Supplement to AOR 2012-07

Perkins Coie

Marc Erik Elias
PHONE: (202) 434-1609
FAX: (202) 654-9126
EMAIL: MElias@perkinscoie.com

700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
PHONE: 202.654.6200
FAX: 202.654.6211
www.perkinscoie.com

May 1, 2012

BY HAND DELIVERY

Shawn Woodhead Werth
Commission Secretary
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request 2012-07

Dear Ms. Werth:

We are writing on behalf of Feinstein for Senate (the "Committee") in response to the discussion of Advisory Opinion 2012-07 at the April 12, 2012 open meeting. At the meeting, several commissioners asked whether it was possible for the Commission to craft a narrow opinion, which grants the Committee's request without disturbing settled interpretations of the Federal Election Campaign Act (the "Act"). We believe that the Commission can craft such an opinion and should do so here.

I. The Committee Should Be Permitted to Seek Replacement Contributions for All of the Stolen Funds

There are several distinctive features about this case, which allow the Commission to grant the Committee's request in a narrowly-tailored way.

- *First*, the request deals with a clear and unambiguous case of theft, with Ms. Durkee having already entered a criminal plea. It would be reasonable for the Commission to require such clear evidence in any future case, in the form of a criminal plea or conviction, a civil judgment or admission of liability, or a finding by the Commission or a state agency.

- *Second*, all of the funds at issue in the Committee's request were received by Ms. Durkee

after she had devised and begun to implement her fraudulent scheme. This is relevant, because it shows that Ms. Durkee did not receive these funds while acting as an agent of the campaign, but instead did so to further her fraudulent scheme.

- *Third*, the Committee only seeks replacement contributions for this election cycle, not past ones. This fact distinguishes the Committee's request from that submitted by Senator DeConcini, who sought the Commission's approval to treat as debt certain funds that had been embezzled in a previous election cycle.

The question before the Commission is whether funds received by Ms. Durkee and stolen by her before they could be utilized for authorized campaign purposes were "accepted" by the Committee under the Act.[1] The answer to that question turns on whether Ms. Durkee undertook these acts as an "agent" of the Committee. If Ms. Durkee did not act undertake these acts while acting as an agent of the Committee, there would be no basis for the Commission to find that the Committee accepted the funds. For example, if a commercial messenger unaffiliated with the Committee had cashed a donor's check rather than delivering it to the Committee, the donor could replace the check without counting the original attempt against her contribution limit.

It is not enough that Ms. Durkee was an agent of the Committee. To find that the Committee accepted the funds, the Commission must determine that Ms. Durkee undertook the relevant acts *while acting in her capacity as an agent of the Committee*. Under the Commission's regulations, "a principal can only be held liable for the actions of an agent while the agent is acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals."[2] Just as a state party chair who also serves as a national party committeeman may "wear multiple hats," so too can someone in Ms. Durkee's position.

The element of theft distinguishes this case from one where the treasurer merely misused campaign funds. An agent who misuses her prinicipal's funds may still be acting within the scope of her agency. However, an agent who steals her principal's funds is, by definition, acting outside that scope.[3] It is a basic tenet of agency law that an agent "engaged in an independent

---

[1] Ms. Durkee may be found liable for violating the personal use provisions at 2 U.S.C. § 439a. These provisions bar any person from converting contributions or donations to personal use. While the statute could be read to apply only to funds "accepted" by a committee, the Commission has interpreted the statute more broadly to cover all "funds in a campaign account." 11 C.F.R. § 113.2. Therefore, if Ms. Durkee converted funds in the Committee's accounts to personal use, she would be in violation of the Commission's regulations.

[2] Final Rule, Soft Money, 67 F.R. 49064, 49083 (July 29, 2002).

[3] *See* Statement of Reasons of Chairman Michael E. Toner and Commissioner David M. Mason in Mater Under Review 5721 (July 27, 2006), at 2 (an "agent's embezzlement cannot, by definition, be within the scope of the agent's employment.").

course of conduct not intended to further any purpose of the employer" does not create liability for her principal, because the agent's "intention severs the basis for treating [her] act as that of the employer in [her] interaction with the third party."[4] When Ms. Durkee stole the funds, she was engaged in an independent course of conduct to benefit herself and was not acting as an agent of the Committee.

Likewise, Ms. Durkee did not *receive* the funds while acting as an agent of the Committee. Instead, she did so on her own behalf. The timing is particularly relevant here. The U.S. Government concluded that "[f]rom in or about *January 2000 to in or about September 2011* ... [Ms. Durkee] did devise and intend to devise and participate in a material scheme and artifice to defraud clients of Durkee & Associates, and to obtain money from them by means of materially false and fraudulent pretenses, representations, and promises."[5] The Committee is seeking to recover only those funds provided on or after November 8, 2006. Thus, by the time that Ms. Durkee received the first dollar at issue in this request, she had already devised and begun to execute her fraudulent scheme. As a means to conceal the scheme, Ms. Durkee developed a practice of receiving the funds into the Committee's accounts before transferring them to her own accounts.[6] The first act was no less indispensable to the criminal scheme than the second. And both were undertaken by Ms. Durkee on her own behalf, not the campaign's.

These two elements – the uncontroverted evidence of theft and the timing of that theft – establish that Ms. Durkee acted outside the scope of her agency when she received the funds and, as a result, did not accept them on the Committee's behalf. In future cases, it would be reasonable for the Commission to require that the evidence of theft and its timing be uncontroverted, and be part of a criminal plea or conviction, a civil judgment or admission of liability, or a finding by the Commission or a state agency. That would be consistent with how the Commission has handled other requests involving allegations of misconduct, where its conclusion depended on the outcome of a parallel government proceeding.[7]

Finally, it is significant here that the Commission is seeking funds solely for this election cycle, not previous ones.[8] This distinguishes the Committee's request from that made by Senator

---

[4] Restatement (Third) of Agency, § 7.07 (2006), cmt. (b).

[5] Information, *United States v. Durkee*, 2:12-cr-123 (E.D. Cal. Mar. 27, 2012), ¶ 12 (emphasis added).

[6] As we have indicated, we believe that some funds may not have been deposited in the Committee's accounts at all.

[7] *Compare* FEC Adv. Op. 1996-5 (Kim) (requiring refund to original donor or disgorgement to U.S. Treasury where original donor entered guilty plea) and FEC Adv. Op. 1991-39 (D'Amato) (permitting donation to charity where alleged donor denied allegations that he had reimbursed contributions).

[8] We agree with the sentiment expressed by some commissioners that permitting committees to seek funds from previous election cycles would be difficult to administer.

DeConcini in 1989, following the 1988 election cycle. Senator DeConcini did not seek replacement contributions, nor did he contend that the embezzled funds were not accepted by his campaign. Instead, he asked whether funds embezzled by the former treasurer were debts or obligations owed by the campaign, against which additional funds could be raised under the Commission's debt retirement rules. The Commission had little choice but to conclude otherwise, because the facts showed that the embezzled funds were a debt owed *to* his campaign, not a debt owed *by* it.[9] The Commission's response to this very different question bears little relevance to this request.

II. The Committee Should Be Permitted to Seek Replacement Contributions for Funds Not Deposited in a Committee Bank Account

Even if the Commission does not permit the Committee to seek replacement contributions for all funds stolen by Ms. Durkee, it should permit the Committee to seek replacement contributions for funds that were never deposited in a Committee bank account. The Act requires that all funds received by a committee be deposited into a committee bank account.[10] Funds not deposited in accordance with that rule may not be spent by the committee and accordingly have not been accepted by it.[11]

As a result, and as we documented in our original request, the Commission has repeatedly permitted donors to replace contributions that were not deposited in a committee bank account.[12] The argument for doing so here is even stronger. A treasurer who disavows her statutory duty to deposit contributions in the committee's account and, in contravention of the committee's interests, keeps the funds for herself is engaged in an independent course of conduct and is not acting as an agent of the Committee. And, as we have argued, if Ms. Durkee was not acting as an agent of the Committee, there is no basis to conclude that the funds were accepted by it.

III. The Proposed Solicitations Pose No Threat of Actual or Apparent Corruption

We agree that past advisory opinions do not address the situation where, as here, the donor may be asked to write a second check. But we disagree that this feature poses a threat of actual or

---

[9] FEC Adv. Op. 1989-10 (DeConcini) (emphasis in original) ("Any funds that the former treasurer allegedly embezzled or misappropriated are not debts or obligations owed by the '88 Committee."). As the Committee indicated in its initial request, if it recovers any funds from Ms. Durkee in a criminal or civil action, it would make appropriate refunds to ensure that it does not accept more than $2,500 per election from any individual donor.

[10] 2 U.S.C. § 432(h); 11 C.F.R. § 103.3(a).

[11] *Id.*

[12] *See, e.g.* FEC Adv. Ops. 1992-42 (Lewis), 1999-23 (ABPAC), 2000-11 (Georgia Pacific).

apparent corruption. The Supreme Court has found that the corruption problem emerges in "a system of private financing of elections" because a candidate "must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign."[13] In other words, the threat of corruption arises when financial support is provided to a campaign, not when it is merely offered.[14] As we pointed out in our initial comments, the donors who attempted to make contributions, but whose funds were stolen by Ms. Durkee, have not provided the Committee with any resources that it can use to fund a campaign.[15]

In addition, the purported threat of actual or apparent corruption must be weighed against the constitutional right of donors to associate with the Committee. The act of "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate."[16] The donors who attempted to make contributions to the Committee have been denied that right and, absent Commission action, will suffer this constitutional harm for the remainder of the election cycle. The Supreme Court has also found that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates ... from amassing the resources necessary for effective advocacy."[17] The government may restrict contributions, but it may "not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by ... candidates ...."[18] Unfortunately, if the Commission denies this request, campaigns victimized by large-scale thefts could have difficulty amassing the resources necessary for effective advocacy. In sum, the constitutional considerations weigh in favor of granting the request, not denying it.

IV. Granting the Committee's Request Does Not Diminish Incentives for Financial Controls

---

[13] *Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

[14] Otherwise, a candidate who received a check for more than $2,500 per election from a donor could not cure the potential violation by refunding the excess portion. The candidate would be aware that the donor had shown a willingness to part with more than $2,500 per election in support of her campaign, and would be subject to an impermissible threat of actual or potential corruption.

[15] We believe that *Davis v. FEC*, 554 U.S. 724 (2008) is inapposite. In *Davis*, the Court concluded that Congress could not provide certain candidates with one contribution limit, and other candidates for the same office with another contribution limit. But here, the Committee is not asking for a higher contribution limit. It simply asks the Commission to recognize that it never accepted the funds at issue and, thus, those funds do not count against the $2,500 per election limit to which the Committee and all other authorized committees are subject.

[16] *Buckley*, 424 U.S. at 22.

[17] *Id.*, 424 U.S. at 21. *See also Randall v. Sorrell*, 548 U.S. 230 (2006) (invalidating Vermont's contribution limits).

[18] *Buckley*, 424 U.S. at 29.

As we discussed at the open meeting, the Committee sought to professionalize its compliance operation by hiring a well-regarded compliance firm and also went a step further, requesting periodic reports from Ms. Durkee and requiring that other committee personnel authorize disbursements. Most, if not all, viable Senate campaigns entrust their compliance to professional firms, taking these firms at their word that they are complying with the FEC's safe harbor for internal controls. It is unreasonable for the Commission to expect campaign personnel – untrained in compliance, audit procedure, or crime detection – to discover fraudulent schemes that the FEC itself was unable to uncover on its own.[19]

The fact that a committee may have some recourse to recoup stolen funds will not diminish the incentive to adopt sound financial controls in the future. The Durkee ordeal has been a financial whirlwind for the Committee (and other affected committees and nonprofits), wiping out millions of dollars and causing the Committee to incur thousands of dollars in legal and compliance costs. Even if the Committee's request is granted, a certain percentage of donors will choose not to contribute and the funds received from other donors will be offset, in part, by the costs incurred in re-soliciting them. The Commission should not worry for a moment that granting this request will cause committees to relax their guard in the future.

We want to again thank the Commission for providing us with an opportunity to submit further comments in support of the request. We sincerely wish that we were able to provide more information with respect to the specific factual questions posed by the commissioners but, unfortunately, the investigation has not reached the point where we have answers to those inquiries. We are more than willing to answer any further questions that the Commission or the Office of General Counsel may have.

Very truly yours,

Marc E. Elias/JSB

Marc E. Elias
Kate S. Keane
Jonathan S. Berkon
Counsel for Feinstein for Senate

cc: Anthony Herman, General Counsel

---

[19] *See* Adam Martin, *Atlantic Wire*, "'Madoff of Campaign Finance' Has Surprisingly Clean FEC Record," (Sept. 13, 2011), *available at* http://www.theatlanticwire.com/national/2011/09/madoff-campaign-finance-has-surprisingly-clean-fec-record/42429/ (last accessed April 30, 2012).