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October 9, 2003

AGENDA ITEM
For Meeting of: 10-16-03

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

James A. Kahl
Deputy General Counsel

Rosemary C. Smith
Acting Associate General Counsel

John C. Vergelli
Acting Assistant General Counsel

Richard Ewell
Staff Attorney

Subject: Draft AO 2003-25

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 16, 2003.

Attachment

ADVISORY OPINION 2003-25 [Draft]

Neil Reiff, Esq.
Sandler, Reiff & Young, P.C.
50 E Street, S.E.
Suite 300
Washington, D.C. 20003

DRAFT

Dear Mr. Reiff:

This refers to your letter dated August 7, 2003, as supplemented by your letters and e-mails dated August 19 and 22, 2003, and September 4, 2003, on behalf of Indiana State Representative Jonathan Weinzapfel and the Weinzapfel for Mayor Committee ("the Weinzapfel Committee"), requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to advertisements to be run by the Weinzapfel Committee that will feature U.S. Senator Evan Bayh's endorsement of Mr. Weinzapfel for Mayor of Evansville, Indiana.

Background

Mr. Weinzapfel is currently a member of the Indiana House of Representatives. He is the Democratic nominee in the November 3, 2003 general election for Mayor of Evansville, Indiana. Mr. Weinzapfel has established a campaign committee under Indiana law, the Weinzapfel Committee. You state that, under Indiana law, the committee is permitted to accept donations from individuals and Indiana political committees that are not amount-limited. The Committee may also accept limited donations from corporations and labor organizations. *Indiana Code* 3-9-2-4(7).

1 Senator Bayh is currently a candidate for re-election in 2004. He has designated
2 the Evan Bayh Committee as his principal campaign committee. The primary election for
3 the office Senator Bayh currently holds is scheduled to take place on May 4, 2004.
4 Wishing to capitalize on Senator Bayh's name recognition and popularity in
5 Evansville, the Weinzapfel Committee seeks to produce and pay for a television
6 advertisement featuring the Senator. You state that the advertisement will not solicit
7 donations to the Weinzapfel or Bayh campaigns, nor will it include any campaign
8 materials prepared by Senator Bayh or his campaign, or agents of either. You further
9 indicate that, other than Senator Bayh's appearance, neither Senator Bayh, his agents, or
10 his committees will prepare any materials for use in the advertisement or provide
11 campaign materials to the Weinzapfel campaign. The Weinzapfel Committee does not
12 expect that any conduct undertaken in connection with the advertisement will satisfy any
13 of the coordination conduct standards set forth at 11 CFR 109.21(d). You assume,
14 however, that Senator Bayh or his representative will review the final script "for
15 appropriateness" in advance of the Senator's appearance in the advertisement.
16 You state that the Weinzapfel Committee intends to broadcast this advertisement
17 in October and early November of this year. In this context, you have provided the script
18 and storyboard for the television broadcast advertisement featuring Senator Bayh
19 endorsing Mr. Weinzapfel for Mayor. You add that no other communication by or
20 regarding Senator Bayh (*i.e.*, no on-screen graphics or other communicative content such
21 as a sign in the background) will be included. Also, no speaker other than Senator Bayh
22 will be heard in the advertisement. However, you note that Senator Bayh will have an
23 opportunity to review the script of the advertisement prior to the airing of the
24 advertisment.

The advertisement would appear as follows:

Weinzapfel for Mayor
"COMMITTED" (TV / 30 seconds)

Scene 1: [The screen consists of an image of Senator Bayh in front of a solid blue background with part of an American flag behind his right shoulder. The words "Senator Evan Bayh" appear in white in the lower right corner.]

Sen. Bayh: Hi. I'm Evan Bayh. Over the past few years, I've come to know Jonathan Weinzapfel very well.

Scene 2: [The screen consists of an image of Mr. Weinzapfel, pointing offscreen. Mr. Weinzapfel is accompanied by two men wearing hard hats, and a construction crane and building are visible in the background.]

Sen. Bayh: We've worked together . . . .

Scene 3: [The screen consists of an image of Senator Bayh in front of a solid blue background with part of an American flag behind his right shoulder.]

Sen. Bayh: And I've seen first-hand how committed he is to making Evansville a better city.

Scene 4: [The screen consists of an image of Mr. Weinzapfel outdoors with three people and a tree in the background. The words "Working to cut taxes" appear in the lower right corner.]

Sen. Bayh: From working to cut taxes . . .

Scene 5: [The screen consists of images of a girl and Mr. Weinzapfel looking off screen. The words "Protect kids from drugs" appear in the lower portion of the screen.]

Sen. Bayh: . . . to passing a law that protects our kids from drugs . . .

Scene 6: [The screen consists of an image of Mr. Weinzapfel pointing towards construction girders while a man with a hard hat looks on.]

Sen. Bayh: . . . . Jonathan Weinzapfel knows how to get the job done.

Scene 7: [The screen consists of an image of Senator Bayh in front of a solid blue background with part of an American flag behind his right shoulder.]

Sen. Bayh: He's got a bipartisan, common-sense way of solving problems.

Scene 8: [The screen consists of an image of Senator Bayh in front of a solid blue background with part of an American flag behind his right shoulder. The words "Weinzapfel. Mayor." appear in the lower right corner.]

Sen. Bayh: He cares about what really matters to people. And he's exactly the kind of Mayor Evansville needs.

1 ***Legal Analysis and Conclusions***

2 *Question 1. May the Weinzapfel Committee use funds that comply with Indiana law but*
3 *that do not comply with the amount limitations, source prohibitions, and reporting*
4 *requirements of the Act to pay for the production and airing of the "Committed"*
5 *advertisement, which features Senator Evan Bayh's endorsement of Jonathan Weinzapfel*
6 *for Mayor of Evansville, Indiana?*

7 As set forth below, the Weinzapfel Committee may use non-federal funds to pay
8 for the "Committed" advertisement because the "Committed" advertisement does not
9 promote, support, attack, or oppose a clearly identified candidate for Federal office within
10 the meaning of 2 U.S.C. 431(20)(A)(iii) and 441i(f), and 11 CFR 100.24(b)(3).

11 On November 6, 2002, the Bipartisan Campaign Reform Act of 2002 (Pub. L.
12 107-155 (Mar. 27, 2002)) ("BCRA") took effect. Under the Act, as amended by BCRA, a
13 public communication[1] that clearly identifies[2] a Federal candidate, and that "promotes,
14 supports, attacks, or opposes"[3] a Federal candidate, constitutes "federal election activity"
15 (FEA), whether or not the communication expressly advocates a vote for or against a
16 Federal candidate, and regardless of when the public communication is broadcast,
17 distributed, or otherwise publicly disseminated. 2 U.S.C. 431(20)(A)(iii); 11 CFR

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[1] "Public communication" is defined in 2 U.S.C. 431(22) as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising." Under 11 CFR 100.26, the term public communication shall not include communications over the Internet.

[2] The term "clearly identified" means "the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or 'the incumbent,' or through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for Senate in the State of Georgia.'" 11 CFR 100.17.

[3] Neither Congress or the Commission has defined the phrase "promotes, supports, attacks, or opposes."

1 100.24(b)(3).[4]

2 Candidates for State or local office and individuals holding State or local office
3 must spend only Federal funds for a "public communication that refers to a clearly
4 identified candidate for Federal office (regardless of whether a candidate for State or local
5 office is also mentioned or identified), and that promotes or supports any candidate for
6 that Federal office, or attacks or opposes any candidate for that Federal office (regardless
7 of whether the communication expressly advocates a vote for or against a candidate)." 11
8 CFR 300.71. Non-Federal funds, that is, funds that do not comply with the limitations,
9 prohibitions, and reporting requirements of the Act, may not be spent for such an
10 advertisement. 2 U.S.C. 441i(f). A State or local candidate, or a State or local
11 officeholder, may spend non-Federal funds for a public communication in connection
12 with an election for State or local office that refers to a clearly identified Federal
13 candidate so long as the communication does *not* promote, support, attack, or oppose any
14 candidate for Federal office. 2 U.S.C. 441i(f)(2); 11 CFR 300.72.

15 The "Committed" advertisement, as contemplated by the Weinzapfel Committee,
16 qualifies as a "public communication" because it will be broadcast via television to the
17 general public. 11 CFR 100.26. "Committed" will clearly identify Senator Bayh, a
18 Federal candidate. 2 U.S.C. 431(18) and 11 CFR 100.17. Thus, the critical question
19 (under section 441i(f)) is whether the "Committed" advertisement promotes, supports,
20 attacks, or opposes Senator Bayh.

21 The Commission concludes that it does not. Under the plain language of the
22 FECA, the mere identification of an individual who is a Federal candidate does not

[4] Such public communications constitute one type of "federal election activity;" the others are not relevant here. *See* 11 CFR 100.24(b)(1), (2), and (4).

1 automatically promote, support, attack, or oppose that candidate. Sections
2 431(20)(A)(iii) and 441i(f) expressly set forth separate requirements that a
3 communication must "refer to a clearly identified candidate" *and* "promote, support,
4 attack, or oppose" that candidate in order to constitute Federal election activity. *See also,*
5 11 CFR 100.24(b)(3), 300.71, and 300.72. It is a settled rule of statutory construction that
6 each word and phrase in a statute is intended to have "particular, nonsuperfluous
7 meaning." *Bailey v. United States*, 516 U.S. 137, 146 (1995). While Senator Bayh may
8 benefit, as an incidental matter, from appearing in the "Committed" advertisement in that
9 it may increase his name recognition in Evansville, Indiana, six months before the
10 primary election, the salient features of this advertisement, taken together, point to an
11 endorsement of the mayoral candidate, and not directly or indirectly to the re-election of
12 Senator Bayh.

13 Congress, in passing BCRA, specifically contemplated communications paid for
14 by a State or local candidate and referring to a Federal candidate's endorsement of a State
15 or local candidate. One of BCRA's principal sponsors, Senator Feingold, explained that
16 the relevant BCRA provisions would not prohibit "spending non-Federal money to run
17 advertisements that mention that [state candidates] have been endorsed by a Federal
18 candidate or say that they identify with a position of a named Federal candidate, so long
19 as those advertisements do not support, attack, promote or oppose the Federal candidate."
20 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002).

21 In determining that the advertisement does not promote, support, attack, or oppose
22 a Federal candidate, the Commission notes that Senator Bayh does not refer to himself as
23 a Federal candidate, nor is he identified in any manner other than "Evan Bayh" and
24 "Senator Bayh." All references to positions on issues are characterized as Mr.

1 Weinzapfel's positions, and not as those of Senator Bayh. Senator Bayh states his own
2 opinion of Mr. Weinzapfel's character, but never mentions his own views or
3 qualifications for the office of U.S. Senator. In addition, the advertisement ends with the
4 words that the Commission construes as an exhortation to elect Mr. Weinzapfel as mayor
5 of Evansville, Indiana: "Weinzapfel. Mayor."

6 The Commission further notes the absence of any statements about Senator
7 Bayh's record or position or views on any issue (other than Mr. Weinzapfel's
8 qualifications for mayor), or on the Senator's character, or his qualifications or fitness for
9 Federal office, or his party affiliation. Nor are audio/visual techniques employed to
10 influence the audience's views of Senator Bayh as a candidate. Nor does the
11 advertisement contain any solicitation of funds, or any reference to any other Federal
12 candidate or any political party.

13 Because the "Committed" advertisement would not promote, support, attack, or
14 oppose a candidate for Federal office, the Weinzapfel Committee may use non-federal
15 funds to finance the advertisement. The Commission emphasizes, however, that its
16 consideration of the various factors described above is limited to the situation presented
17 by your request. The presence or absence of any one of these factors, or any particular
18 combination of these factors, is not necessarily determinative of whether a different
19 communication promotes, supports, attacks, or opposes a clearly identified Federal
20 candidate. Other factors, such as the presentation of policy issues or opinions that appear
21 closely associated with a Federal candidate's campaign, could be relevant in other
22 situations.
23

1 *Question 2. Does the Weinzapfel Committee's payment for the "Committed"*
2 *advertisement constitute an in-kind contribution to Senator Bayh?*

3 The Commission concludes that the payment for "Committed" is not an in-kind
4 contribution to Senator Bayh. Congress has defined one type of in-kind contribution as
5 an expenditure made by any person "in cooperation, consultation, or concert, with, or at
6 the request or suggestion of" a candidate. 2 U.S.C. 441a(a)(7)(B)(i). Congress expanded
7 this definition in BCRA to include expenditures made by any person "in cooperation,
8 consultation, or concert, with, or at the request or suggestion of" a political party
9 committee or its agents. 2 U.S.C. 441a(a)(7)(B)(ii). Other than this expansion, this
10 definition of a contribution did not change.

11 Congress did, however, direct the Commission to replace its pre-BCRA
12 regulations on "coordinated general public political communications" (*see* former 11
13 CFR 100.23) with new regulations to provide further guidance regarding 2 U.S.C.
14 441a(a)(7)(B)(i) and (ii) contributions in the context of communications. The
15 Commission's "coordinated communication" regulation at 11 CFR 109.21 implements
16 this directive by setting forth a three-pronged test: 1) the communication must be paid for
17 by a person other than a Federal candidate, a candidate's authorized committee, or
18 political party committee, or any agent of any of the foregoing; 2) one or more of the four
19 content standards set forth in 11 CFR 109.21(c) must be satisfied; and 3) one or more of
20 the five conduct standards set forth in 11 CFR 109l(d) must be satisfied. A payment for a
21 communication satisfying all three prongs "satisfies the statutory requirements for an
22 expenditure in the specific context of coordinated communications, and thereby
23 constitutes a contribution under 2 U.S.C. 441a(a)(7)(B)(i) and (ii)." Final Rules and
24 Explanation and Justification for Coordinated and Independent Expenditures, 68 *Fed.*

1 *Register* 421, 427 (Jan. 30, 2003). If one or more of the three prongs are not met, then the
2 communication is not a coordinated communication. If "Committed" satisfies all three
3 prongs with respect to Senator Bayh, then the payment for "Committed" would be an in-
4 kind contribution to Senator Bayh. 11 CFR 109.21(b)(1).

5 The Weinzapfel Committee is not a Federal candidate, so its payment for
6 "Committed" would satisfy the "payment source" prong. 11 CFR 109.21(a)(1).

7 The Commission further concludes that, despite your assertion to the contrary,
8 "Committed" would satisfy the conduct standard in 11 CFR 109.21(d) in light of Senator
9 Bayh's appearance in the "Committed" advertisement. The conduct standard is satisfied
10 if, among other things, the Federal candidate, the candidate's authorized committee, or
11 one of their agents is "materially involved" in a decision regarding one or more listed
12 aspects of the creation, production, or distribution of a communication. 11 CFR
13 109.21(d)(2). Given the importance of and potential campaign implications for each
14 public appearance by a Federal candidate, it is highly implausible that a Federal candidate
15 would appear in a communication without being materially involved in one or more of
16 the listed decisions regarding the communication. *See* 11 CFR 109.21(d)(2).[5] In fact,
17 your request explicitly assumes that Senator Bayh or his representative will review the
18 final script in advance "for appropriateness." To suggest that a candidate may personally
19 approve the content of an advertisement without satisfying the conduct standard in
20 109.21(d)(2) would be to obviate that section of the regulations.

21 The Commission concludes, however, that the "Committed" advertisement does
22 *not* meet the content standard. A communication will satisfy the content standard if the

[5] It is also likely that the candidate or his or her agent would engage in one or more substantial discussions with the person paying for that communication. 11 CFR 109.21(d)(3).

1 communication: 1) is an electioneering communication as defined in 11 CFR 100.29; 2)
2 disseminates, distributes, or republishes, in whole or in part, campaign materials prepared
3 by a Federal candidate, the candidate's authorized committee, or their agents; 3) expressly
4 advocates the election or defeat of a clearly identified candidate for Federal office; or 4) is
5 a public communication, as defined in 11 CFR 100.26, that refers to a clearly identified
6 candidate for Federal office, is publicly distributed or disseminated within one hundred
7 and twenty days of an election for Federal office, and is directed to voters within the
8 jurisdiction of the clearly identified candidate. 11 CFR 109.21(c)(1) through (4).
9 "Committed" does not appear to expressly advocate the election or defeat of Senator
10 Bayh or any other Federal candidate. You have indicated that "Committed" will not
11 contain any campaign materials prepared by Senator Bayh or his campaign, and there is
12 nothing portrayed in the storyboard to suggest otherwise.[6] Furthermore, "Committed" is
13 not an "electioneering communication," as defined in 11 CFR 100.29, because you state
14 in your request that the communication will not be broadcast after November 2003, well
15 before the sixty-day period before the Federal elections in Indiana. Likewise,
16 "Committed" cannot satisfy the remaining content standard because it will not be publicly
17 distributed or disseminated within one hundred and twenty days of a Federal election.
18 Thus, "Committed" is not a coordinated communication within the meaning of 11 CFR
19 109.21 and no contribution would result under 2 U.S.C. 441a(a)(7)(B)(i) or 11 CFR
20 109.21(b). To the extent that the contribution analysis in Advisory Opinion 1982-56 is
21 inconsistent, it is superseded.

[6] The Commission also notes that the absence of any campaign material prepared or provided by Senator Bayh, his authorized committee, or their agents, precludes a contribution under 11 CFR 109.23.

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

7 The Commission notes that this advisory opinion analyzes the Act, as amended by
8 BCRA, and Commission regulations, including those promulgated to implement the
9 BCRA amendments, as they pertain to your proposed activities. On May 2, 2003, a three-
10 judge panel of the United States District Court for the District of Columbia ruled that a
11 number of BCRA provisions are unconstitutional and issued an order enjoining the
12 enforcement, execution, or other application of those provisions. *McConnell v. FEC,* 251
13 F.Supp. 2d 176 (D.D.C. 2003); *prob. juris. noted,* 123 S.Ct. 2268 (U.S. 2003).
14 Subsequently, the district court stayed its order and injunction in *McConnell v. FEC,* 253
15 F. Supp. 2d 18 (D.D.C. 2003), pending review by the Supreme Court. The Supreme
16 Court heard oral arguments on *McConnell v. FEC* on September 8, 2003. The
17 Commission cautions that the legal analysis in this advisory opinion may be affected by
18 the eventual decision of the Supreme Court.

19 Sincerely,

20

21 Bradley A. Smith

22 Vice Chairman