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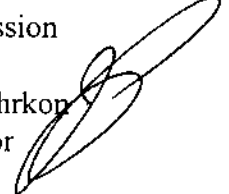
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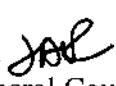
AGENDA ITEM
For Meeting of: 06-12-03

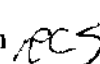
MEMORANDUM


TO: The Commission


THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence H. Norton 
General Counsel

James Kahl 
Deputy General Counsel

Rosemary C. Smith 
Acting Associate General Counsel

Mai Dinh 
Acting Assistant General Counsel

Kevin Deeley 
Staff Attorney

Subject: Draft AO 2003-10

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 12, 2003.

Attachment

DRAFT

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2003-10

Mr. Marc E. Elias, Esquire
Perkins Coie
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

Dear Mr. Elias:

This responds to your letter dated March 31, 2003 requesting an advisory opinion, on behalf of Mr. Rory Reid and the Nevada State Democratic Party (collectively "the Requestors"), concerning application of the Federal Election Campaign Act of 1971 (the "Act"), as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), and Commission regulations to certain fundraising activities that Mr. Reid, Clark County, Nevada Commissioner, plans to undertake on behalf of the Nevada State Democratic Party ("State Party").

Background

According to your request, the State Party is a major political party in Nevada. Nev. Rev. Stat. § 293.128 (2002). The State Party maintains both a Federal account registered with the Commission, and a non-federal account registered with the Nevada Secretary of State. Under Nevada law, the State Party may solicit and accept donations into its non-federal account that are prohibited under the Act, including donations in unlimited amounts from individuals, corporations and labor organizations. The State Party makes donations and disbursements from

1 its non-federal account to support state and local Democratic candidates in Nevada. You state
2 that Rory Reid is a former Chairman of the Nevada State Democratic Party.

3 You state that, on January 6, 2003, Rory Reid was sworn into office as Commissioner of
4 Clark County, Nevada. As Commissioner, he serves on the Nevada Development Authority, the
5 Metropolitan Police Committee on Fiscal Affairs, the Clark County District Board of Health, and
6 the Southern Nevada Water Authority.

7 Rory Reid also is the son of U.S. Senator Harry Reid, the senior U.S. Senator from
8 Nevada. Senator Reid was reelected to another six-year term to the U.S. Senate in the
9 November 1998 general election. In addition to being a current Federal officeholder, Senator
10 Reid is a candidate for re-election to the U.S. Senate from Nevada in the 2004 elections.¹

11 You state that the State Party plans to feature Commissioner Reid prominently when
12 raising non-federal funds. The State Party "will use Commissioner Reid as a draw for its non-
13 federal fundraising events, placing his name on its fundraising invitations and solicitations."
14 Commissioner Reid will "make personal appearances at [State] Party fundraisers and appear as a
15 featured guest or speaker whenever it would benefit the [State] Party for him to do so." "At the
16 party's direction," Commissioner Reid also will "make fundraising calls and personal
17 solicitations of contributors to raise money for the Party's non-federal account." You also
18 indicate that Commissioner Reid "will conduct these activities exclusively on behalf of
19 the [State] Party, and not on the authority of any other person, including Senator Reid."

¹ Senator Reid filed a statement of candidacy in June 1999. "Friends For Harry Reid" is his principal campaign committee. According to its Statement of Organization, Friends For Harry Reid is affiliated with "Nevada Senate 2004," a joint fundraising committee with the Democratic Senatorial Campaign Committee.

Questions Presented:

1. May Commissioner Reid solicit non-federal funds for the Nevada State Democratic Party even though he is the son of a Federal candidate and officeholder?

2. May Commissioner Reid solicit non-federal funds for the Nevada State Democratic Party even if he had raised money on behalf of Senator Reid in the past?

3. Even if Senator Reid were to give Commissioner Reid actual authority to raise federally permissible funds in certain circumstances or at certain events in connection with an election on Senator Reid's behalf, may Commissioner Reid still raise non-federal funds on his own behalf for the Nevada State Democratic Party in other circumstances?

Analysis and Conclusions

The Act, as amended by BCRA, prohibits Federal candidates and officeholders,² or any "agent of a candidate or an individual holding Federal office," from soliciting, receiving, directing, transferring or spending funds in connection with an election for Federal office, including funds for Federal election activity, unless the funds are subject to the limitations, prohibitions and reporting requirements of the Act. 2 U.S.C. 441i(e)(1)(A). BCRA also prohibits Federal candidates, officeholders and their agents from the same activities in connection with an election other than an election for Federal office, and prohibits them from disbursing funds in connection with such an election, unless the funds do not exceed the limitations on contributions to candidates and political committees in section 441a(a) and do not come from prohibited sources under the Act. 2 U.S.C. 441i(e)(1)(B)(i)-(ii).³ *See also* 11 CFR

² Senator Reid holds "Federal office" as defined in 2 U.S.C. 431(3) and 11 CFR 100.4. *See also* 11 CFR 100.2(o).

³ These prohibitions also apply to any "entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of [one] or more candidates or individuals holding Federal office." 2 U.S.C. 441i(e)(1).

1 300.62 (2002). However, notwithstanding these restrictions, BCRA provides that Federal
2 candidates and officeholders “may attend, speak, or be a featured guest at a fundraising event for
3 a State, district or local committee of a political party” even when funds are raised outside the
4 source and amount limitations of the Act (hereinafter “non-federal funds”). 2 U.S.C. 441i(e)(3).
5 *See also* Advisory Opinion 2003-03 (adopting a parallel interpretation for state and local
6 candidate fundraising events at which non-federal funds are raised, provided an appropriate
7 disclaimer is made that the Federal candidate or officeholder is only soliciting federally
8 permissible funds).

9 Several of the prohibitions and restrictions of the Act, as amended by BCRA, apply to a
10 “principal,” such as a political party committee, candidate or officeholder, and to the “agents” of
11 a principal where they act on behalf of the principal. *See, e.g.*, 2 U.S.C. 441i(a)(1) and (2);
12 441i(b)(1); 441i(e)(1). Congress did not define the term “agent” in BCRA. 67 Fed. Reg. 49064,
13 49082 (July 29, 2002).

14 The Commission promulgated regulations to define “agent” as used in Title I of BCRA.
15 The regulations define an “agent” of a Federal candidate or officeholder to mean “any person
16 who has actual authority, either express or implied,” “to solicit, receive, direct, transfer or spend
17 funds in connection with any election.” 11 CFR 300.2(b)(3). The accompanying Explanation
18 and Justification emphasizes that: “a principal cannot be held liable for the actions of an agent
19 unless (1) the agent has actual authority, (2) the agent is acting on behalf of his or her principal,
20 and (3) the agent is engaged in one of the specific activities described.” 67 Fed. Reg. at 49,083.
21 The Commission made clear that under BCRA, the definition of agent “does not apply to
22 individuals who do not have any actual authority to act on their [principal’s] behalf, but only
23 ‘apparent authority’ to do so.” *Id.* at 49,082.

1 The Commission also noted in the Explanation and Justification that “[i]t is necessary . . .
2 to define ‘agent’ to include implied and express authority in order to fully implement Title I
3 of BCRA. Otherwise, agents with actual authority would be able to engage in activities that
4 would not be imputed to their principals so long as the principal was careful enough to confer
5 authority through conduct or a mix of conduct and spoken words.” *Id.* However, “a principal
6 may not be held liable, under an implied actual authority theory, unless the principal’s own
7 conduct reasonably causes the agent to believe that he or she had authority Once an agent
8 has actual authority, however, “[u]nless otherwise agreed, authority to conduct a transaction
9 includes authority to do acts which are incidental to it, usually accompany it, or are reasonably
10 necessary to accomplish it.” *Id.* at 49,083 (quoting Restatement (Second) of Agency, 35; other
11 citation omitted).

12 1. *May Commissioner Reid solicit non-federal funds for the Nevada State*
13 *Democratic Party even though he is the son of a Federal candidate and officeholder?*

14 Nothing in the FECA as amended by BCRA, or the Commission’s regulations, bars
15 Commissioner Reid from soliciting non-federal funds solely by virtue of the fact that his father is
16 a Federal candidate and officeholder. Accordingly, the Commission concludes that
17 Commissioner Reid is not an “agent” of Senator Reid solely because they are father and son. As
18 explained above, an agent of a Federal candidate or officeholder is someone who has actual
19 authority, either express or implied, “to solicit, receive, direct, transfer, or spend funds in
20 connection with any election.” 11 CFR 300.2(b)(3). As the Explanation and Justification for the
21 Commission’s definition of “agent” in 11 CFR 300.2(b) makes clear, the “definition of ‘agent’ . .
22 . does not apply to individuals who do not have actual authority to act on their behalf.”

23 67 Fed. Reg. at 49082. It is not enough that there is some relationship or contact between the

1 principal and agent; rather, that agent must be acting on behalf of the principal to create potential
2 liability for the principal. Thus, the father-son relationship alone is insufficient to create an
3 agency relationship.

4 2. *May Commissioner Reid solicit non-federal funds for the Nevada State*
5 *Democratic Party even if he had raised money on behalf of Senator Reid in the past?*

6 You state that Commissioner Reid may have “carried out some fundraising activity for
7 Senator Reid in the past” and “raised money on Senator Reid’s behalf.” The State Party and
8 Commissioner Reid thus seek confirmation that Commissioner Reid would not be considered the
9 “agent” for Senator Reid within the meaning of 2 U.S.C. 441i(e) “even if Commissioner Reid
10 had carried out some fundraising activity for Senator Reid in the past.”

11 The Commission’s definition of agent is limited to when a person is acting pursuant to
12 “actual authority” from the Federal candidate or officeholder. 11 CFR 300.2(b). Assuming that
13 Commissioner Reid had raised money on Senator Reid’s behalf and that there was a prior agency
14 relationship between Commissioner Reid and his father, this past agency relationship would not
15 by itself prohibit Commissioner Reid from raising non-federal funds for the State Party. If
16 Commissioner Reid does not have actual authority to act on behalf of Senator Reid when
17 soliciting non-federal funds for the State Party in the future, the Commission concludes that any
18 past actions in raising Federal or non-federal funds by Commissioner Reid on Senator Reid’s
19 behalf would not, by themselves, bar Commissioner Reid from assisting the State Party in raising
20 non-federal funds in the future.

21 3. *Even if Senator Reid were to give Commissioner Reid actual authority to raise*
22 *federally permissible funds in certain circumstances or at certain events in connection with an*

1 *e'lection on Senator Reid's behalf, may Commissioner Reid still raise non-federal funds on his*
2 *own behalf for the Nevada State Democratic Party in other circumstances?*

3 You suggest that Commissioner Reid might "carry out some fundraising activity on
4 behalf of Senator Reid in some circumstances in the future." You correctly acknowledge that
5 "[i]f Senator Reid were to grant Commissioner Reid actual authority to raise funds at a particular
6 event on his behalf, that authority would extend to all acts incidental to that fundraising activity,
7 or that usually accompany it or are reasonably necessary to accomplish it." You also state,
8 however, that "Commissioner Reid's agency relationship with the Senator would be limited to
9 those activities only." His efforts assisting the State Party will be "exclusively on behalf of the
10 Party, and not on the authority of any other person, including Senator Reid."

11 The facts set forth in the Request describe two explicit agency relationships – one
12 between the Senator and Commissioner Reid, and the other between the State Party and
13 Commissioner Reid. As discussed in the Explanation and Justification, the Commission's
14 definition of "agent" contemplates a dual-agency situation.

15 Under the Commission's final rules defining 'agent,' a principal
16 can only be held liable for the actions of an agent when the agent is
17 acting on behalf of the principal, and not when the agent is acting
18 on behalf of other organizations or individuals. Specifically, it is
19 not enough that there is some relationship or contact between the
20 principal and agent; rather, that agent must be acting on behalf of
21 the principal to create potential liability for the principal. This
22 additional requirement ensures that liability will not attach due
23 solely to the agency relationship, but only to the agent's
24 performance of the prohibited acts for the principal."

25
26 67 Fed. Reg. at 49,083.

27 As long as Commissioner Reid solicits non-federal funds in his own capacity as a state
28 official of Nevada and exclusively on behalf of the State Party, and not on the authority of any

1 Federal candidate or officeholder, including Senator Reid, the fundraising activities will not be
2 attributed to any Federal candidate or officeholder for purposes of 2 U.S.C. 441i(e). State party
3 officials who also serve on national party committees may “wear multiple hats” and “raise non-
4 Federal funds for their State party organizations without violating the prohibition against non-
5 Federal fundraising by national parties.” 67 Fed. Reg. at 49,083. Similarly, Commissioner Reid,
6 as a prominent state official in Nevada, may at different times act in his capacity as an agent on
7 behalf of the State Party and act as an agent on behalf of Senator Reid. If his fundraising is
8 “exclusively on behalf of the Party” and not on the authority of Senator Reid, Commissioner
9 Reid may raise non-federal funds for the State Party.

10 This response constitutes an advisory opinion concerning the application of the Act and
11 Commission regulations to the specific transaction or activity set forth in your request. *See*
12 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or
13 assumptions presented and such facts or assumptions are material to a conclusion presented in
14 this opinion, then the Requestors may not rely on that conclusion as support for their proposed
15 activity.

16 The Commission notes that this advisory opinion analyzes the Act, as amended by the
17 Bipartisan Campaign Reform Act of 2002 (“BCRA”), and Commission regulations, including
18 those promulgated to implement the BCRA amendments, as they pertain to your proposed
19 activities. On May 2, 2003, a three-judge panel of the United States District Court for the
20 District of Columbia ruled that a number of BCRA provisions are unconstitutional and issued an
21 order enjoining the enforcement, execution, or other application of those provisions. *McConnell*
22 *v. FEC*, 251 F.Supp.2d 948 (D.D.C. May 2, 2003); *stay granted by* 2003 WL 21146609 (D.D.C.
23 May 19, 2003); *appeal docketed*, No. 02-1674 (U.S. May 16, 2003). Subsequently, the District

1 Court stayed its order and injunction. *Id.* The District Court ruling has been appealed to the
2 United States Supreme Court. *Id.* The Commission cautions that the legal analysis in this
3 advisory opinion may be affected by the eventual decision of the Supreme Court.

4
5
6 Sincerely,

7
8
9 Bradley A. Smith
10 Vice-Chairman

11
12 Enclosure (AO 2003-03)