaint in the Texas lawsuit. Additionally, ABM alleged that Mr. Kazeminy “provided Coleman and his family with a private plane for travel to Paris and the Bahamas” and “funded Coleman’s shopping sprees at Neiman Marcus.”²

In addition to the above matters concerning allegations made in the Texas and Delaware lawsuits, Senator Coleman and the Committee also seek to use campaign funds for legal fees and expenses incurred in relation to another complaint filed with the Senate Ethics Committee against Senator Coleman. On July 1, 2008, Citizens for Responsibility and Ethics in Washington (“CREW”) requested that the Senate Ethics Committee investigate whether Senator Coleman had accepted free or discounted lodging for his Washington, D.C. apartment from Jeff Larson, in possible violation of Senate gift rules.

² ABM sent a second letter to the Senate Ethics Committee on December 12, 2008, concerning news coverage of the allegations in the Texas lawsuit, possible FBI interest in the allegations, and a report about extensive renovations to Senator Coleman’s home.

Press

Senator Coleman and the Committee represent that all of the matters described above – the Texas lawsuit, Delaware lawsuit, the FBI investigation, and both Senate Ethics Committee complaints – have generated considerable media interest. Copies of several articles from the Minnesota and national press are attached to the request for an advisory opinion.

Legal Fees and Expenses

Senator Coleman has retained legal counsel to represent him in the above matters. Legal counsel has generated fees in the following capacities: reviewing the CREW and ABM complaints to the Senate Ethics Committee;³ reviewing the letter from ABM to the FBI; monitoring, preparing for Senator Coleman's possible involvement in, and preserving documents for the Texas and Delaware lawsuits; responding to media inquiries concerning the Senate Ethics Committee complaints, the letter to FBI, and the Texas and Delaware lawsuits; and miscellaneous costs. Senator Coleman anticipates incurring additional legal fees and expenses arising from ABM's letter to the FBI, including, should it be necessary, representation in an FBI inquiry into allegations of receiving improper or undisclosed gifts from Mr. Kazeminy.

Question Presented

May the Committee use campaign funds to pay legal counsel for the services described above in connection with the Texas and Delaware lawsuits, the FBI investigation, and the Senate Ethics Committee complaints?

Legal Analysis and Conclusions

For the reasons discussed below, the Commission concludes that the Committee may use campaign funds to pay for the following legal services: reviewing the complaints to the Senate Ethics Committee; reviewing ABM's letter to the FBI; representing Senator Coleman in an FBI investigation of alleged violations of Federal law or rules governing the office of a Senator or the conduct of campaigns; monitoring and representing Senator Coleman in the Texas and Delaware lawsuits; and responding to media inquiries.⁴ The Committee may not, however, use campaign funds to pay for legal services representing Senator Coleman in an FBI investigation of allegations unrelated to Senator Coleman's campaign or duties as a Federal officeholder.

³ The advisory opinion request does not seek an opinion on whether the Committee may use campaign funds to pay legal fees and expenses incurred in representing Senator Coleman in responding to the Senate Ethics Committee's investigations.

⁴ This advisory opinion concerns only the use of campaign funds to pay for the requested legal fees and expenses. Senator Coleman is involved in a continuing recount of the 2008 election. This advisory opinion should not be relied on as allowing the use of recount funds because it does not address the use of recount funds.

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.

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." Explanation and Justification for Final Rules on Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 FR 7862, 7867 (Feb. 9, 1995) ("1995 Personal Use E&J"). 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 7868. 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.*

Reviewing Senate Ethics Committee Complaints

The Committee seeks to use campaign funds for legal fees and expenses incurred in reviewing the Senate Ethics Committee complaints filed against Senator Coleman. The Commission has previously concluded that efforts to respond to the Senate Ethics Committee are directly related to an individual's duties as a Federal officeholder, and that legal fees and expenses incurred in responding to the Senate Ethics Committee's inquiries or investigations are ordinary and necessary expenses incurred in connection with the duties of a Federal officeholder. *See* Advisory Opinion 2008-07 (Vitter); *see also* Advisory Opinions 2006-35 (Kolbe) and 1998-01 (Hilliard) (involving inquiries or investigations by the House Committee on Standards of Official Conduct). Accordingly, the Commission concludes that the Committee may use campaign funds to pay legal counsel to review the various Senate Ethics Committee complaints described in the request. Such use would not be a conversion to personal use because these legal fees would not exist irrespective of Senator Coleman's duties as a U.S. Senator. *See* Advisory Opinions 2008-07 (Vitter), 2006-35 (Kolbe), and 1998-01 (Hilliard).

Reviewing Letter to FBI and Representation in Possible FBI Inquiry

The Committee also seeks to use campaign funds to pay legal fees and expenses incurred in reviewing ABM's letter to the FBI as well as, should it be necessary, in representing Senator Coleman in an FBI inquiry.⁵

The Commission has previously concluded that a candidate's authorized committee may use campaign funds to pay legal fees and expenses incurred in representing a candidate or Federal officeholder before a non-congressional investigation or legal proceeding when the allegations in that investigation are directly related to a candidate's campaign activity or duties as a Federal officeholder. *See* Advisory Opinions 2006-35 (Kolbe), 2005-11 (Cunningham), and 1996-24 (Cooley); *see also* Advisory Opinion 2003-17 (Treffinger) (involving a criminal indictment). In determining the nature of the underlying allegations in those non-congressional investigations, the Commission has looked to whether the inquiry concerns information known to or acquired by the officeholder in the course of conducting his or her official duties, whether the inquiry concerns actions taken by the individual as an officeholder, and whether the allegations relate to conduct that would have occurred irrespective of the candidacy or the officeholder's duties. *See* Advisory Opinions 2006-35 (Kolbe), 2005-11 (Cunningham), and 2003-17 (Treffinger).

The Commission notes that the details of the FBI investigation in the instant inquiry are not public at this time. Indeed, according to press reports, the FBI has neither confirmed nor denied whether it is investigating Senator Coleman. Nonetheless, ABM's letter indicates that, in its efforts to investigate the "alleged scheme [] purportedly to provide an unlawful benefit to a United States Senator," the FBI could inquire into whether Senator Coleman had knowledge of Mr. Kazeminy's and DMT's alleged scheme to divert money to Hays for Senator Coleman's benefit, whether Senator Coleman received a benefit, and whether Senator Coleman properly disclosed and accounted for any gifts, including clothing, airfare, or other items of value from Mr. Kazeminy. Recent press reports indicate that the FBI has questioned at least one person about whether Mr. Kazeminy had purchased clothing on Senator Coleman's behalf.⁶

To the extent that the FBI is investigating or inquiring into allegations that Senator Coleman may have received unreported gifts in violation of Federal law or violated campaign finance law,⁷ the allegations would not exist irrespective of Senator

⁵ The question of whether the Committee may use campaign funds to pay legal fees and expenses incurred in representing Senator Coleman in "any other inquiries or proceedings that may arise out of the same operative facts" as the FBI investigation requested in ABM's letter is, at this time, hypothetical and does not qualify as an advisory opinion request. *See* 11 CFR 112.1(b).

⁶ *See, e.g.,* Sam Stein, *FBI Investigating Coleman in Minnesota*, HUFFINGTON POST, May 13, 2009, http://www.huffingtonpost.com/2009/05/13/fbi-investigating-coleman_n_203204.html.

⁷ *See* 5 U.S.C. 7353 (gratuities); 5 U.S.C. app. 4 secs. 101-11 (gift disclosure); 18 U.S.C. 201 (bribes); *see also* 11 CFR 113.1(g)(6) (third party payments for personal expenses such as clothing); *Senate Ethics Manual*, S. Pub. No. 108-1, at 22-33, 56, 58-59, and 134-35 (2003 ed.), available at <http://ethics.senate.gov/downloads/pdf/manual.pdf>.

Coleman's campaign or duties as a Federal officeholder to comply with the laws and rules governing that office. Accordingly, the Commission concludes that the Committee may use campaign funds to pay counsel for the review of ABM's letter to the FBI and for representing Senator Coleman in the investigation by the FBI into allegations that Senator Coleman violated Federal law or rules governing the office of a Senator or the conduct of campaigns. Such use would not be a conversion to personal use because these legal fees would not exist irrespective of Senator Coleman's duties as a U.S. Senator or candidate for Federal office. *See* Advisory Opinions 2006-35 (Kolbe), 2005-11 (Cunningham), and 2003-17 (Treffinger).

Nonetheless, the details of the FBI investigation are not public at this time and the investigation could involve allegations not related to Senator Coleman's campaign or duties as a Federal officeholder. "The use of campaign funds to pay for [Senator Coleman's] representation in legal proceedings regarding any allegations that are not related to his campaign activity or duties as a Federal officeholder would constitute an impermissible personal use." Advisory Opinion 2005-11 (Cunningham); *see also* 2003-17 (Treffinger) (determining a percentage approach to representation when some counts are related and some unrelated to campaign activity). Accordingly, the Committee may not use campaign funds to pay for legal representation of Senator Coleman with respect to allegations not directly related to his campaign or duties as a Federal officeholder.

Monitoring of, Representation in, and Document Preservation for Texas and Delaware Lawsuits

The Committee also seeks to use campaign funds to pay legal fees for counsel's monitoring of, possible representation of Senator Coleman in, and document preservation for the Texas and Delaware lawsuits.

The complaints in the Texas and Delaware lawsuits allege corporate malfeasance with respect to DMT and DMH in the form of, among other allegations, corporate payments to Hays in the alleged scheme to divert money to Hays for Senator Coleman's benefit. Although the corporate malfeasance causes of action in the Texas and Delaware lawsuits do not, on their face, relate to Senator Coleman's campaign or his duties as a Federal officeholder, the alleged facts are directly related to Senator Coleman's campaign activity or duties as a Federal officeholder.

As discussed above, the Texas and Delaware lawsuit complaints include factual allegations that DMT's controlling shareholder, Mr. Kazeminy, is "a large donor to Senator Coleman's campaign" who wanted "to financially assist United States Senator Norm Coleman." Additionally, the complaint in the Delaware lawsuit alleges that Mr. Kazeminy and Senator Coleman "have vacationed together at Kazeminy's expense using Kazeminy's private plane" and that Mr. Kazeminy "may have paid large bills for clothing purchases at Neiman Marcus in Minneapolis by Senator Coleman and his wife." Thus, these factual allegations relate to Senator Coleman's campaign or duties as a Federal officeholder.

Accordingly, the Commission concludes that Senator Coleman's need to incur legal fees to monitor, preserve documents for, and prepare for possible involvement in the Texas and Delaware lawsuits would not exist irrespective of his campaign or duties as a Federal officeholder. *See, e.g.*, Advisory Opinions 2005-11 (Cunningham), 2003-17 (Treffinger), and 1997-12 (Costello). The Committee may use campaign funds to pay the legal fees and expenses incurred in monitoring, preserving documents for, and representing Senator Coleman in the Texas and Delaware lawsuits.

Responding to Media Inquiries

The Committee also wishes to use campaign funds to pay legal fees and expenses incurred in responding to press inquiries regarding the Texas and Delaware lawsuits, Senate Ethics Committee complaints, and possible FBI investigation.

The Commission has recognized that "the activities of candidates and officeholders may receive heightened scrutiny and attention in the news media." Advisory Opinion 2008-07 (Vitter) (quoting Advisory Opinion 1998-01 (Hilliard)). The Commission has found that a candidate's or officeholder's need to respond to intense media scrutiny would not exist irrespective of the candidate's campaign or officeholder duties. Advisory Opinion 2008-07 (Vitter); *see also* Advisory Opinion 1998-01 (Hilliard) (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 incurred in responding to press inquiries regarding allegations both related and unrelated to campaign activities and duties as an officeholder. *See* Advisory Opinions 2008-07 (Vitter), 2006-35 (Kolbe), 1998-01 (Hilliard), 1997-12 (Costello), and 1996-24 (Cooley).

The request indicates that the media has shown considerable interest in the various allegations against Senator Coleman. Senator Coleman's need to respond to the media's demands for public discussion of the allegations would not exist irrespective of his campaign or officeholder duties. The Commission concludes that the Committee may use campaign funds to pay Senator Coleman's legal fees and expenses incurred in responding to the press regarding the FBI investigation, Senate Ethics Committee complaints, and Texas and Delaware lawsuits.

Miscellaneous Costs and Expenses

The Committee also seeks to use campaign funds to pay certain miscellaneous expenses, including copying and phone calls. To the extent that Senator Coleman incurred the miscellaneous expenses in connection with legal fees the Commission has determined may be paid with campaign funds, the miscellaneous expenses also may be paid with campaign funds. To the extent that Senator Coleman incurred the miscellaneous expenses in connection with legal fees the Commission has determined may not be paid with campaign funds, however, the miscellaneous expenses may not be paid with campaign funds.

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), 104.3(b)(2), 104.3(b)(4), and 104.11.

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.

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)
Steven T. Walther
Chairman