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AOR 2003-10

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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Re: Advisory Opinion Request

Dear Mr. Norton:

This letter constitutes a request for an advisory opinion on behalf of the Nevada State Democratic Party ("the Party") and Rory Reid, Commissioner of Clark County, Nevada, regarding certain fundraising activities that Commissioner Reid plans to undertake under the Bipartisan Campaign Reform Act of 2002 to support the Party.

Commissioner Reid

Rory Reid is a Commissioner of Clark County, Nevada, and former Chairman of the Nevada State Democratic Party. Commissioner Reid grew up in Las Vegas, Nevada, which is part of Clark County, and remains active in the Clark County community. As almost seventy percent of Nevada's population resides in Clark County, Commissioner Reid is well known throughout the state as an accomplished businessman and devoted public servant. He is also the son of Senator Harry Reid, the senior United States Senator from Nevada.

Commissioner Reid was sworn into office as Clark County Commissioner on January 6, 2003. As Commissioner he serves his state and his community in a number of capacities, including as part of the Nevada Development Authority, the Metropolitan Police Committee on Fiscal Affairs, the Clark County District Board of Health, and the Southern Nevada Water Authority.

Nevada State Democratic Party

The Nevada State Democratic Party is a major political party in Nevada, qualified pursuant to Nev. Rev. Stat. § 293.128 (2002). It maintains both a federal account registered with the Federal Election Commission and a nonfederal account registered with the Nevada Secretary of State. Pursuant to Nevada State law, it may

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solicit and accept contributions into its nonfederal account that are prohibited under federal law, including contributions in unlimited amounts from individuals, corporations, and labor unions. The Party makes contributions and expenditures from its nonfederal account to support state and local Democratic candidates in Nevada.

As a prominent local official, Commissioner Reid expects to support, as he has in the past, the Party's nonfederal efforts. The Party, in turn, plans to feature Commissioner Reid prominently in its nonfederal fundraising. It will use Commissioner Reid as a draw for its nonfederal fundraising events, placing his name on its fundraising invitations and solicitations. At the Party's direction, Commissioner Reid intends to make fundraising calls and personal solicitations of contributors to raise money for the Party's nonfederal account. In addition, he intends to make personal appearances at Party fundraisers and appear as a featured guest or speaker whenever it would benefit the Party for him to do so. Commissioner Reid will conduct these activities exclusively on behalf of the Party, and not on the authority of any other person, including Senator Reid.

Legal Framework

The Bipartisan Campaign Reform Act of 2002 ("BCRA") and its implementing regulations generally prohibit federal candidates and officeholders, and agents acting on their behalf, from soliciting, receiving, directing, transferring, or spending "soft money"—that is, funds that exceed the contribution limits of the Federal Election Campaign Act ("the Act") or come from sources that are prohibited from making contributions under the Act--in connection with any nonfederal election. 2 U.S.C. § 441i(e) (2002); 11 C.F.R. § 300.62 (2002).

At the outset, the Party and Commissioner Reid (collectively, "Requesters") note their understanding that in passing BCRA, Congress did not intend to impede the ability of state candidates and state elected officials to raise nonfederal funds solely in connection with nonfederal elections. See, e.g., 2 U.S.C. § 441i(e)(2). They understand, however, that BCRA and its implementing regulations may affect the ability of a state candidate or state elected official who is an "agent" of a federal candidate or officeholder to raise nonfederal funds. 2 U.S.C. § 441i(e).

In light of these new provisions and the Federal Election Commission's ("Commission"'s) regulations implementing them, the Requesters wish to clarify the

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permissibility of Commissioner Reid's fundraising activity in support of the Party, and to confirm how the Commission will treat Commissioner Reid's activities. To these ends, the Requesters present the following issues:

- 1) The Requesters ask the Commission to confirm their understanding that Commissioner Reid may solicit nonfederal funds for the Party.

The Requesters would like to confirm their understanding that Commissioner Reid is not an "agent" of Senator Reid for purposes of BCRA, and therefore prohibited from raising nonfederal funds for the Party, solely because he is Senator Reid's son. Requesters understand that this is the case even if Commissioner Reid had carried out some fundraising activity for Senator Reid in the past.

An "agent" of a federal candidate or officeholder is a person with actual authority, express or implied, to solicit, receive, direct, transfer, or spend funds in connection with any election. 11 C.F.R. § 300.2(b). To create an agency relationship under BCRA, a federal candidate or officeholder must confer on his agent actual authority to raise or spend funds on the candidate's or officeholder's behalf. *Id.* This authority may be by express instruction or implied from conduct of the federal candidate or officeholder that reasonably causes the agent to believe he has authority to solicit funds on the candidate or officeholder's behalf. *Explanation and Justification of Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49064, 49083 (July 29, 2002).

That Commissioner Reid is Senator Reid's son is not sufficient to make him an agent under BCRA. An agency relationship does not arise between two individuals solely based on their relationship or past dealings with each other. This is true even if Commissioner Reid had, at times in the past, raised money on Senator Reid's behalf. Commission regulations require the agent to act on behalf of the principal at the time he conducts the acts in question in order for the principal to be liable for the agent's acts. As the Commission has stated, a federal candidate or officeholder will only be liable for the actions of his agent "when the agent *is acting on behalf of the principal*, and not when the agent is acting on behalf of other organizations or individuals." *Id.* (emphasis added).

Accordingly, the fact that Commissioner Reid may have, at times in the past, had the authority to conduct fundraising activity on Senator Reid's behalf does not

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mean that he is Senator Reid's "agent" under BCRA at all times, even when acting on behalf of others. In order for Senator Reid to be liable for Commissioner Reid's acts, Commissioner Reid must carry out specific acts pursuant to Senator Reid's actual authority.

- 2) The Requesters would like the Commission to confirm their understanding that 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, Commissioner Reid may still undertake soft money fundraising activity on his own behalf for the Party in other circumstances.

The Requesters understand that if Commissioner Reid were to carry out some fundraising activity on behalf of Senator Reid in some circumstances in the future, Commissioner Reid would be an "agent" of Senator Reid in only those circumstances, and would be free to solicit, receive, direct, transfer, or spend nonfederal funds in other circumstances as long as he does not act as the agent of another federal candidate or officeholder or national party committee.

As stated above, an "agent" of a federal candidate or officeholder is a person who has "actual authority, either express or implied, . . . to solicit, receive, direct, transfer, or spend funds in connection with any election." 11 C.F.R. § 300.2(b). If Senator Reid were to grant Commissioner Reid actual authority to raise funds at a particular event on his behalf, that authority would extend to all acts incidental to that fundraising activity, or that usually accompany it or are reasonably necessary to accomplish it. Explanation and Justification of Final Rules, 67 Fed. Reg. at 49083 (citing Restatement (Second) of Agency, 35). However, Commissioner Reid's agency relationship with the Senator would be limited to those activities only, and BCRA would prohibit Commissioner Reid from soliciting and raising soft money only with regard to those activities.

Thus, as one person may be an "agent" in one circumstance and not in others, Commissioner Reid could solicit and raise soft money on his own behalf at all other times on an unlimited basis. As the Commission has explained, one individual may wear "multiple hats," and liability attaches to the principal only with regard to those

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acts the agent performs for the principal. Explanation and Justification of Final Rules,
67 Fed. Reg. at 49083.

Accordingly, the Requesters would like the Commission to confirm that
Commissioner Reid may solicit, receive, direct, transfer, or spend soft money for the
Party unless Senator Reid actually gives Commissioner Reid authority to do so on the
Senator's behalf.

Please do not hesitate to call me should you have any questions about this
request.

Very truly yours



Marc E. Elias
Counsel to the Nevada State Democratic
Party and Commissioner Rory Reid