

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

Oct 1 4 05 PM '98



FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 1, 1998

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Acting Staff Director

FROM: Lawrence M. Noble *LN*
General Counsel

N. Bradley Litchfield *NBL*
Associate General Counsel

Jonathan M. Levin *JL*
Senior Attorney

Subject: Draft AO 1998-18

AGENDA ITEM
For Meeting of: 10-8-98

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 8, 1998.

Attachment

1 ADVISORY OPINION 1998-18

DRAFT

2
3 Joseph E. Sandler
4 Neil P. Reiff
5 Sandler & Reiff, P.C.
6 6 E Street, S.E.
7 Washington, D.C. 20003

8
9 Dear Mr. Sandler:

10
11 This responds to your letters dated August 10 and September 3, 1998, on behalf of
12 the Washington State Democratic Committee (the "State Party"), requesting an advisory
13 opinion concerning the application of the Federal Election Campaign Act of 1971, as
14 amended ("the Act"), and Commission regulations to payments for a poll conducted for
15 "testing the waters" purposes.

16 I. *Background*

17 In May 1998, the State Party contracted for a polling firm to conduct a poll of
18 voters for a particular congressional district in the State of Washington. You state that
19 the poll was for the purpose of testing the prospects of an individual who was considering
20 the idea of a candidacy for the Democratic nomination for the U.S. House of
21 Representatives. The poll results were received by the State Party and disclosed to both
22 the individual and the Democratic Congressional Campaign Committee ("DCCC") in
23 early June 1998. They have not been shared with or disclosed to any person running for
24 Federal office, or the authorized committee of any such person. Ultimately, the potential
25 candidate decided not to run for Congress or any other office in the 1998 election cycle.¹
26 You state that the potential candidate had never publicly manifested any interest in
27 running for the Congressional seat, and thus there was no occasion for him to announce
28 that he would not seek the nomination.

29 The poll was conducted by a random telephone survey and responses were
30 received from 400 persons. The poll consisted of 17 questions of which three were
31 demographic. The remaining 14 are described as follows: five questions testing the
32 Republican incumbent candidate head to head against the individual whose prospects
33 were being tested; one question testing the favorability of the incumbent, the potential

¹ The filing deadline for primary ballot access for a House candidacy in the State of Washington was July 31, 1998, and the primary election date was September 15.

1 candidate, President Clinton, Speaker Gingrich, other Democratic and Republican
2 leaders, and a particular industry; one testing approval of President Clinton, the State's
3 two U.S. Senators, the State's Governor, the potential candidate, the Republican House
4 candidate, and the Republicans in Congress; two questions, one with six sub-parts and
5 one with five sub-parts, testing reaction to various statements about the Republican
6 House candidate and the potential candidate; one question testing the ideological
7 characterization of those two individuals; one question asking generically as to which
8 party the responding person would vote for in a Congressional election; one question
9 asking the respondents of their impression of the direction of the country; one question
10 asking about the likelihood that the respondent would vote; and one question asking
11 about the likelihood that the voter would vote by mail.

12 The State Party has received the invoice for the poll and the cost of the poll is
13 \$8,000. You ask whether the State Party should pay for the poll using only funds from its
14 Federal account, i.e., only from funds subject to the Act's limitations and prohibitions;
15 whether the State Party may instead apply the allocation rules at 11 CFR 106.5 and pay
16 for the poll from both Federal and non-Federal accounts; or whether it may pay for the
17 poll entirely from funds not subject to the Act's limitations and prohibitions. You
18 premise the last two options on the fact that the potential candidate never became a
19 candidate.²

20 II. *Applicable Law*

21 The Act and Commission regulations define a contribution to include a gift of
22 money or anything of value to any person for the purpose of influencing a Federal
23 election. 2 U.S.C. §431(8)(A)(i); 11 CFR 100.7(a)(1). The term "anything of value"
24 includes in-kind contributions, and the provision of any goods or services without charge,
25 or at a charge which is less than the usual and normal charge for such goods or services,
26 is a contribution, unless specifically exempted under 11 CFR 100.7(b). 11 CFR
27 100.7(a)(1)(iii). An expenditure is defined to include a purchase or payment of money or
28 anything of value for the purpose of influencing a Federal election, as well as a written
29 contract, promise, or agreement to make an expenditure. 2 U.S.C. §431(9)(A); 11 CFR

² The Commission notes your representation that the poll has "a minimal, unquantifiable benefit" to the State Party in its general efforts to influence Federal and non-Federal elections and that there is "no value whatsoever" to the DCCC.

1 100.8(a)(1) and (2); see also 11 CFR 100.8(a)(1)(iv). It is considered to be made as of the
2 date of such written contract or agreement. 11 CFR 100.8(a)(2).

3 Through its regulations, the Commission, in essence, has excepted "testing the
4 waters" activity from the reporting rules that would otherwise apply. Commission
5 regulations provide that the term "contribution" does not include "[f]unds received solely
6 for the purpose of determining whether an individual should become a candidate." 11
7 CFR 100.7(b)(1)(i). Similarly, the term "expenditure" does not include "[p]ayments
8 made solely for the purpose of determining whether an individual should become a
9 candidate." 11 CFR 100.8(b)(1)(i). Conducting a poll is an example of an activity
10 permissible under these exceptions if it is done to determine whether an individual should
11 become a candidate. 11 CFR 100.7(b)(1) and 100.8(b)(1). These regulations provide,
12 nevertheless, that only funds permissible under the Act may be used for such activities.
13 *Id.* If the individual subsequently becomes a candidate, the funds received and payments
14 made are, respectively, contributions and expenditures subject to the reporting
15 requirements of the Act. *Id.*

16 Commission regulations address the treatment of polls and poll results for the
17 purposes of the Act. The purchase of opinion poll results by a political committee that is
18 not authorized by a candidate and the subsequent acceptance of the poll results by a
19 candidate, his authorized committee, or agent, or by another unauthorized political
20 committee is an in-kind contribution by the purchaser to the recipient candidate or
21 political committee. 11 CFR 106.4(b). Poll results not already made public are
22 considered to be accepted by the candidate or political committee if the candidate or
23 committee (1) requested the poll results before their receipt; (2) used the poll results; or
24 (3) does not notify the contributor that the results are refused. 11 CFR 106.4(b)(1), (2),
25 and (3), and (c). The purchase by an unauthorized political committee for its own use, in
26 whole or in part, is an overhead expenditure by the political committee under 11 CFR
27 106.1(c)(1) to the extent of the benefit derived by the committee. 11 CFR 106.4(d); see
28 also 11 CFR 106.5(a)(2)(i) (referring to administrative costs as allocable Federal/non-
29 Federal costs). Commission regulations, at 11 CFR 106.4(e), provide for various
30 methods of allocating the cost of the poll among recipient candidates and political
31 committees.

1 **III. *Legal Analysis***

2 You have stated that the purpose of the poll was to test the waters for a potential
3 Federal candidacy of a particular individual. Although, for reporting purposes, the
4 donation of the results of a poll conducted for testing the waters purposes is not a
5 contribution or an expenditure until the prospective candidate becomes a candidate,
6 Commission regulations provide for adherence to the Act's limits and prohibitions at the
7 time of the activity, in anticipation of the eventual candidacy. Thus, funds spent for the
8 purposes of testing the waters for a Federal candidacy should be analyzed in the same
9 way, for the purposes of your question, as contributions and expenditures with respect to
10 a particular Federal candidacy.

11 The framework for discussing the source of the future payment to the pollster
12 does not change merely because the actual payment will be made after the individual
13 decided not to be a candidate. If the poll was conducted pursuant to a written contract,
14 the equivalent of an expenditure would have been made at that time, i.e., in May. See 11
15 CFR 100.8(a)(2). More definitively, the poll results were given to the potential
16 candidate, and accepted by him, in June. Thus, the in-kind donation would have been
17 made at that point. See 11 CFR 110.1(b)(6). The fact that the payment to the pollster
18 will not occur until now does not change the nature of the State Party's disbursement to
19 some form of overhead administrative expense allocable under 11 CFR 106.5(a)(2)(i).

20 Since you have indicated that the sole purpose of conducting the poll was to test
21 the waters for a potential Federal candidate, the Commission concludes that the State
22 Party's payment to the pollster must be made entirely from its Federal account. Because
23 the in-kind donation itself is past activity and the value of the DCCC's receipt of poll
24 results is open to question, the Commission does not address the application of the
25 contribution limits to the State Party's proposed payments with respect to the individual
26 potential candidate. See 11 CFR 112.1(b).

