

# CREW | citizens for responsibility and ethics in washington

June 22, 2009

Mary W. Dove  
Secretary  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

**BY FAX: 202-208-3333**

Re: Comment on Drafts A and B of Advisory Opinion 2009-12

Dear Ms. Dove:

Citizens for Responsibility and Ethics in Washington (CREW) respectfully requests that the Commission adopt Draft A of Advisory Opinion 2009-12, with one addition, and reject Draft B.

The principal difference between Draft A and Draft B of Advisory Opinion 2009-12 is their treatment of the issue of former Senator Coleman's ability to use campaign funds to pay legal fees for representation in corporate shareholder lawsuits in Texas and Delaware. Draft A concludes that the use of campaign funds for this purpose would be an impermissible conversion of campaign funds to personal use in violation of 2 U.S.C. § 439a(b)(1) and 11 C.F.R. § 113.2(e). Draft A at 11-13. Draft B concludes that the use of campaign funds would be permissible because the factual allegations in the Texas and Delaware lawsuits are directly related to former Senator Coleman's status as a Federal officeholder. Draft B at 11-12.

Draft A's resolution of this issue would be consistent with the Commission's regulations governing the personal use of campaign funds. In contrast, Draft B's approach to this issue would run directly counter to the Commission's rule that campaign funds may not be used to routinely pay legal fees incurred by a Member of Congress merely because the legal action arises during the period of time that he or she holds Federal office.

Regulations require that the Commission make a case-by-case determination as to whether using campaign funds to pay legal expenses constitutes a personal use of campaign funds. 11 C.F.R. § 113.1(g)(1)(ii)(A). Since 1995, it has been the Commission's policy that "legal expenses will *not* be treated as though they are campaign or officeholder related merely because the underlying legal proceedings have some impact on the campaign or the officeholders' *status*." Final Rule and Explanation and Justification, Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7868 (Feb. 9, 1995)(*emphasis added*). The touchstone in deciding whether legal expenses are

Ms. Mary W. Dove  
June 22, 2009  
Page Two

campaign or officeholder related is whether “the expenses at issue resulted from campaign or officeholder *activities*.” *Id.* at 7867 (*emphasis added*).

Draft A makes it abundantly clear the legal fees that former Senator Coleman has incurred with regard to the Texas and Delaware lawsuits are not the result of any *activities* he engaged in either during the campaign or as an Federal officeholder. Rather, both lawsuits allege that a third party sought to channel corporate funds to former Senator Coleman because of his *status* as a United States Senator who, it is asserted, “don’t make [expletive deleted].” There is no allegation in either lawsuit that former Senator Coleman did anything, either as a candidate or as a Federal officeholder, in exchange for these funds. Indeed, neither lawsuit alleges that former Senator Coleman was even aware of the efforts by this third party to direct funds to him. Accordingly, because the legal fees incurred by former Senator Coleman in the Texas and Delaware lawsuits are unrelated to his activities as a Federal candidate or officeholder, Draft A correctly concludes that allowing him to use campaign funds to pay legal fees related to these lawsuits would constitute an impermissible conversion of campaign funds to personal use.

Draft B takes exactly the opposite approach and would allow the use of campaign funds to pay legal fees in lawsuits whose only relationship to former Senator Coleman is the allegation that a third party sought to direct funds to him because of his status as a United States Senator. Such an interpretation runs directly counter to the Commission’s long-standing requirement that campaign funds can only be used to pay expenses that “resulted from campaign or officeholder activities.” *Id.*

Draft A and Draft B do, however, share one common deficiency: both drafts decline to address the issue of whether Coleman for Senate ’08 may use recount funds to pay former Senator Coleman’s other legal fees on the basis that this issue was not raised in the initial advisory opinion request. Draft A at 6, n.5; Draft B at 6, n. 4.

The short answer to the Commission’s decision not to address this important issue is that nothing in the Federal Election Campaign Act or Commission regulations requires the Commission to address only the issue narrowly presented by the requestor. See 2 U.S.C. § 437f and 11 C.F.R. Part 112. The only limitation on the Commission’s power to render advisory opinions is that they may pertain “only to the Federal Election Campaign Act of 1971, as amended, chapters 95 or 96 of the Internal Revenue Code of 1954, or rules or regulations duly prescribed under those statutes.” 11 C.F.R. § 112.4(d). The Commission has previously held that recount funds established by a Federal officeholder or candidate are subject to 2 U.S.C. § 441i(e)(1)(A) and that “any funds solicited, received, directed, transferred, or spent are subject to the amount limitations, source prohibitions and reporting requirements of the Act.” Advisory Opinion 2006-24 at 4. Accordingly, the Commission has the power to address the issue of whether former Senator Coleman may use recount funds to pay his legal fees.

Ms. Mary W. Dove

June 22, 2009

Page Three

More importantly, the issue of whether recount funds may be used by former Senator Coleman to pay his legal fees is properly before the Commission. CREW filed comments on former Senator Coleman's advisory opinion request on May 19, 2009 and noted that the Coleman Minnesota Recount Committee transferred more than \$325,000 to Coleman for Senate '08 between December 12, 2008 and March 31, 2009. "That figure amounts to more than half of the \$469,563.73 Coleman for Senate '08 had in cash-on-hand on March 31, 2009." CREW Comment on Advisory Opinion Request 2009-12 at 2-3 (May 19, 2009). The Commission has previously held that

Recount funds are subject to the limitations, prohibitions, and reporting requirements of the Act, *but they are not in connection with the general election campaign of the Federal candidate because the campaign has ended and because such funds are not otherwise permitted to be used for campaign activity.*

Advisory Opinion 2006-24 at page 9 (*emphasis added*).

Accordingly, CREW requested that the Commission, if it determined that Coleman for Senate '08 could use campaign funds to pay any of the legal expenses specified in Advisory Opinion Request 2009-12, "prohibit Coleman for Senate '08 from using campaign funds derived from the Recount Committee for that purpose." CREW Comment on Advisory Opinion Request 2009-12 at 4 (May 19, 2009).

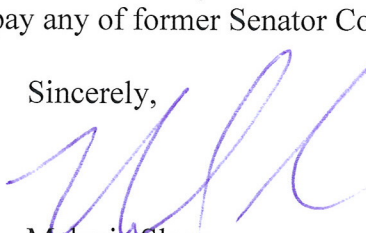
Commission regulations state specifically that "the Commission *shall* accept and *consider* all written comments submitted within the 10 day comment period" before issuing an advisory opinion. 11 C.F.R. § 112.3(e) (*emphasis added*). Refusing to address the issue of whether former Senator Coleman may use recount funds to pay his legal fees because the issue was raised in a comment on Advisory Opinion Request 2009-12 rather than in the advisory opinion request itself hardly constitutes due consideration of CREW's comments. Moreover, establishing a policy of only responding to the issue as narrowly defined by the advisory opinion requestor would allow future requestors to game the system by drafting their requests to solicit only the answer they wish to hear.

Accordingly, CREW respectfully requests that the Commission reject Draft B of Advisory Opinion 2009-12 and approve Draft A with the addition of a paragraph

Ms. Mary W. Dove  
June 22, 2009  
Page Four

admonishing Coleman for Senate '08 not to use any funds derived from the Coleman Minnesota Recount Committee to pay any of former Senator Coleman's legal fees.

Sincerely,



Melanie Sloan  
Executive Director

cc: Rosemary C. Smith  
Associate General Counsel