



FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 20, 1998

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1998-22

Leo Smith
1060 Mapleton Avenue
Suffield, CT 06078

Dear Mr. Smith:

This refers to your letters dated September 18, September 23, and October 2, 1998, which request advice concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the creation of a web site which supports the election of a Federal candidate.

FACTUAL BACKGROUND

You state that you are registered as an independent voter in Suffield, Connecticut. You are also the sole owner of Capital Ventures Group, LLC ("CVG") and have been involved in creating web sites for different clients as well as one for your own enterprises.¹ You also indicate that, in order to protest House Republican efforts against President Clinton, you have created an Internet web site advocating the defeat of the Republican candidate, Representative Nancy Johnson, in the Sixth Congressional District of Connecticut. The site also advocates the election of her opponent, Democratic candidate Charlotte Koskoff.² You state that the web site is currently active and has been up since September 17, 1998.

You assert that no funds were received or expended to create the Web site. The site is administered and maintained by you personally from your computer.³ You also

¹ You have in the past created web sites for such organizations as the Connecticut State Dental Association and the Connecticut Dental Hygienist Association.

² The web site address is <http://www.e-source.com/koskoff>.

³ You state that you and CVG, the business entity through which you conduct various enterprises, jointly own the computer hardware used to create the site. All of the necessary coding was done by you directly using software that was included with the general "Windows" software package.

state that, as a result of a prior business transaction, you pay no cost for your Internet connection.⁴ The domain name web site is E-SOURCE.COM and is registered with InterNIC in 1996 for a fee of \$100 for the first two years. You state that the fees are now \$35 per year.⁵

You have provided documentation depicting the content of the web site. As you originally constructed it, the site urged viewers to “defeat Nancy Johnson” and “Work to elect Koskoff for Congress.” The site also offered the choice to contribute money or volunteer time to the Koskoff campaign by choosing options on the screen. The option to contribute would lead to an additional screen with the address of the Koskoff campaign to which contributions would be sent. An additional screen also included a form that would allow the viewer to state the amount of the contribution he or she would like to make, as well the type of volunteer work the viewer could choose. When filled out, the form could be sent directly from your web site to the official Koskoff campaign.⁶ Your site also contained the statement: “This web site is posted by a registered Independent voter in the Sixth District. This site is not affiliated with or supported by the official Koskoff for Congress campaign.” The web site also has a link to the electronic mail (“e-mail”) address of Friends of Charlotte Koskoff (“the Koskoff Committee”), the principal campaign committee of Ms. Koskoff.

Your request includes documents indicating some communication between you and the Koskoff Committee regarding its apparent request that you remove the web site. You deny that such a request was made. You do, however, state that Koskoff campaign personnel asked you to correct the spelling of the candidate’s name and to remove references to the use of credit cards for making contributions to the Koskoff campaign. You state that you complied with these requests.

Given the above factual background, you ask whether the Act and Commission regulations require that you include a statement on your web site that identifies you as the sponsor of the web site or the payor of costs related to the site. You also seek advice as to any other reporting obligations that apply to your activity.

ACT AND COMMISSION REGULATIONS

The definition of "expenditure" in 2 U.S.C. §431(9) includes “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made

⁴ In exchange for promoting the services of JavaNet, as the officially recommended Internet service of the Connecticut State Dental Association and the Connecticut Chiropractic Association, you were provided a free Internet hook-up.

⁵ You explain that E-SOURCE.COM was originally established in 1996 as a web site address for overseeing the web sites constructed by you for several trade associations within Connecticut. Later, each association purchased their own URL. Currently the E-SOURCE is used by CVG to display information regarding its services. The \$35 fee to InterNIC for 1998 was paid by CVG. You state that there is no cost or charge for any additional sublistings off the E-SOURCE.COM URL.

⁶ Since your first submission, the form regarding the level of monetary or voluntary support has been removed.

by any person for the purpose of influencing any election for” Federal office. See also 11 CFR 100.8(a)(1). Whenever any person makes an expenditure to finance communications expressly advocating the election or defeat of a clearly identified candidate or soliciting any contribution, and does so through various types of mass media (e.g., a broadcasting station) or via “any other type of general public political advertising,” the communication is required to include a statement of sponsorship or disclaimer. 2 U.S.C §441d, 11 CFR 110.11. The disclaimer must clearly state if the communication has been paid for and authorized by a candidate, or the candidate’s authorized political committee. If the communication is paid for by other persons but authorized by a candidate (including an authorized political committee of a candidate or its agents), the disclaimer shall clearly state that the communication is paid for by those other persons and authorized by such authorized political committee. On the other hand, if the communication is not authorized by a candidate (including an authorized political committee of a candidate or its agents), the disclaimer shall clearly state the name of the person who paid for the communication and state that it is not authorized by any candidate or the candidate’s committee. 2 U.S.C §441d; see 11 CFR 109.3, 110.11(a)(1) and 110.11(a)(5).

APPLICATION TO WEB SITE

Disclaimer requirements

Because of the general availability of access to the Internet, the Commission has concluded that communication via a web site would be considered a form of communication to the general public. See Advisory Opinions 1997-16, 1996-16, 1995-35, 1995-33 and 1995-9. In the past, the Commission has issued advisory opinions requests which entailed the use of the Internet for the endorsement of candidates (Advisory Opinion 1997-16) and the solicitation of political contributions (Advisory Opinions 1995-35 and 1995-9).

The web site would be viewed as something of value under the Act because it expressly advocates the election of a Federal candidate, and the defeat of another Federal candidate.⁷ Therefore, it meets the requirements of 2 U.S.C. §431(9) and 11 CFR 100.8(a)(1). The Commission concludes that the costs associated with the creation and maintaining of the web site, as described in your request, would be considered an expenditure under the Act and Commission regulations.

The Commission has required political advertisements located on a web site to have the proper disclaimer as required by the Act and Commission regulations. See Advisory Opinions 1995-35 and 1995-9. Your web site both expressly advocates the candidacy of Ms. Koskoff and solicits contributions on her behalf. Therefore, it is required to have a disclaimer that meets the requirements of 2 U.S.C §441d and 11 CFR

⁷ While 2 U.S.C. §431(9) is not restricted to express advocacy in every circumstance, communications which do include express advocacy clearly fall with the definition of “expenditure.”

110.11. As part of this disclaimer your statement must indicate your full name. Your statement on the web site that identifies that you as an “independent voter” is insufficient and must be modified to include your full name. It must also include a truthful statement as to whether or not your communication via the web site is authorized by any candidate.

Constitutional considerations

You cite the United States Supreme Court decision in *McIntyre v. Ohio Elections Commission*, 515 U.S. 334 (1995) which, you state, “offered no support for any FEC requirement that disallows anonymous political publications.” Generally, Federal administrative agencies are without power or expertise to pass upon the constitutionality of legislative action. Advisory Opinions 1998-20 and 1992-35 (citing court decisions). Further, the Commission notes the subject of *McIntyre* was an Ohio statute. The Court’s opinion did not reach any issues concerning the constitutionality of 2 U.S.C. §441d. Accordingly, the Commission need not further address that issue in this advisory opinion.

Possible reporting obligations

Given the conclusion that your web site is an expenditure and requires a disclaimer, the issue is also raised whether the Act or Commission regulations impose any reporting obligations as a consequence of your expenditure. You assert that the creation of the web site is without cost to you. The Commission, however, cannot agree with this characterization.⁸ The Commission notes that there are minimal costs associated with creating the web site. Some portion of the previous expenses described in your request could be apportioned to each and every web site that you construct as part of your business. These overhead costs would include, for example, the fee to secure the registration of domain name, the amounts you invested in your hardware, and the utility costs to create the site.⁹

⁸ The Commission notes that a claim that political advertisement directed to the general public entails no cost to the maker would seem to run counter to the perception of the Supreme Court in *Buckley* at 635. The Court observed:

virtually every means of communicating ideas in today’s mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

⁹ Looking at this from a slightly different perspective, the Commission notes that you have created web sites for various non-profit organizations as part of your business. Presumably, part of the fee you would charge your clients would consist of costs incurred in the preparation of these websites. This valuation would be relevant to a determination of the amount of the expenditure for your Koskoff website. Of course, you may exclude from the valuation, the amount representing only your personal services since you could volunteer your uncompensated services to a campaign without any contribution resulting. See 2 U.S.C. §431(8)(B)(ii).

In the circumstances presented, the Commission advises that any reporting requirements would be determined by the valuation of the expenditures. In addition, they would also be determined by whether your website activity was completely independent of the Koskoff campaign, or whether it was done in cooperation, consultation or concert with that campaign. Should the activity qualify as an independent expenditure, you would be required to file reports with the Commission if the total value of your expenditures exceeds \$250 during 1998. 2 U.S.C. §§431(17), 434(c), 441a(a)(7)(B); 11 CFR 109.1, 109.2. In contrast, if your activity were not conducted completely independent of the Koskoff campaign, your expenditures would be reportable by the Koskoff Committee as an in-kind contribution from you. 2 U.S.C. §§431(8)(A)(i), 434(b)(2)(A), 434(b)(3)(A); 11 CFR 104.3(a)(3)(i), 104.3(a)(4)(i), 104.13.¹⁰

This response constitutes an advisory opinion concerning the application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely,

(signed)

Scott E. Thomas
Acting Chairman

Enclosures (AOs 1997-16, 1996-16, 1995-35, 1995-33, and 1995-9)

¹⁰ Your request concerns whether your circumstances require the placement of a disclaimer in your web site. You have not asked whether the expenditures that are the subject of your request would be considered independent or coordinated expenditures given the contacts between you and the Koskoff Committee. Therefore, this opinion will make no determination whether the expenditures to create and maintain the web site are independent or coordinated expenditures.