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Swan Street Bldg., Core 1, ESP
12223-1650
(518) 474-6220
Fax: (518) 486-4068

FAX TRANSMISSION COVER SHEET

Date: November 1, 1995
To: Bradley Litchfield, Esq.
Fax: 202-219-3923
Re: Determination & Opinion
Sender: Stanley Zalen

Background for
AOR 1995-41

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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

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In the Matter of the Complaint of
the Times Union, Rochester, New York

Background for
AOR 1995-41

FINAL
DETERMINATION
FC89-7

v.

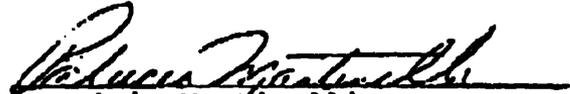
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The Committee to Elect John Bouchard
to Congress and John Bouchard
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WHEREAS, a complaint having been filed by the Times Union, Rochester, New York against John Bouchard and his campaign committee, the Committee to Elect John Bouchard, that a poll conducted by that committee and released to the press had not been filed in accordance with §6201.2 of the Fair Campaign Code of the State Board of Elections. (9NYCRR 6201.2), the Board having determined that a hearing was warranted, a hearing having been conducted on January 8, 1990, and findings of fact and conclusions of law having been issued by the hearing officer on August 21, 1990;

NOW THEREFORE, it is the determination of the Board that based upon substantial evidence, John Bouchard and the Committee to Elect John Bouchard violated §6201.2 of the Fair Campaign Code by failing to file the Committee's opinion poll within 48 hours after its disclosure; and

NOW THEREFORE, this Board assesses a fine of \$300 jointly and severably against John Bouchard and the Committee to Elect John Bouchard and orders that they pay said fine.


Patricia Martinelli

DATED: September 7, 1990

NEW YORK STATE
BOARD OF ELECTIONS
1984 OPINION #1

DATE: MAY 3, 1984

QUESTION PRESENTED:

With reference to disclosure and polling of public opinion polls:

- [Handwritten initials: DJ]*
- [Handwritten bracket around question (1)]*
- (1) Under what circumstances, if any, are the provisions of 9 NYCRR §6201.2 applicable to candidates for federal office?
 - (2) If the person is not an announced candidate but releases the results of his or her "testing the waters" poll must the results be filed pursuant to the Fair Campaign Code provision 9 NYCRR §6201.2 or is there an exclusion for "testing the waters" polls since he or she is not yet a candidate?
 - (3) If there is a "testing the waters" poll exclusion what are the parameters of that exclusion? Is the exclusion lost if a person formally becomes a candidate and continues to use the poll to further his or her candidacy? What if he or she formally becomes a candidate, and publicly points to the poll as a basis for his or her decision to run but does not use it for any other purpose?
 - (4) If one person commissions or contracts for the poll but a different person or organization pays for the poll must the name of both parties be filed pursuant to paragraph (a) of §6201.2 of the regulations. Must the name of each person contributing toward the payment of the cost of the poll be filed?
 - (5) If a group of corporations fund a "testing the waters" poll with the intent of using the results to urge a certain person to run for a specific office, is the funding of the poll to be deemed a corporate contribution to that person from each corporation? What if that person runs for a different office perhaps a federal office where corporate contributions are barred? Suppose that person never becomes a candidate for any office? If a different person learns of the poll results and uses them to further his or her candidacy, is it a contribution to that person? Does it make a difference if the original poll subject has no knowledge of the poll until it is concluded? Alternatively, suppose the person consents to having the poll conducted?
 - (6) What is the difference, if any, between the information required to be filed under paragraph (c) of section 6201.2 which asks for "the numerical size of the total poll sample" and paragraph (g) which asks for "the number of persons in the poll sample"?
 - (7) If a person is required to file the poll with the Board must he or she file the results of the entire poll or only the results of the poll questions released to the general public? If only the specific questions made public need be filed, what is the meaning of 9 NYCRR §6201.2 paragraph (h) which asks that "the results of the poll" be filed? Further, if only the questions made public need be filed does paragraph (d) which asks the "numerical sequence" of the questions mean the sequence of the released and filed questions vis-a-vis each other or the sequence of the released questions vis-a-vis all the questions in the entire poll whether or not released?
 - (8) Is a candidate required to file poll results if the poll was designed strictly for internal campaign use and is shown only to campaign staff members yet is somehow leaked to the media and thus published? Does the answer to that question change if the "leak" can be shown not to have been against the wishes of the campaign committee? (If so who has the burden of proof?) Suppose the results of the poll found their way into print via an act of political espionage? If, in any of the above situations, the results must be filed, what safeguards exist to prevent a political opponent from fabricating results of the poll, leaking them for publication and attributing them to the opponent's campaign, thus requiring the opponent to file the true results?
 - (9) Does the answer to any part of question eight change if the true poll results are shown by a candidate to volunteer staff and advisers as well as the candidate's paid staff and

consultants? To the candidate's campaign supporters as well as the candidate's staff? To potential supporters as well as supporters? To political leaders such as party chairmen as well as potential supporters? To opponents as well as to political leaders?

DISCUSSION:

Section 6201.2 of the Rules and Regulations of the State Board of Elections sets forth the filing requirements for public opinion polls. That section states:

§6201.1 . Use of Public Opinion Polls .

No candidate, political party or committee shall attempt to promote the success or defeat of a candidate by directly or indirectly disclosing or causing to be disclosed the results of a poll relating to a candidate for such an office or position, unless within 48 hours after such disclosure, they provide the following information concerning the poll to the board or officer with whom statements or copies of statements of campaign receipts and expenditures are required to be filed by the candidate to whom such poll relates?

- (a) The name of the person, party or organization that contracted for or who commissioned the poll and/or paid for it.
- (b) The name and address of the organization that conducted the poll.
- (c) The numerical size of the total poll sample, the geographic area covered by the poll and any special characteristics of the population included in the poll sample.
- (d) The exact wording of the questions asked in the poll and the sequence of such questions?
- (e) The method of polling—whether by personal interview, telephone, mail or other.
- (f) The time period during which the poll was conducted.
- (g) The number of persons in the poll sample; the number contracted who responded to each specific poll question; the number of persons contracted who did not so respond.
- (h) The results of the poll.

In response to the first question, the Board is of the opinion that since the regulation refers to "the course of any campaign . . ." the provisions of the regulation apply to all campaigns conducted in New York State where the intent is to influence the voters of the State. There are no federal laws, rules or regulations known to the Board which would supersede the regulation of the New York State Board of Elections.

With regard to the second question, the Board is of the opinion that a "testing the waters" poll is excluded from the poll filing requirements because the person is not yet seeking the nomination nor is the person a candidate for office. However, the mere fact that a person has not officially announced his or her candidacy does not prevent the person from being considered as a candidate if the person's actions show that he or she is in fact a candidate. Such determination of candidacy must be made on a case by case basis.

In answer to the third question, the Board is of the opinion that the exclusion provided for in a "testing of the waters" poll is lost if the person becomes a candidate and uses the poll to further his or her candidacy. Even if the person only cites the results of the poll as the reason for his or her decision to seek office and does not use the poll after that disclosure, the poll must be filed because once the person has declared his or her candidacy and is, from the point on, in the course of seeking the nomination or election, the disclosure of any poll by the candidate, political party or political committee must be filed in accordance with the rule.

The Board is of the opinion that the fourth question should be answered in the affirmative. The rule is clear that if one person commissions or contracts but a different person or organization pays for a poll, the name of both parties must be filed pursuant to §6201.1(a) of the Rules and Regulations. The name of each person contributing toward the cost of the poll must be filed if each contributes separately toward the payment. However, if several people contribute to a committee which pays for the poll, only the name of the committee must be filed because the contributors to the committee will be reported on the financial disclosure reports filed by the committee pursuant to Article 14 of the Election Law.

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In regard to question five, the Board is of the opinion that if a corporation or group of corporations funds a "testing of the waters" poll in order to urge a certain person to run for public office, such funding would not be a contribution to that person. Since a "testing of the waters" poll is conducted before a person takes any steps toward seeking the nomination or election to office, any expenditure by a corporation for such a poll would not be a contribution to a person but the corporate expenditure would be for political purposes and must be included in that \$5,000 limitation on corporate expenditures for political purposes in accordance with the provisions of section 14-116(b) of the Election Law. However, if the person becomes a candidate and uses the poll to promote his or her candidacy, it would be considered as a contribution to that candidate or the candidates' committee. As to that part of question five which asks what the effect would be if the person runs for federal office where corporate contributions are barred, the Board does not have authority to interpret federal election laws as they relate to federal candidates. The Federal Election Commission is the proper authority to answer such a question.

In answer to the sixth question, the information required under subdivision (c) of section 6201.2 sets forth the total number of persons polled, the geographic area and any special characteristics of the population. The information required under subdivision (g) once again asks for the same total as in (c) but requires a breakdown on how the people who made up that total responded to the poll questions.

In response to the seventh question, the Board is of the opinion that once the results of a poll have been disclosed, the candidate need only file the results of the poll questions released to the public. The candidate must also file those questions in the poll which are related to the results disclosed, including those questions which are asked preparatory to the question which is the basis of the results disclosed. Subdivision (d) of section 6201.2 requires that the sequence of the questions be set forth so that the preparatory questions to the main question will be shown to indicate how those preparatory questions may have influenced the answer to the main question upon which the results are based.

With regard to the eighth question, the Board is of the opinion that the results of a poll must be filed even if the poll was designed strictly for internal use but is "leaked" to the media and published. The fact that a campaign committee does not have control over its members would not relieve the committee from the requirement that the results of a poll must be filed once the results have been disclosed. If the results of a poll are fabricated by an opponent in an attempt to force the candidate to file the true results of the poll, the candidate or the proper committee may file a statement with the filing officer stating that the results disclosed are not the true results of the poll. The filing officer will conduct a confidential investigation to determine if the results released are the true results which must be disclosed. If the true results are disclosed via an act of political espionage, the poll must be filed but the candidate or the proper committee would have a valid complaint under section 6201.1(a) of the Rules and Regulations of the State Board of Elections which prohibit practices of political espionage.

Finally, in answer to question nine, once the results of the poll are disclosed for the purpose of promoting or opposing a person's candidacy for office, the results must be filed. If the results are shown only to the campaign staff, advisers or consultants, whether volunteers or paid, the results need not be filed. However, once the results are disclosed beyond the immediate campaign staff, advisers and consultants, the results must be filed because any revealing of poll results beyond such campaign committee level would be deemed to be for the purpose of promoting the success or defeat of a candidate.

This opinion is limited to the facts contained in the questions presented for review and is not intended to be a broad interpretation of the regulation. Circumstances concerning the requirement to file a public opinion poll must be decided on the merits of each individual case.

STATE BOARD OF ELECTIONS