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ONE HUNDRED EIGHTH CONGRESS

# U.S. House of Representatives

COMMITTEE ON STANDARDS OF  
OFFICIAL CONDUCT

Washington, DC 20515-6328

July 25, 2003

Lawrence H. Norton, General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

*Comment to  
AOR 2003-15*

Re: Advisory Opinion Request 2003-15

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

2003 JUL 28 P 2: 57

Dear Mr. Norton:

As the Chairman and Ranking Minority Member of the House Committee on Standards of Official Conduct, we wish to submit the comments set forth below on the captioned request, which was submitted on behalf of Congresswoman Denise Majette. We hereby request, pursuant to 11 C.F.R. §112.3(b), that the time for comments be extended to enable us to do so.

The subject of the advisory opinion request is Congresswoman Majette's wish to establish, pursuant to regulations issued by the Standards Committee, a Legal Expense Fund for the purpose of paying the legal expenses she has incurred in connection with a particular lawsuit. That lawsuit, *Osburn v. Cox*,<sup>1</sup> raises constitutional and statutory challenges to "crossover voting" in the 2002 Democratic Primary in the 4<sup>th</sup> Congressional District of Georgia, which she won. The request seeks confirmation that the funds raised and spent by the Legal Expense Fund are not "contributions" or "expenditures" as defined in the Federal Election Campaign Act, and hence are not subject to the provisions of the Act.

Our interest in this matter stems from the Committee's responsibility under the Rules of the House of Representatives to oversee and regulate funds established by House Members and staff for the purpose of paying legal expenses related to their status as a candidate or an officeholder. The Committee has exercised this authority for over twenty years – initially through its authority to issue waivers of the House gift rule, and, since 1996, under a specific provision of the gift rule that took effect that year.

Nevertheless, the device of legal expense funds provides a meaningful alternative to Members for the payment of legal expenses only to the extent that the Federal Election Commission deems those funds to be outside the scope of the Federal Election Campaign Act. Put another way, to the extent that the Commission deems contributions to and

<sup>1</sup> Case No. 1:02-CV-2721 (N. D. Ga.).

expenditures from a legal expense fund to be subject to the Act's limitations, prohibitions and disclosure requirements, there is no reason for separate legal expense funds to exist. We are aware that in numerous advisory opinions on legal expense funds that predate the Bipartisan Campaign Reform Act ("BCRA") – opinions that were issued in a variety of circumstances to candidates for office as well as officeholders – the Commission determined that the fund in question was outside the scope of the Federal Election Campaign Act.<sup>2</sup>

It appears that the major question presented here is whether the enactment of BCRA, and specifically 2 U.S.C. §441i(e)(1)(A), requires a different result here. Insofar as Members of the House are concerned, that statute provides that neither a Member nor an entity established or controlled by a Member may solicit or spend funds –

*in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act. (emphasis added)*

With the above background, we wish to make the following points.

First, it is our understanding that in past instances when the Commission considered a fund intended to pay legal expenses incurred in election-generated litigation comparable to that in which Congresswoman Majette has been involved, the Commission determined that the fund was outside the scope of the Federal Election Campaign Act.<sup>3</sup> Accordingly, for the Commission to hold that the fund she now wishes to establish would be subject to the Act would mark a significant change.

We are aware of nothing either in the terms of the BCRA, including 2 U.S.C. §441i(e)(1)(A), or in the legislative history of the Act, that specifically mandates such a change. In our view, the absence of any language specifically limiting the use of legal expense funds, or suggesting an intention to do so, is particularly noteworthy in view of both the long history of use of such funds by members of the House and the extensive set of regulations that govern their use.

In this regard, House authorities that recognize the permissibility of legal expense funds date back at least to 1979. In its Final Report, issued in January of that year, the House Select Committee on Ethics noted that –

a legal defense fund must on occasion be established to assist a Member who does not have the personal financial resources to pay substantial legal

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<sup>2</sup> See, e.g., Advisory Opinions 1996-39, 1983-37, 1983-21, 1982-37, 1982-35B, and 1979-37. In addition, in certain specific circumstances, the Commission has held that a fund was subject to the Act. See, e.g., Advisory Opinion 1981-16 (legal services to ensure compliance with the Federal Election Campaign Act), and Advisory Opinion 1980-57 (litigation to force an opponent off the ballot).

<sup>3</sup> See, e.g., Advisory Opinions 1983-37 and 1982-35B.

expenses incurred in defending a court action arising out of either a contested election or performance of official duties.<sup>4</sup>

Later that year the Federal Election Commission issued the first advisory opinion of which we are aware holding that a legal defense fund established by a House Member – in that instance, for the purpose of defending against criminal charges and Committee proceedings relating to actions taken in the Member's official capacity – was outside the scope of the Federal Election Campaign Act.<sup>5</sup>

Through 1995 the House Standards Committee regulated the legal defense funds of House Members and staff through the House gift rule then in effect, which required a Committee-issued gift rule waiver for the acceptance of any gift of more than \$250 a year from any source (other than a relative).<sup>6</sup> In that period it was the Committee's policy to issue a waiver for the acceptance of contributions to a legal expense fund exceeding \$250 only if certain requirements were satisfied, including the following:

- The fund had to be established as a trust that was administered by an independent trustee,
- Trust funds could be used only for legal expenses, and under no circumstances could a trust beneficiary convert the funds to any other purpose,
- No individual or organization could contribute more than \$5,000 in a single year, and
- Contributions to one's legal defense fund exceeding \$250 in a calendar year had to be reported on the beneficiary's Financial Disclosure Statement.<sup>7</sup>

Standards Committee policy regarding legal expense funds was formalized and elaborated upon subsequent to House approval of a revised gift rule that took effect on January 1, 1996. One of the provisions of that rule, which has been in effect continuously since then, allows a Member or staff person to accept "a contribution or other payment to a legal expense fund established for the benefit" of that individual "that is otherwise lawfully made in accordance with the restrictions and disclosure requirements of the Committee on Standards of Official Conduct."<sup>8</sup> However, the rule explicitly prohibits the acceptance of a contribution or other payment to a legal expense fund from a registered lobbyist or an agent of a foreign principal.<sup>9</sup>

Pursuant to these provisions of the gift rule, on June 10, 1996 the Standards Committee issued a set of Legal Expense Fund Regulations. A copy of those regulations

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<sup>4</sup> *Final Report of the Select Comm. on Ethics*, H. Rep. 95-1837, 95<sup>th</sup> Cong., 2d Sess. 15 (1979).

<sup>5</sup> Advisory Opinion 1979-37.

<sup>6</sup> See, e.g., House Rule 43, cl. 4, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1995).

<sup>7</sup> See *House Ethics Manual*, 102d Cong., 2d Sess. (1992) at 49-50.

<sup>8</sup> House Rule 25, cl. 5(a)(3)(E), 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2003).

<sup>9</sup> *Id.* cl. 5(c)(3).

as currently in effect is enclosed herewith. Among the provisions of the regulations are ones that –

- Define the kinds of matters for which the resulting legal expenses may be paid through a fund,
- Require that any fund be established as a trust that is administered by an independent trustee, *i.e.*, one that has no family, business or employment relationship with the beneficiary,
- Limit use of trust funds to the payment of the subject legal expenses and expenses incurred in soliciting for and administering the trust,
- Limit contributions from any individual or organization to \$5,000 per calendar year,
- Require written approval of the Standards Committee of a completed trust document before any contributions may be solicited or accepted, as well as public disclosure of the trust document,
- Require the filing of publicly available, quarterly reports on donations to and expenditures from the fund, including disclosure of any contribution received from a corporation or labor union, and
- Reiterate the gift rule's prohibition against contributions from either registered lobbyists or agents of foreign principals.

Copies of trust documents approved by the Standards Committee and quarterly reports of contributions and expenditures are made available to the public through the House Legislative Resource Center, which is located in Room B-106 of the Cannon House Office Building. The Legislative Resource Center, which is part of the office of the Clerk of the House, is also the repository of Member, staff and candidate Financial Disclosure Statements.

We believe that the Commission is familiar with the manner in which the rules relating to legal expense funds of House Members are implemented, in that it gave extensive consideration to a Member's Legal Expense Fund in connection with its consideration of Advisory Opinion 2000-40. That opinion indicates that both the Standards Committee's approval letter and the trust document are part of the record of that proceeding.

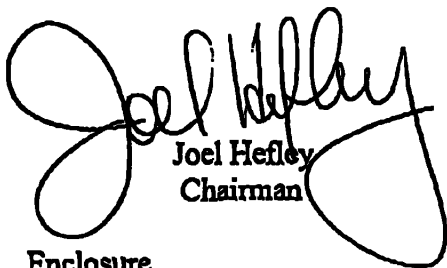
One other point that we wish to address is the availability of campaign funds to pay the legal expenses that a candidate or officeholder incurs in connection with a lawsuit such as the one involved here. It is our understanding that under the provision of the Federal Election Campaign Act on proper use of campaign funds, such legal expenses may be paid with campaign funds. The fundamental test of that provision, which

prohibits the conversion of campaign funds to personal use, is whether the expense involved "would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office."<sup>10</sup> Quite clearly, however, as a matter of logic, the fact that an expenditure of funds would be permissible under this test does not mean that the expenditure would be, in the terms of BCRA, "in connection with an election for Federal office." Put another way, under the Federal Election Campaign Act, the mere fact that particular legal expenses may be paid with campaign funds does not mean that those expenses must be paid with campaign funds, to the exclusion of any other donated monies.

Moreover, for the Commission now to hold, in effect, that the legal expenses at issue here must be paid with campaign funds would raise a concern that the Commission recognized in an advisory opinion issued over twenty years ago: that such a holding could result in a dissipation of campaign funds in the payment of expenses incurred in defending lawsuits and other legal proceedings, thereby reducing – perhaps significantly – the ability of the candidate or officeholder to engage in genuine election-related activities. In that advisory opinion, in which the Commission approved the acceptance of donated legal services by a presidential campaign committee, the Commission noted that a different holding could lead to a situation in which such a committee "would have to use up its expenditure limit (and perhaps its funds as well if donated legal services were not available) in defending law suits, rather than campaigning for the Presidency."<sup>11</sup> In the years since that opinion was issued, the likelihood of candidates and officeholders becoming enmeshed in lawsuits and other legal proceedings has increased significantly, and thus the concern expressed by the Commission then is even more pressing today.

We appreciate having the opportunity to submit these comments on this matter.

Sincerely,



Joel Hefley  
Chairman

Enclosure



Alan B. Mollohan  
Ranking Minority Member

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<sup>10</sup> 2 U.S.C. §439a.

<sup>11</sup> Advisory Opinion 1980-4.

***Legal Expense Fund Regulations*****MEMORANDUM TO ALL MEMBERS, OFFICERS, AND EMPLOYEES<sup>108</sup>**

**From:** Committee on Standards of Official Conduct  
Nancy L. Johnson, Chairman  
Jim McDermott, Ranking Democratic Member

**Date:** June 10, 1996

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The new gift rule exempts "a contribution or other payment to a legal expense fund established for the benefit of a Member, officer, or employee that is otherwise lawfully made in accordance with the restrictions and disclosure requirements of the Committee on Standards of Official Conduct," as long as the contribution is not from a registered lobbyist or an agent of a foreign principal (House Rule 26, clause 5(a)(3)(E)). In light of this new rule, and pursuant to its authority thereunder, the Committee hereby issues regulations explaining its "restrictions and disclosure requirements" for legal expense funds. The regulations set forth below supersede the Committee's prior policies under the old gift rule<sup>109</sup> and take effect as of July 1, 1996. The prior policies remain in effect until that date.

**Legal Expense Fund Regulations**

1. A Member, officer, or employee who wishes to solicit and/or receive donations, in cash or in kind, to pay legal expenses shall obtain the prior written permission of the Committee on Standards of Official Conduct.<sup>110</sup>

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<sup>108</sup>These regulations have been updated in several respects, including to reflect certain Committee policies established after the regulations were originally issued, and the re-numbering of the House Rules that occurred at the beginning of the 106<sup>th</sup> Congress.

<sup>109</sup>See *House Ethics Manual*, 102d Cong., 2d Sess. 49-50 (1992).

<sup>110</sup>Permission is not required to solicit and/or receive a donation in any amount from a relative or a donation of up to \$250 from a personal friend.

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2. The Committee shall grant permission to establish a Legal Expense Fund only where the legal expenses arise in connection with: the individual's candidacy for or election to federal office; the individual's official duties or position in Congress (including legal expenses incurred in connection with an amicus brief filed in a Member's official capacity, a civil action by a Member challenging the validity of a law or federal regulation, or a matter before the Committee on Standards of Official Conduct); a criminal prosecution; or a civil matter bearing on the individual's reputation or fitness for office.
3. The Committee shall not grant permission to establish a Legal Expense Fund where the legal expenses arise in connection with a matter that is primarily personal in nature (e.g., a matrimonial action).
4. A Member, officer, or employee may accept pro bono legal assistance without limit to file an amicus brief in his or her capacity as a Member of Congress; to bring a civil action challenging the validity of any federal law or regulation; or to bring a civil action challenging the lawfulness of an action of a federal agency, or an action of a federal official taken in an official capacity, provided that the action concerns a matter of public interest, rather than a matter that is personal in nature. Pro bono legal assistance for other purposes shall be deemed a contribution subject to the restrictions of these regulations.
5. A Legal Expense Fund shall be set up as a trust, administered by an independent trustee, who shall oversee fund raising.
6. The trustee shall not have any family, business, or employment relationship with the trust's beneficiary.
7. Trust funds shall be used only for legal expenses (and expenses incurred in soliciting for and administering the trust), except that any excess funds shall be returned to contributors. Under no circumstances may the beneficiary of a Legal Expense Fund convert the funds to any other purpose.
8. A Legal Expense Fund shall not accept more than \$5,000 in a calendar year from any individual or organization.
9. A Legal Expense Fund shall not accept any contribution from a registered lobbyist or an agent of a foreign principal.

10. Other than as specifically barred by law or regulation, a Legal Expense Fund may accept contributions from any individual or organization, including a corporation, labor union, or political action committee (PAC).
11. No contribution shall be solicited for or accepted by a Legal Expense Fund prior to the Committee's written approval of the completed trust document (including the name of the trustee). No amendment of the trust document is effective, and no successor or substitute trustee may be appointed, without the Committee's written approval.
12. Within one week of the Committee's approval of the trust document, the beneficiary shall file a copy of the trust document with the Legislative Resource Center (B-106 Cannon House Office Building) for public disclosure.
13. The beneficiary of a Legal Expense Fund shall report to the Committee on a quarterly basis, with a copy filed for public disclosure at the Legislative Resource Center:
- a) any donation to the Fund from a corporation or labor union;
  - b) any contribution (or group of contributions) exceeding \$250 in a calendar year from any other single source; and
  - c) any expenditure from the Fund exceeding \$250 in a calendar year.
- The reports shall state the full name and street address of each donor, contributor or recipient required to be disclosed. Beginning October 30, 1996, these reports shall be due as follows:
- | <u>Reporting Period</u>  | <u>Due Date</u> |
|--------------------------|-----------------|
| January 1 -- March 31    | April 30        |
| April 1 -- June 30       | July 30         |
| July 1 -- September 30   | October 30      |
| October 1 -- December 31 | January 30      |

14. Any Member or employee who established a Legal Expense Fund prior to July 1, 1996 shall make any necessary modifications to the trust document to bring it into compliance with these regulations and shall disclose the trust document with his or her first quarterly report of the 105th Congress on January 30, 1997. Reports of receipts and expenditures shall be due beginning October 30, 1996, as stated in paragraph 13, above.

#### **Use of Campaign Funds for Legal Expenses**

This Committee has stated (in the 1992 *Ethics Manual*) that Members may use campaign funds to defend legal actions arising out of their campaign, election, or the



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performance of their official duties. More recently, however, the Federal Election Commission (FEC) issued regulations defining impermissible personal uses of campaign funds, including using campaign funds for certain legal expenses. Any Member contemplating the use of campaign funds for the direct payment of legal expenses or for contribution to a legal expense fund should first contact the FEC.