

RECEIVED

By Office of the Commission Secretary at 10:06 am, Sep 12, 2024



FEDERAL ELECTION COMMISSION
Washington, DC

AGENDA DOCUMENT NO. 24-36-A
AGENDA ITEM
For meeting of September 19, 2024

September 12, 2024

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
Acting General Counsel

Neven F. Stipanovic *NFS*
Associate General Counsel

Robert Knop *RMK*
Assistant General Counsel

Luis Lipchak *LML*
Attorney

Subject: AO 2024-10 (Lowenthal) - Draft A

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00pm (Eastern Time) on September 18, 2024.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2024-10

2
3 Congressman Alan Lowenthal
4 Alan Lowenthal for Congress
5 16633 Ventura Blvd #1008
6 Encino, California 91436

DRAFT A

7
8 Dear Congressman Lowenthal:
9

10 We are responding to your advisory opinion request on behalf of you and your
11 principal campaign committee, Alan Lowenthal for Congress¹ (the “Committee”)
12 (collectively, “Requestors”), concerning the application of the Federal Election
13 Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to
14 Requestors’ proposal to use remaining campaign funds in the Committee’s account to pay
15 a researcher or editor to assist in drafting a book or other publications related to your
16 experience in Congress. The Commission concludes that Requestors’ proposed
17 expenditures to hire a researcher or editor would constitute a prohibited personal use of
18 campaign funds.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter and email
21 received on June 1, 2024, and confirmation email received July 17, 2024, as well as on
22 information from public disclosure reports filed with the Commission.

23 You served in the United States House of Representatives as the representative for
24 California’s 47th congressional district from 2013 to 2023. In January 2023, you retired

¹ See Alan Lowenthal for Congress, Statement of Organization, FEC Form 1 (May 23, 2018), <https://docquery.fec.gov/pdf/608/201805239113319608/201805239113319608.pdf>.

1 from the House of Representatives. You state that you do not plan to campaign for
2 office.

3 You state that former constituents asked you to document your experience as a
4 Congressman in the United States House of Representatives. You intend to hire a
5 researcher and/or editor (“Assistant”) to assist in drafting a book or other publication,
6 such as a series of articles regarding your experience as a congressman. You represent
7 that the Assistant would not be a family member and would not have any duties other
8 than researching and writing the book or other publication described in your advisory
9 opinion request. You confirm that the work product of the proposed Assistant would not
10 have a campaign purpose.

11 Requestors propose three different alternatives. In the first scenario, you would
12 publish a series of articles for which you would not earn a profit. In the second scenario,
13 you would publish a book or other publication and you would earn profits from the
14 publication through publishing advances, sales, and royalties. In the final scenario, you
15 would publish a book or other publication that would generate profits for you, but you
16 would donate all profits to a charitable organization under section 501(c)(3) of the
17 Internal Revenue Code.

18 Under all three scenarios, Requestors expect to hire the Assistant on a flat rate
19 basis. In the first scenario, the payment to the Assistant would be a flat rate per article
20 written. In the second and third scenarios, the payment for the Assistant would be a flat
21 rate for all work on the entire book or other publication.

Requestors seek to pay the Assistant with campaign funds from the Committee. The Committee most recently reported a cash-on-hand balance of \$132,686.83 with no debts or obligations owed by the Committee.²

Questions Presented

1. *May Requestors use campaign funds to pay the Assistant to assist with drafting written content that will not generate any profit for Congressman Lowenthal?*
2. *May Requestors use campaign funds to pay the Assistant to assist with drafting written content that will generate profit for Congressman Lowenthal?*
3. *May Requestors use campaign funds to pay the Assistant to assist with drafting written content that will generate profit for Congressman Lowenthal if he donates all profits to a charitable organization?*

Legal Analysis

No, Requestors may not use campaign funds to pay the Assistant to help Congressman Lowenthal draft a book or other publication. The Commission concludes that the payment to hire the Assistant would be an expense that exists irrespective of your status or duties as a candidate or officeholder and, thus, would constitute the personal use of campaign funds.

The Act and Commission regulations identify five categories of permissible non-campaign uses of campaign funds, including two that are relevant here: the “ordinary

² See Alan Lowenthal for Congress, FEC Form 3 at 2 (July 11, 2024), <https://docquery.fec.gov/pdf/703/202407119653118703/202407119653118703.pdf>.

1 and necessary expenses incurred in connection with duties of the individual as a holder of
2 Federal office”; and “any other lawful purpose” that is not “personal use.”³ Commission
3 regulations specify, however, that any use of funds that would be personal use “will not
4 be considered . . . an ordinary and necessary expense incurred in connection with the
5 duties of a holder of Federal office.”⁴ Conversion to personal use occurs when funds in a
6 campaign account are used “to fulfill any commitment, obligation or expense . . . that
7 would exist irrespective of the candidate’s election campaign or . . . duties as a holder of
8 Federal office.”⁵

9 In 1989, Congress amended the Act to ensure that the personal use prohibition
10 would apply to all current and former members of Congress.⁶ The legislative history of
11 the Ethics Reform Act of 1989 indicates that Congress was particularly interested in
12 prohibiting the conversion of campaign funds to personal use by former officeholders (or
13 their estates) after they have retired, been defeated, or died.⁷ As explained in the
14 legislative history, the Ethics Reform Act of 1989 amended the personal use provision to
15 clarify that it would be impermissible for a former Congress member to use (or, in the

³ 52 U.S.C. § 30114(a)(2), (6); 11 C.F.R. § 113.2(a), (e).

⁴ 11 C.F.R. § 113.1(g)(5).

⁵ 52 U.S.C. § 30114(b)(2); *see also* 11 C.F.R. § 113.1(g).

⁶ *See* Ethics Reform Act of 1989, Public Law 101-194, § 504, 103 Stat. 1716, 1755 (restricting previous grandfather provision that had exempted from personal use rules certain members elected to office prior to 1980).

⁷ *See* 135 Cong. Rec. S15968-69 (daily ed. Nov. 17, 1989) (statement of Senator Nickels).

1 case of a deceased officeholder, have the estate use) campaign funds for personal

2 purposes as essentially “an illegal pension fund.”⁸ .

3 Because you retired in January 2023 and no longer have ongoing duties as a
4 candidate or officeholder, your decision to publish a written work during retirement is a
5 personal choice unconnected to any campaign or officeholder duties. Indeed, you
6 confirmed that the work product of the proposed Assistant would not have any campaign
7 purpose, and that the Assistant would not have any duties other than researching and
8 writing the material as described in your advisory opinion request. The expense to hire
9 the Assistant, therefore, “would exist irrespective of the candidate’s campaign or duties
10 as a Federal officeholder.”⁹

11 Furthermore, the use of campaign funds proposed by Requestors is
12 distinguishable from Advisory Opinion 2001-09 (Kerrey for U.S. Senate). There, a
13 former candidate and officeholder desired to use remaining campaign funds to respond to
14 media coverage focusing on his conduct and particular statements he had made as a
15 candidate and officeholder. The media inquiry faced by Senator Kerrey in retirement
16 commenced while — and demonstrably because — Senator Kerrey was a candidate and
17 officeholder. The inquiry unavoidably continued after Senator Kerrey retired from public
18 office and followed him into private life. The Commission concluded that there was “a
19 direct resultant relationship” between the media inquiry and Senator Kerrey’s “campaigns
20 and officeholder activities.” Because Senator Kerrey’s expenses to address the media

⁸ See 135 Cong. Rec. S15969-70 (daily ed. Nov. 17, 1989) (statement of Senator Shelby).

⁹ 52 U.S.C. § 30114(b)(2); *see also* 11 C.F.R. § 113.1(g).

1 inquiry resulted from his former campaign and officeholder duties, the Commission
2 concluded the expenses were sufficiently necessary and therefore were not incurred
3 irrespective of his status or duties as a candidate or officeholder. Additionally, the
4 Commission stated that the media inquiry at issue was “directly related to Mr. Kerrey’s
5 Federal campaign and officeholder duties.” Indeed, the Commission warned against an
6 overbroad reliance upon the opinion observing that Senator Kerrey’s request presented “a
7 unique situation.”¹⁰

8 In contrast to the *Kerrey* advisory opinion, Requestors seek to use remaining
9 campaign funds during your retirement to publish written works that detail your
10 experience as a congressman. The request does not present the need to respond to a
11 specific legacy matter that began during your past service or campaigns as in *Kerrey*, or
12 caused by your past service or campaigns.

13 The Commission therefore concludes that the expense of hiring an Assistant to
14 draft a book or other publication would exist irrespective of your duties as a candidate or
15 officeholder. Accordingly, your proposal would constitute personal use of campaign
16 funds and would be prohibited under the Act.¹¹

17 This response constitutes an advisory opinion concerning the application of the
18 Act and Commission regulations to the specific transaction or activity set forth in your

¹⁰ Advisory Opinion 2001-09 (Kerrey for U.S. Senate).

¹¹ Because the Commission concludes that using campaign funds to pay for the Assistant would be prohibited under the Act, questions about how proceeds from any publications may be used are moot.

1 request.¹² The Commission emphasizes that, if there is a change in any of the facts or
2 assumptions presented, and such facts or assumptions are material to a conclusion
3 presented in this advisory opinion, then the requestor may not rely on that conclusion as
4 support for its proposed activity. Any person involved in any specific transaction or
5 activity which is indistinguishable in all its material aspects from the transaction or
6 activity with respect to which this advisory opinion is rendered may rely on this advisory
7 opinion.¹³ Please note that the analysis or conclusions in this advisory opinion may be
8 affected by subsequent developments in the law including, but not limited to, statutes,
9 regulations, advisory opinions, and case law. Any advisory opinions cited herein are
10 available on the Commission's website.

11 On behalf of the Commission,

12
13 Sean J. Cooksey,

14 Chairman

¹² See 52 U.S.C. § 30108.

¹³ See *id.* § 30108(c)(1)(B).