



Office of the Secretary of State  
Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, West Virginia 25305

**Natalie E. Tennant**  
Secretary of State  
State of West Virginia

RECEIVED  
FEDERAL ELECTION  
COMMISSION

2009 JUL 10 AM 9:40

OFFICE OF GENERAL  
COUNSEL

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July 1, 2009

Federal Election Commission  
Office of General Counsel  
999 E Street, N.W.  
Washington, D.C. 20463

AOR 2009-21

Re: Request for Advisory Opinion

Dear Sir or Madam:

In behalf of the West Virginia Secretary of State, chief election officer of the state, please consider this request, filed under provisions of 2 U.S.C. 437f(a)(1) and 11 CFR 112.1(b) and (c), for an Advisory Opinion concerning a possible preemption of Federal regulation over relevant state law.

The relevant facts and specific activity are:

1. On or about September 27, 2008, a citizen of this state was contacted by telephone by an organization conducting a public opinion poll;
2. The polling organization was allegedly employed by the campaign committee of a candidate in the November, 2008 general election for the United States House of Representatives for the 2nd Congressional District of West Virginia;
3. A formal written and verified complaint was submitted by the citizen to the West Virginia Secretary of State, who, by provisions of West Virginia Code §3-1A-6, is charged with enforcing West Virginia election laws;
4. West Virginia law prohibits the expenditure of campaign monies on "push polls", as defined by Code, in any election, W.Va. Code §3-8-9(a)(10) (copy attached, Exhibit A);
5. The nature of the questions asked in the polling, as alleged by the complainant; suggest that the polling conducted by the agency may have violated West Virginia Code;

6. As part of the investigation initiated by the Secretary, the polling agency was contacted for information, concerning the nature of the questions asked in the poll, in a letter dated October 6, 2008 (copy attached, Exhibit B);
7. On October 21, 2008 an attorney representing the candidate's committee responded to the letter addressed to the polling agency and informed the Secretary that federal election law preempted the jurisdiction of the state election official. The attorney cited and attached advisory opinion 1995-41 involving preemption of a New York state election law (copy attached, Exhibit C);
8. By letter dated November 26, 2008, the W.Va. Secretary of State informed counsel that the Secretary believed the state did have jurisdiction because the information sought did not involve any campaign disclosures. Rather, the inquiry went to the nature of the polling and the information was to determine whether the polling was prohibited by W.Va. code (copy attached, Exhibit D);
9. On December 12, 2008, counsel for the candidate indicated his intention to request an advisory opinion from the FEC. The Secretary does not know if the advisory opinion was ever requested (copy attached, Exhibit E);
10. The investigation has been inactive since and a new Secretary of State took office in January, 2009, and has inherited this dispute.

Because the parties disagree over whether the cited Advisory Opinion is controlling in the facts of this particular case, and because there appears to be some question as to whether federal campaign financing laws preempt a state law defining the nature of permissible political polling, the Secretary seeks guidance from your office in the form of an Advisory Opinion.

Respectfully yours,



Timothy G. Leach  
Assistant General Counsel  
West Virginia Secretary of State

cc: Hershel Rose, counsel for candidate's committee  
Attachments: Exhibits A-E

**§3-8-9. Lawful and unlawful election expenses; public opinion polls and limiting their purposes; limitation upon expenses; use of advertising agencies and reporting requirements; delegation of expenditures.**

(a) No financial agent or treasurer of a political committee shall pay, give or lend, either directly or indirectly, any money or other thing of value for any election expenses, except for the following purposes:

- (1) For rent, maintenance, office equipment and other furnishing of offices to be used as political headquarters and for the payment of necessary clerks, stenographers, typists, janitors and messengers actually employed therein;
- (2) In the case of a candidate who does not maintain a headquarters, for reasonable office expenses, including, but not limited to, filing cabinets and other office equipment and furnishings, computers, computer hardware and software, scanners, typewriters, calculators, audio visual equipment, the rental of the use of the same, or for the payment for the shared use of same with the candidate's business and for the payment of necessary clerks, stenographers and typists actually employed;
- (3) For printing and distributing books, pamphlets, circulars and other printed matter and radio and television broadcasting and painting, printing and posting signs, banners and other advertisements, including contributions to charitable, educational or cultural events, for the promotion of the candidate, the candidate's name or an issue on the ballot;
- (4) For renting and decorating halls for public meetings and political conventions, for advertising public meetings and for the payment of traveling expenses of speakers and musicians at such meetings; (5) For the necessary traveling and hotel expenses of candidates, political agents and committees and for stationery, postage, telegrams, telephone, express, freight and public messenger service;
- (6) For preparing, circulating and filing petitions for nomination of candidates;
- (7) For examining the lists of registered voters, securing copies thereof, investigating the right to vote of the persons listed therein and conducting proceedings to prevent unlawful registration or voting;
- (8) For conveying voters to and from the polls;
- (9) For securing publication in newspapers and by radio and television broadcasting of documents, articles, speeches, arguments and any information relating to any political issue, candidate or question or proposition submitted to a vote;
- (10) For conducting public opinion poll or polls. For the purpose of this section, the phrase "conducting of public opinion poll or polls" shall mean and be limited to the gathering, collection, collation and evaluation of information reflecting public opinion, needs and preferences as to any candidate, group of candidates, party, issue or issues. No such poll shall be deceptively designed or intentionally conducted in a manner calculated to advocate the election or defeat of any candidate or group of candidates or calculated to influence any person or persons so polled to vote for or against any candidate, group of candidates, proposition or other

matter to be voted on by the public at any election: *Provided*, That nothing herein shall prevent the use of the results of any such poll or polls to further, promote or enhance the election of any candidate or group of candidates or the approval or defeat of any proposition or other matter to be voted on by the public at any election;

(11) For legitimate advertising agency services, including commissions, in connection with any campaign activity for which payment is authorized by subdivisions (3), (4), (5), (6), (7), (9) and (10) of this subsection;

(12) For the purchase of memorials, flowers or citations by political party executive committees or political action committees representing a political party;

(13) For the purchase of nominal noncash expressions of appreciation following the close of the polls of an election or within thirty days thereafter;

(14) For the payment of dues or subscriptions to any national, state or local committee of any political party;

(15) For contributions to a county party executive committee, state party executive committee or a state party legislative caucus political committee; and

(16) For contributions to a candidate committee: *Provided*, That a candidate committee may not contribute to another candidate committee except as otherwise provided by section ten of this article.

(b) A political action committee may not contribute to another political action committee or receive contributions from another political action committee: *Provided*, That a political action committee may receive contributions from its national affiliate, if any.

(c) Every liability incurred and payment made shall be for the fair market value of the services rendered.

(d) Every advertising agency subject to the provisions of this article shall file, in the manner and form required by section five-a of this article, the financial statements required by section five of this article at the times required therein and include therein, in itemized detail, all receipts from and expenditures made on behalf of a candidate, financial agent or treasurer of a political party committee.

(e) Any candidate may designate a financial agent by a writing duly subscribed by him which shall be in such form and filed in accordance with the provisions of section four of this article.

Number  
7004 1350 0001  
Domestic Return Receipt  
August 2001

**COMPLETE THIS SECTION**

Complete items 1, 2, and 3. Also complete Restricted Delivery if desired. Our name and address on the reverse of this card to the back of the mailpiece, if space permits.

Addressed to:

**COMPLETE**

A. Signature  *[Signature]*

B. Restricted Delivery

C. Signature

D. Is delivery restricted?  If YES, I

*10/2/08*

*Sent 10/2/08*

*Cost #*

*7004 1350 0001*

*14896309*

5, 2008

To Whom It May Concern:

I am writing to request information from a telephone poll conducted by your company.

Specifically, I am writing to request a copy of the script used for a telephone poll during the recent General Election in West Virginia. The candidate for whom you were polling was Ann Barth. She is a democratic candidate for the US Congress.

Please respond to this request within (15) days of receipt of this letter. Your cooperation is appreciated.

Should you need further information in the intern. please do not hesitate to contact us at 1-304-558-6000.

Sincerely,

Kevin Cruickshank  
Chief Investigator

**EXHIBIT B**



ROSE LAW OFFICE  
 500 N. JAMES STREET, SUITE 1400  
 P.O. BOX 8502  
 CHARLESTON, WV 25305  
 PHONE: 304-542-5050 FAX: 304-542-4455

October 21, 2008

Kevin Cruickshank  
 Chief Investigator  
 Office of the Secretary Of State  
 Building One, Suite 157-K.  
 1900 Kanawha Blvd., East  
 Charleston, WV 25305

[REDACTED] Letter Dated October 6, 2008

Dear Mr. Cruickshank:

On behalf of the Anne Barth for Congress committee, I'm responding to your October 6, 2008 letter to [REDACTED] regarding a telephone poll that that organization may have conducted on behalf of the Anne Barth for Congress campaign. In view of the fact that polls that have been conducted by [REDACTED] for the Anne Barth for Congress committee are owned by the latter, I believe it is appropriate for the Anne Barth for Congress committee to respond.

It is my understanding that on issues like the one described in your letter, the jurisdiction of the Federal Elections Commission preempts the jurisdiction of the appropriate state elections official. I am enclosing advisory opinion 1995-41 of the Federal Elections Commission which appears to be directly on point.

You think that the Secretary of State has jurisdiction in this matter, please let me know.

Very truly yours,

Herschel H. Rose III  
 Chairman, Anne Barth for  
 Congress Committee

10-02-2008 Barth Poll

Enclosure

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OCT 22 2008

EXHIBIT C

In the office of the  
 WV Secretary of State  
 Investigations Unit



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

December 7, 1995

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1995-41

Robert F. Bauer  
Perkins Coie  
607 Fourteenth Street, N.W.  
Washington, D.C. 20005-2011

Dear Mr. Bauer:

This responds to your letter dated October 30, 1995, as counsel for the Democratic Congressional Campaign Committee, who inquires on behalf of Representative Carolyn Maloney and Maloney for Congress, concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to Federal preemption of certain reporting obligations of New York State campaign finance laws.

Maloney for Congress (the "Committee") is the principal campaign committee of Carolyn Maloney, a member of the U.S. House of Representatives for the New York 14th Congressional District. She is currently a candidate for re-election. You state that New York law requires all candidates for public office to disclose certain information about polling activity for public reporting purposes. Specifically, the statute requires that any candidate preparing to release poll results to the public must file within 48 hours, with the appropriate New York state regulatory authority, a report which states the poll sample size, the wording of the questions asked, and the full results of the poll. See 9 NYCRR §6201.2.<sup>1/</sup>

You note that the New York State Board of Elections ("the Board") has taken the position that this reporting requirement applies to Federal, as well as other candidates, and that the Board communicated this position to Ms. Maloney.<sup>2/</sup> You therefore ask whether the Act, Commission regulations, and prior Advisory Opinions issued by the Commission, indicate that the New York reporting requirement is preempted by Federal law.

The Act states that its provisions and the rules prescribed thereunder, "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. 453. The House committee that drafted this provision intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). According to the Conference Committee report on the 1974 Amendments to the Act, "Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights" as to other areas such as voter fraud and ballot theft. H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974). The Conference report also states that Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect state laws as to the manner of qualifying as a candidate, or the dates and places of elections. *Id.* at 100-101.

When the Commission promulgated regulations at 11 CFR 108.7 on the effect of the Act on state law, it stated that the regulations follow section 453 and that, specifically, Federal law supersedes state law with respect to the organization and registration of political committees supporting Federal candidates, disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees. Federal Election Commission Regulations, Explanation and Justification, House Document No. 95-44, at 51. 11 CFR 108.7(b). The regulations provide that the Act does not supersede state laws concerning the manner of qualification as a candidate or political party organization, dates and places of elections, voter registration, voting fraud and similar offenses, or candidates' personal financial disclosure. 11 CFR 108.7(c). The Commission explained that "[t]hese types of electoral matters are interests of the states and are not covered in the Act." House Document 95-44, at 51.

The Commission has previously concluded that the Act supersedes and preempts state law with respect to the reporting requirements of Federal committees and State committees which engage in Federal activity. See Advisory Opinions 1993-14, 1986-27 and 1978-54. Given this legal authority, the Act would preempt New York State law with respect to the reporting of contributions, disbursements and expenditures, including expenditures for polling activity in Federal election campaigns. New York State may not impose any obligation for reporting Federal contributions, disbursements and expenditures since those obligations fall only within the purview of the Act and Commission regulations. See 2 U.S.C. 434(b) and 11 CFR 104.3. Therefore, the Commission concludes that 9 NYCRR §6201.2 may not be applied to Maloney for Congress, Carolyn Maloney or any other Federal candidate or committee with respect to polling activity that is done as part of a Federal election campaign.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

Danny L. McDonald  
Chairman

Enclosures (AOs 1993-14, 1986-27, and 1978-54)

1 The cited provision states:

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 include in 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 numbers contacted who responded to each specific poll questions; the number of persons contacted who did not so respond.
- (h) The results of the poll.

2 In a May 3, 1984 Opinion, the Board stated that section 6201.2 "app[lies] 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." New York Board of Elections 1984 Opinion #1. Furthermore, the Board has previously found that a Federal committee, the Committee to Elect John Bouchard to Congress, was in violation of section 6201.2. See Times Union v. Committee to Elect John Bouchard, New York State Board of Election, Final Determination FC89-7 (September 7, 1990).





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**RECEIVED**

DEC 15 2008

December 12, 2008

In the office of the  
 WV Secretary of State  
 Investigations Unit

Kevin Cruickshank  
 Chief Investigator  
 Office of the Secretary Of State  
 Building One, Suite 157-K.  
 1900 Kanawha Blvd., East  
 Charleston, WV 25305

**[REDACTED]** Letter Dated October 6, 2008

Dear Mr. Cruickshank:

Thank you for your November 26, 2008, which I received on December 2, 2008.

I continue to respectfully disagree with you regarding the jurisdiction of the Secretary of State in this matter. It is my intention to request an advisory opinion from the Federal Elections Commission regarding the extent of federal jurisdiction over polling disputes. I will send you a copy of the request.

I presume that your request for the scripts was made in response to a complaint or inquiry received by the Secretary. Pursuant to the provisions of chapter 29B of the West Virginia Code, I request an opportunity to inspect and copy any documents that the Secretary has received or prepared that relate to the Secretary's request for the production of the polling scripts.

Very truly yours,

Herschel H. Rose III  
 Chairman, Anne Barth for  
 Congress Committee

1002-2008 Kanawha Co.

**EXHIBIT E**