

SANDLER, REIFF & YOUNG, P.C.

50 E STREET, S.E., SUITE 300
WASHINGTON, DC 20003

JOSEPH E. SANDLER
sandler@sandlerreiff.com
NEIL P. REIFF
reiff@sandlerreiff.com

TELEPHONE: (202) 479-1111
FACSIMILE: (202) 479-1115

COUNSEL:
JOHN HARDIN YOUNG
young@sandlerreiff.com

AOR 2003-25

August 7, 2003

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2003 AUG - 8 A 9 29

Dear Mr. Norton:

I am writing on behalf of Jonathan Weinzapfel and the Weinzapfel for Mayor Committee to request an advisory opinion relating to advertisements that Mr. Weinzapfel wishes to run in connection with his candidacy for the Mayor of Evansville, Indiana.

By way of background, Mr. Weinzapfel is currently a member of the Indiana House of Representatives. He has been nominated by the Democratic Party as its candidate for Mayor of the city of Evansville, Indiana. The general election is being held on November 4, 2003. Mr. Weinzapfel has established a committee under Indiana law, Weinzapfel for Mayor Committee, to accept contributions and make expenditures in connection with his campaign for Mayor of Evansville (hereinafter referred to as the "campaign committee"). Under Indiana law, a candidate for Mayor of Evansville may accept contributions, without limit, from individuals and political committees registered in the state of Indiana. The campaign committee is permitted to accept contributions from corporations and labor unions up to \$2,000 per year (which is aggregated between all candidates for school board and other local candidates). See Indiana Code 3-9-2-4(7).

The campaign committee wishes to produce and pay for radio and television advertisements featuring United States Senator Evan Bayh during its 2003 general election campaign for Mayor. The campaign wishes to capitalize on Senator Bayh's name recognition and popularity in the city of Evansville. It is our understanding that Senator Bayh will likely be a candidate for re-election in 2004.

The advertisements would adhere to the following parameters:

- 1) Senator Bayh will be narrator for both the radio and television advertisements.
- 2) Senator Bayh will refrain from referring to himself as a candidate for federal office.
- 3) In television advertising, Senator Bayh may be featured in a full, unobstructed view while narrating the advertisement, and may also be featured in pictures or video with Mr. Weinzapfel.
- 4) All references to issues in the advertisements will be attributed, in the third person, to Mr. Weinzapfel, and not to Senator Bayh. Accordingly, phrases like "we believe", "Jonathan and I believe" will be avoided.
- 5) The first person will only be used in referring to Mr. Weinzapfel's character or as a way to expressly advocate the election of, or Senator Bayh's endorsement of, Mr. Weinzapfel. Therefore, the use of the first person will limited to phrases such as "I believe that Jonathan is the most qualified candidate for Mayor," "I urge you to vote for Jonathan Weinzapfel for Mayor" or "That is why I am endorsing Jonathan Weinzapfel for Mayor."

The campaign committee would begin running ads featuring Senator Bayh in October 2003 and such ads would run until no later than November 4, 2003.

By this letter, Mr. Weinzapfel would like to confirm the following:

- (1) The above described advertisements featuring Senator Bayh would not result in a contribution to Senator Bayh's re-election campaign in 2004.
- (2) Mr. Weinzapfel's campaign committee could pay for the production and airing of such advertisements with funds that are in compliance with Indiana campaign finance laws but may not be in compliance with Federal campaign laws.

LEGAL ANALYSIS

Prior to the enactment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the analysis regarding the facts in this request would appear to be very straightforward. In Advisory Opinion 1982-56, the Commission ruled that a Congressman could appear, and endorse a state or local candidate in an advertisement of a local candidate without such appearance constituting a contribution to the federal candidate so long as the advertisement was not for the for the purpose of influencing the candidate's election for federal office. In that instance, the candidate was on the ballot at the same time as the local candidate. Furthermore, in Advisory Opinion 1980-28, a federal candidate was permitted to endorse a candidate for delegate to a national nominating

Lawrence H. Norton, Esq.

convention so long as 1) the purpose of the advertising was to advocate the election of the other candidate, rather than the candidacy of the member of Congress and 2) the text of the advertisement emphasized the election of the candidate being endorsed and not the campaign of the Congressman. It seems clear that, the proposed advertisements of the Weinzapfel campaign committee would have no problems meeting the standards set forth in these Advisory Opinions.

In enacting the BCRA, Congress included a provision that regulates the ability of state and local candidates to feature federal candidates in any public communications that are produced and paid for by them. 2 U.S.C. § 441i(f). This section requires a candidate for state and local office to use only funds that meet the prohibitions, limitations and reporting requirements of the Federal Election Campaign Act ("FECA") if such public communications 1) refers to a candidate for federal office and 2) "promotes or supports or attacks or opposes" that federal candidate. This provision of the BCRA has been codified by Commission regulation at 11 C.F.R. § 300.71. However, the Commission has clarified that this rule is conjunctive and that an ad that refers to a federal candidate, but does not "promote or support or attack or oppose" a federal candidate may be paid for with funds that do not comply with the FECA. 11 C.F.R. § 300.72.

Although the Commission has not provided any additional detail as to the meaning of the term "promote or support or attack or oppose" it has clarified that section 323(f) does not encompass all advertising undertaken by state and local candidates that refer to federal candidates:

As Senator Feingold explained...new FECA section §323(f) does not prohibit "spending non-Federal money to run advertisements that mention that [state candidates] have been endorsed by a Federal candidate or say that they identify with a position of a named Federal candidate, so long as those advertisements do not support, attack, promote or opposed the Federal candidate."

Brief of Federal Election Commission, et. al., McConnell v. FEC., United States Supreme Court, No. 02-1674 (August 5, 2003) (citing 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002)).

Thus, the advertisements proposed in this opinion request appear to be the exact type of activities that the BCRA, and consequently, the FECA do not purport to regulate. First, the advertisements will avoid reference to Senator Bayh as a candidate for federal office and refrain from advocating his election to any office. Second, the content of the advertisement will be restricted to referring to issues that are attributed to Mr. Weinzapfel and not Senator Bayh. Third, the end of each advertisement will end with an endorsement of or the exhortation to vote for Mr. Weinzapfel. Finally, the advertisements will be run in 2003, one full year before the general election of Senator Bayh.

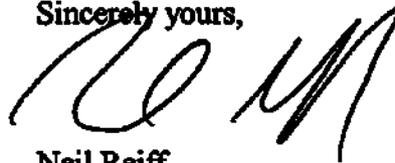
Lawrence H. Norton, Esq.
August 7, 2003
Page Four

The totality of the facts presented in this request provide for the perfect example of non-federal activities that the FECA should not purport to regulate. Thus, under the standards set forth in Advisory Opinion 1982-56, it is clear that the proposed advertisements would not result in a contribution to the Bayh campaign. Furthermore, under the views articulated by the FEC to the United States Supreme Court the proposed advertisements do not "promote or support" the candidacy of Senator Bayh for purposes of sections 441i(f) of the BCRA and section 300.72 of its regulations.

Accordingly, we respectfully request that you find that the proposed advertisements may be paid for by Mr. Weinzapfel's campaign committee with funds that are not regulated by the FECA, and that such advertisements will not result in a contribution to Senator Bayh or any campaign committee controlled by Senator Bayh.

Due to proximity of the November 2003 general election, we request that this opinion be expedited to the fullest extent possible. If you have any questions or need additional information in connection with this Advisory Opinion Request, please contact me at (202) 479-1111. Thank you for your time and attention to this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Neil Reiff". The signature is fluid and cursive, with a large initial "N" and "R".

Neil Reiff
Counsel to Jonathan Weinzapfel



FEDERAL ELECTION COMMISSION

Washington, DC 20463

August 15, 2003

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

Dear Mr. Reiff:

This refers to your letter dated August 7, 2003, on behalf of Jonathan Weinzapfel and Weinzapfel for Mayor Committee ("the Weinzapfel Committee"), 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.

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. Under Indiana law, he can accept donations from individuals and Indiana political committees that are not amount-limited, as well as limited donations from corporations and labor organizations.

Wishing to capitalize on Senator Bayh's name recognition and popularity in Evansville, the Weinzapfel Committee seeks to produce and pay for radio and television advertisements featuring the Senator. Senator Bayh will likely be a candidate for re-election in 2004. Senator Bayh will be the narrator, and, in the television ads, he will be featured in a full, unobstructed view and may also be featured in pictures or video with Mr. Weinzapfel. He will not refer to himself as a Federal candidate. All references to issue positions will be characterized as Mr. Weinzapfel's position, and not those of Senator Bayh. Senator Bayh will only use the first person to refer to his opinion of Mr. Weinzapfel's character or to advocate the election of Mr. Weinzapfel. The Weinzapfel Committee wants to run these ads in October and early November of this year.

Mr. Weinzapfel asks if the above-described ads would result in a contribution to Senator Bayh. He also asks whether the Weinzapfel Committee may pay for the production and airing of these ads with funds that comply with Indiana law but that do not comply with the Act.

The Act authorizes the Commission to issue an advisory opinion request in response to a "complete written request" from any person with respect to a specific transaction or activity by the requesting person. 2 U.S.C. §437f(a). Such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 CFR 112.1(c). The regulations further explain that the Office of General Counsel shall determine if a request is incomplete or otherwise not qualified as an advisory opinion request. 11 CFR 112.1(d).

In view of the above requirements, the Office of General Counsel asks you to provide scripts and story boards. A video and audio tape of the television and radio ads or one script and story board for each of the media will suffice and the Commission's response will use them as representative of the ads. If you wish to provide more than one set of tapes, or more than one set of scripts and story boards, you may do so. Please also answer the following questions:

- (1) Will the ads solicit, by any means, donations to the Weinzapfel or Bayh campaign?
- (2) Will the television and radio ads use or include any campaign materials, e.g., videotaped or audiotaped material, that was, or will be, prepared by Senator Bayh, his principal or authorized campaign committees, or agents of the Senator or his committees? If so, describe such materials and state the amount of time in each ad the material will be aired, as compared to the rest of the ad.
- (3) If the campaign materials described in question 2 will be used in the ads, please describe the contacts or communication that have occurred and will occur between (i) Senator Bayh, his principal and authorized campaign committees, and the agents of the Senator and the committees and (ii) Mr. Weinzapfel, his committee, and the agents thereof. Your answer should include:
 - (a) A statement of who, or what entities, requested or suggested that Senator Bayh appear in such ads;
 - (b) A description of the contacts and communications, between Senator Bayh (and/or his committees and agents thereof) and Mr. Weinzapfel (and/or his committee and agents thereof), as to the ads' contents, intended audience, means or mode of communication, the use of specific media outlets, timing or frequency of the ads, the duration of the ads;
 - (c) Whether information about Senator Bayh's or his committees' plans, projects, activities, or needs was or will be conveyed to Mr. Weinzapfel, his committee, or agents thereof and generally what the information was or is;

- (d) Whether any vendor of services for the ads that has been or will be used by Senator Bayh's committees in the current election cycle (November 1998 - November 2004) engaged in conduct described in 11 CFR 109.21(d)(4), and the circumstances of such provision; and
- (e) Whether any former employee or independent contractor of Senator Bayh or his committees engaged in the conduct described in 11 CFR 109.21(d)(5), and a description of such conduct.

Upon receipt of your responses to this request for information, this Office will give further consideration to your inquiry. If you have any questions about the advisory opinion process or this letter, please contact Jonathan Levin, a senior attorney in this office, at 202-694-1542.

Sincerely,


Rosemary C. Smith
Acting Associate General Counsel

SANDLER, REIFF & YOUNG, P.C.

**50 E STREET, S.E., SUITE 300
WASHINGTON, DC 20003**

JOSEPH E. SANDLER
sandler@sandlerreiff.com
NEIL P. REIFF
reiff@sandlerreiff.com

**TELEPHONE: (202) 479-1111
FACSIMILE: (202) 479-1115**

COUNSEL:
JOHN HARDIN YOUNG
young@sandlerreiff.com

August 19, 2003

**John Vergelli, Esq.,
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463**

Dear Mr. Vergelli:

This letter is in response to the Commission's letter of August 15, 2003 in which it requests additional information in connection with my letter dated August 7, 2003, on behalf of Jonathan Weinzapfel and Weinzapfel for Mayor Committee ("the Weinzapfel Committee"), 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.

In particular, your letter requests scripts and other information to support the advisory opinion request. Other than the parameters set forth in my letter August 7th the Weinzapfel Committee had not made any attempt to produce or draft any advertisements featuring Senator Bayh. Needless to say, my client does not desire to incur any additional production costs for the proposed advertisements until it receives formal advice from the Commission regarding the questions raised in our Advisory Opinion Request. Nevertheless, I have enclosed draft scripts that would be representative of the types of advertisements that the Weinzapfel Committee wishes to run featuring Senator Bayh and are within factual parameters set forth in our initial request. Of course, all scripts utilized by the Weinzapfel Committee during its proposed advertising campaign will fall within those parameters.

As described in my letter of August 7th, it would be anticipated that Senator Bayh will appear by voice in both radio and television advertisements and that Senator Bayh may appear on screen narrating a television advertisement and by picture, with Mr. Weinzapfel, during a television commercial.

2003 AUG 19
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COUNSEL



In response to your specific questions:

- (1) Will the ads solicit, by any means, donations to the Weinzapfel or Bayh campaign?**

No.

- (2) Will the television and radio ads use or include any campaign materials, e.g., videotaped or audiotaped material, that was, or will be, prepared by Senator Bayh, his principal or authorized campaign committees, or agents of the Senator or his committees**

Obviously, Senator Bayh will appear in the advertisements by voice and/or in person. Otherwise, any materials used in connection with the proposed advertisements will be created by consultants, agents or staff of the Weinzapfel campaign. No campaign materials will be provided to the Weinzapfel campaign from Senator Bayh, his principal or authorized campaign committees, his agents or committees.

- (3) If the campaign materials described in question 2 will be used in the ads, please describe the contacts or communication that have occurred and will occur between (i) Senator Bayh, his principal and authorized campaign committees, and the agents of the Senator and the committees and (ii) Mr. Weinzapfel, his committee, and the agents thereof.**

Since the answer to question 2 is No, question 3 need not be answered in detail. Nevertheless, the Weinzapfel Committee does not expect that any conduct undertaken in connection with the proposed advertisements would meet the definition of coordination as described in the Commission's regulations at 11 C.F.R. § 109.21(d). Thus, the Weinzapfel committee does not intend to coordinate the production and dissemination of the advertisements with Senator Bayh, any former or current employee or consultant of Senator Bayh, or any other agent of Senator Bayh.

Notwithstanding the above, we would assume that Senator Bayh or his representative would wish to review the final script for appropriateness in advance of the Senator's appearance in the advertisements.

If you have any additional questions or concerns, please call me at (202) 479-1111. Once again, due to the proximity of the November 2003 election, your expedited consideration of this request is most appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read 'Neil Reiff', written in a cursive style.

Neil Reiff



armourMedia, Inc.

**Weinzapfel for Mayor
TV :30
"Committed"**

DRAFT DRAFT DRAFT DRAFT DRAFT

VIDEO

AUDIO

**Fade up on Senator Evan Bayh to camera.
Title. Senator Evan Bayh.**

Hi, I'm Evan Bayh.

**Over the past few years, I've come to know
Jonathan Weinzapfel very well.**

**Cut to film of Jonathan Weinzapfel and
Senator Evan Bayh.**

(v/o) We've worked together...

Cut to Senator Evan Bayh to camera.

**(s/s) ...and I've seen first-hand how
committed he is to making Evansville a
better city.**

**Cut to film of Jonathan Weinzapfel with
families and kids.**

**(v/o) From working to cut taxes to passing
a law that protects our kids from drugs,
Jonathan Weinzapfel knows how to get the
job done.**

Cut to Senator Evan Bayh to camera.

**(s/s) He's got a bipartisan, common-sense
way of solving problems.**

**He cares about what really matters to
people.**

Super logo. Weinzapfel for Mayor.

**And he's exactly the kind of Mayor
Evansville needs.**



amourMedia, Inc.

**Weinzapfel for Mayor
TV :30
"Get Things Done"**

DRAFT DRAFT DRAFT DRAFT DRAFT

VIDEO

AUDIO

**Fade up on Senator Evan Bayh to camera.
Title. Senator Evan Bayh.**

(Senator Evan Bayh, s/s)

I first started working with Jonathan Weinzapfel five years ago.

And I knew right away that he was a guy who knows how to get things done.

Cut to film of Jonathan Weinzapfel with families and kids.

(v/o) From working to cut taxes to passing a law that protects our kids from drugs, he does things that really matter.

Cut to Senator Evan Bayh to camera.

(a/s) He doesn't play politics.

Cut to film of Jonathan Weinzapfel and Senator Evan Bayh.

(v/o) He knows how to work with people from both parties. And he has a lot of common sense.

Cut to Senator Evan Bayh to camera.

(s/s) Jonathan Weinzapfel is the kind of guy who doesn't just talk about a problem. He does something about it.

Super logo. Weinzapfel for Mayor.

And that's exactly the kind of Mayor Evansville needs.



Neil Reiff <reiff@sandlerreiff.com> on 08/22/2003 03:50:49 PM

To: jvergelli@fec.gov
cc:

Subject: RE: Weinzapfel Advice Request

In response to your questions:

- 1) Your understanding is correct.
- 2a) It is not anticipated that any other voice other than Senator Bayh would be included in any of the proposed advertisements.
- 3) No other communications by or regarding Senator Bayh that haven't otherwise been represented in our request and supplemental materials will be included in any of the advertisements.

Let me know if you need any additional information. Due to the time exigency of this request, your prompt attention to this matter is appreciated.

-----Original Message-----

From: jvergelli@fec.gov [mailto:jvergelli@fec.gov]
Sent: Friday, August 22, 2003 2:17 PM
To: reiff@sandlerreiff.com
Cc: rsmith@fec.gov
Subject: Weinzapfel Advice Request

Good afternoon, Neil.

Thanks for your prompt reply of August 19, 2003 to our August 15, 2003, letter. Please respond to these follow-up questions:

- 1) It is our understanding that Senator Bayh will be identified in the proposed advertisements only by his title of "Senator." Please confirm that this understanding is correct.
- 2) (a) will any voice other than Senator Bayh's be heard in the proposed advertisements?
(b) If so, please also respond to the following: you have represented that Sen. Bayh will be the narrator of the proposed advertisements, and that he will not say certain things. For example, in the August 7th letter, you indicated that "[a]ll references to issues in the advertisements will be attributed, in the third person, to Mr. Weinzapfel, and not to Senator Bayh." We understand that these representations to pertain to the speech in the advertisements by Sen. Bayh. Please confirm in writing that there will be no other (i.e., other than Sen. Bayh) voices heard in the advertisements that will communicate content that you have represented that Senator Bayh will not communicate.
For example, please confirm that no voice other than Senator Bayh will

attribute policy positions to Senator Bayh, either individually or jointly with Mr. Weinzapfel, or make statements of any kind about Senator Bayh.

3) Similarly, please confirm that the proposed advertisements will not otherwise communicate content that that you have represented that Senator Bayh will not communicate. For example, please confirm that there will be no on-screen graphics or other communicative content (e.g., a sign in the background) in the proposed advertisements that attribute policy positions to Senator Bayh or that make statements about Senator Bayh.

Thank you for your time and attention to our questions. If you have any questions or comments, please contact me.



FEDERAL ELECTION COMMISSION

Washington, DC 20463

August 27, 2003

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

Dear Mr. Reiff:

This refers to your letters dated August 7 and 19, 2003, on behalf of Jonathan Weinzapfel and Weinzapfel for Mayor Committee ("the Weinzapfel Committee"), 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.

By letter dated August 15, 2003, the Office of General Counsel informed you that your request for an advisory opinion was incomplete and requested additional information from you. Specifically, you were asked to provide a video and audio tape of the television and radio ads or one script and story board for each of the media. In your response dated August 19, you acknowledged the request for scripts and other information to support the advisory opinion request but explained that "the Weinzapfel Committee had not made any attempt to produce or draft any advertisements" on which you seek an advisory opinion. Instead, you offered "draft scripts that would be representative of the types of advertisements that the Weinzapfel Committee wishes to run featuring Senator Bayh."

As you are aware, the Act authorizes the Commission to issue an advisory opinion request in response to a "complete written request" from any person with respect to a specific transaction or activity by the requesting person. 2 U.S.C. § 437f(a). Such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 CFR 112.1(c). Requests presenting a general question of interpretation or posing a hypothetical situation do not qualify as an advisory opinion request. 2 U.S.C. § 437f(a); 11 CFR 112.1(b). The Office of General Counsel shall determine if a request is incomplete or otherwise not qualified as an advisory opinion request. 11 CFR 112.1(d).

Your request for an advisory opinion remains incomplete without the previously requested information. The actual content of the communication, in addition to its context, is indispensable where the question presented requires the Commission to determine whether the communication "promotes, supports, attacks, or opposes" a candidate for Federal office. A draft script that is "representative of the types of advertisements" that your client intends to produce, absent a specific and accurate depiction of the actual content of the intended communication, does not provide a sufficient factual basis for a complete written request.

In light of the above requirements, the Office of General Counsel again asks you to provide videotape and audiotape or scripts and story boards for the above-described television ads and radio ads. As explained in the previous letter, one script and story board for each of the media will suffice. The scripts and storyboards must accurately depict the scenes in the ads and the portrayal of any candidates for Federal office. If you wish to provide more than one set of scripts and story boards for each media, you may do so.

Upon receipt of your responses to this request for information, this Office will give further consideration to your inquiry. If you have any questions about the advisory opinion process or this letter, please contact Richard Ewell, an attorney in this Office, at 202-694-1650.

Sincerely,



Rosemary C. Smith
Acting Associate General Counsel



Neil Reiff <reiff@sandlerreiff.com> on 09/04/2003 11:42:15 AM

To: rewell@fec.gov

cc:

Subject: Storyboard

Richard, attached is a storyboard for the "committed" advertisement. I am not sure if, or how long it would take to get one for the other advertisement, but I expect the style to be identical to this storyboard.

Richard, attached is a storyboard for the "committed" advertisement. I am not sure if, or how long it would take to get one for the other advertisement, but I expect the style to be identical to this storyboard.



- armourMedia Storyboard - Weinzapfel for Mayor - Evan Bayh - Committed.jpg

armourMedia CREATIVE

Weinzapfel for Mayor "Committed" TV :30



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



We've worked together...



...and I've seen first-hand how committed he is to making Evansville a better city.



From working to cut taxes...



...to passing a law that protects our kids from drugs...



...Jonathan Weinzapfel knows how to get the job done.



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



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



Neil Reiff <reiff@sandlerreiff.com> on 09/04/2003 05:00:27 PM

To: rewell@fec.gov
cc:

Subject: Advertisements

Richard, the Weinzapfel for Mayor campaign will only be requesting guidance with respect to the advertisement called "committed" which is the advertisement that a storyboard was e-mailed to you earlier today. The other ad enclosed in our earlier email should not be considered by the Commission.

Let me know if you have any additional questions.

Neil Reiff.

Richard, the Weinzapfel for Mayor campaign will only be requesting guidance with respect to the advertisement called "committed" which is the advertisement that a storyboard was e-mailed to you earlier today. The other ad enclosed in our earlier email should not be considered by the Commission.

Let me know if you have any additional questions.

Neil Reiff.