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September 7, 2006

AGENDA ITEM

For Meeting of: 09-14-06

MEMORANDUM

TO: The Commission

THROUGH: Patrina M. Clark *PMC*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *AR*
Acting Assistant General Counsel

Jonathan M. Levin *JL*
Senior Attorney

Subject: Draft AO 2006-22

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 14, 2006.

Attachment

1 ADVISORY OPINION 2006-22

2
3 Andrius R. Kontrimas, Esquire
4 Jenkens & Gilchrist
5 1401 McKinney
6 Suite 2600
7 Houston, Texas 77010-4034

DRAFT

8
9 Dear Mr. Kontrimas:

10 We are responding to your advisory opinion request on behalf of Wallace for Congress
11 (“the Wallace Committee”) concerning the application of the Federal Election Campaign Act of
12 1971, as amended (the “Act”), and Commission regulations to an incorporated law firm’s
13 preparation of an *amicus curiae* brief on behalf of the Wallace Committee, free of charge, in a
14 court case addressing the ballot eligibility of the Republican nominee in Mr. Wallace’s
15 congressional district. Specifically, you ask whether the value of the legal services provided free
16 of charge by your law firm would be an in-kind contribution to the Wallace Committee.

17 The Commission concludes that the law firm’s provision of free legal services would be a
18 prohibited corporate contribution to the Wallace Committee.

19 ***Background***

20
21 The facts presented in this advisory opinion are based on your letter received on July 21,
22 2006, and public records, including the Wallace Committee’s 2006 July Quarterly Report filed
23 with the Commission and the Wallace Committee’s website.

24 The Wallace Committee is the principal campaign committee of David G. Wallace, who
25 was seeking election to the House of Representatives from the 22nd congressional district of
26 Texas. You are the Wallace Committee’s treasurer. You are also a shareholder in the
27 incorporated law firm retained by the Wallace Committee to draft the *amicus* brief, Jenkens &
28 Gilchrist (the “Firm”).

1 *1. The court case*

2 On March 7, 2006, the incumbent Representative, Tom DeLay, won the Republican
3 primary for the House seat for the 22nd congressional district. On April 3, 2006, after declaring
4 his intention to move to Virginia, Representative Delay announced that he would retire from the
5 House, effective in early June, and would not seek re-election. After receiving a letter from
6 Representative DeLay asserting his ineligibility to remain on the ballot because of his move to
7 Virginia, the Chair of the Republican Party of Texas declared in writing, on June 7, that
8 Representative DeLay was no longer eligible to be the party's nominee. When a nominee is no
9 longer eligible to be the nominee, Texas law allows the Republican executive committee for the
10 affected congressional district to select a replacement candidate for the general election ballot.

11 In anticipation of the withdrawal of Mr. DeLay's name from the ballot, Mr. Wallace filed
12 his Statement of Candidacy with the Commission on April 17, 2006. The Wallace Committee
13 filed its Statement of Organization on April 24, 2006.

14 On June 8, 2006, the Texas Democratic Party filed a lawsuit in State court, contesting the
15 declaration of Mr. DeLay's ineligibility on constitutional grounds. *See Texas Democratic Party*
16 *v. Benkiser*, No. D-1-GN-06-002089 (Dist. Ct. Travis County, Texas, June 8, 2006). After
17 removal of the case to Federal court, the U.S. District Court for the Western District of Texas
18 held the declaration of ineligibility to be invalid, and permanently enjoined the Republican Party
19 of Texas from certifying to the Texas Secretary of State any candidate other than Mr. DeLay to
20 appear as the Republican candidate on the general election ballot. *See Texas Democratic Party v.*
21 *Benkiser*, ___ F. Supp. ___, 2006 WL 1851295 (W.D. Tex. July 6, 2006). The U.S. Court of
22 Appeals for the Fifth Circuit upheld the District Court decision and the injunction. *See Texas*

1 *Democratic Party v. Benkiser*, ___ F.3d ___, 2006 WL 2170160 (5th Cir. August 3, 2006).¹ On
2 August 9, 2006, Mr. Wallace announced that he intended to qualify, under Texas law, as a
3 “write-in candidate” for the House seat in the 2006 general election.² On August 21, 2006, Mr.
4 Wallace announced that he no longer intended to pursue a write-in candidacy and withdrew from
5 the House race.³

6 If the Court of Appeals’ injunction had been stayed and the declaration of Mr. DeLay’s
7 ineligibility had been given effect, the Republican Party executive committee for the 22nd
8 congressional district, composed of precinct chairs, would have met to select a replacement
9 House candidate for the November ballot. Mr. Wallace was a contender for the nomination.

10 2. *The Firm’s services*

11 On July 11, 2006, the Firm entered into a legal representation agreement with the Wallace
12 Committee. The Firm agreed to submit an *amicus curiae* brief to the Fifth Circuit Court of
13 Appeals supporting reversal of the District Court judgment on constitutional grounds. The
14 agreement specified that the Firm would seek an advisory opinion from the Commission as to
15 whether the preparation of the brief without charge would be a contribution from the Firm to the
16 Wallace Committee. If the Commission determined that it would be a contribution, the Wallace
17 Committee would pay the Firm “a normal fee” for such services. The Wallace Committee
18 agreed, in any event, to pay all routine expenses, such as photocopies and postage. You and the

¹ On August 7, 2006, Justice Antonin Scalia of the U.S. Supreme Court denied a request for a stay of the injunction, and the Republican Party of Texas reportedly considers its legal options to be “exhausted.” Bob Dunn, *Scalia Denies GOP’s Last Stab At Dropping DeLay From Ballot*, FortBendNow, August 7, 2006, available at <http://www.fortbendnow.com/news/1627/scalia-denies-gops-last-stab-at-having-delay-declared-ineligible-for-ballot> (last visited August 21, 2006).

² See Kristen Mack, *Sugar Land Mayor To Be Write-in For DeLay’s Seat*, Houston Chronicle, August 10, 2006, available at <http://www.chron.com/disp/story.mpl/nb/fortbend/news/4105411.html> (last visited August 21, 2006).

³ See Eric Hanson and Ruth Rendon, *Sugar Land Mayor Quits District 22 Race*, Houston Chronicle, August 22, 2006, available at <http://www.chron.com/disp/story.mpl/headline/metro/4132280.html> (last visited August 22, 2006).

1 other Firm employees who provided the services will be compensated as usual by the Firm for
2 your work. The Wallace Committee's *amicus* brief was filed on July 21, 2006.⁴

3 ***Question Presented***

4 *Would the Firm's preparation, free of charge, of an amicus brief on behalf of the*
5 *Wallace Committee be a contribution to the Committee, where the brief sought reversal of a*
6 *Federal court judgment that declared the current nominee of the candidate's party eligible for*
7 *the ballot and thereby precluded Mr. Wallace's eligibility for the party's nomination?*⁵

8 ***Legal Analysis and Conclusions***

9 Yes, the Firm's preparation of an *amicus* brief free of charge for the Wallace Committee
10 would be a contribution to the Wallace Committee and, because the Firm is a corporation, would
11 be impermissible.

12 Corporations are prohibited from making any "contribution or expenditure." 2 U.S.C.
13 441b(a); 11 CFR 114.2(b). The Act defines the term "contribution" in two ways. First, the Act
14 defines "contribution" to include "any gift, subscription, loan, advance, or deposit of money or
15 anything of value made by any person for the purpose of influencing any election for Federal
16 office." 2 U.S.C. 431(8)(A)(i). Second, the Act defines "contribution" to include the "payment
17 by any person of compensation for the personal services of another person which are rendered to
18 a political committee without charge *for any purpose.*" 2 U.S.C. 431(8)(A)(ii) (emphasis added);
19 *see also* 2 U.S.C. 441b(b)(2). The situation presented here implicates the second definition.

⁴ Under the Firm's normal billing procedures, bills for work performed in July are processed in August and sent in September, with payment expected within 30 days of the client's receipt of the bill. Hence, the request pertains to future activity by the Wallace Committee. *See* 11 CFR 112.1(b).

⁵ Your advisory opinion request included a second question, concerning the possible establishment of a legal expense fund to pay for the Firm's services. You withdrew this question from Commission consideration on August 23, 2006, and explained that the Wallace Committee would prefer to pay for the legal services out of its available cash on hand, rather than have Mr. Wallace establish a legal expense fund.

1 Similarly, Commission regulations provide that, with some exceptions, the “payment by
2 any person of compensation for the personal services of another person if those services are
3 rendered without charge to a political committee *for any purpose*” is a contribution to the
4 political committee. 11 CFR 100.54 (emphasis added); *see also* 11 CFR 114.2(b)(1). The
5 Firm’s provision of free legal services to the Wallace Committee would not come within the
6 exception to the definition of “contribution” for legal services provided solely to ensure
7 compliance with the Act or the presidential campaign funding provisions of Title 26. *See* 2
8 U.S.C. 431(8)(B)(viii)(II); 11 CFR 100.86 and 114.1(a)(2)(vii). Nor would they come within the
9 exception for services provided without compensation by an individual volunteer on behalf of a
10 candidate or political committee. *See* 2 U.S.C. 431(8)(B)(i); 11 CFR 100.74.

11 You contend that Mr. Wallace was not a candidate but merely a potential candidate when
12 the Firm rendered its legal services to the Wallace Committee, because no district committee
13 selection process had yet been scheduled. Under the Act and Commission regulations, a
14 “candidate” is “an individual who seeks nomination for election, or election, to Federal office.”
15 2 U.S.C. 431(2); 11 CFR 100.3(a). An individual becomes a candidate for Federal office when
16 that individual, or a person acting on the candidate’s behalf and with his or her consent, “has
17 received contributions aggregating in excess of \$5,000 or made expenditures aggregating in
18 excess of \$5,000.” 11 CFR 100.3(a)(1) and (2); *see* 2 U.S.C. 431(2)(A) and (B). According to
19 its 2006 July Quarterly Report, the Wallace Committee raised over \$200,000 in contributions
20 before July 1 and spent over \$45,000, including \$20,000 for a “radio buy.” Moreover, as of
21 August 1, 2006, its website, davidwallaceforcongress.com, made clear that Mr. Wallace
22 considered himself a candidate for election to the House in 2006. For example, the website (i)
23 asked readers to contact precinct chairs in support of his nomination; (ii) attacked the Democratic

1 general election candidate in a number of articles; (iii) posted a committee radio ad expressly
2 advocating Mr. Wallace's election and the Democratic candidate's defeat; and (iv) noted that,
3 prior to July 1, Mr. Wallace received commitments for \$800,000 in contributions, over and above
4 the amounts already received.⁶ Thus, Mr. Wallace was a Federal candidate at the time the Firm
5 rendered its services, and the Wallace Committee, as Mr. Wallace's principal campaign
6 committee, was a political committee. *See* 11 CFR 100.5(d) ("an individual's principal
7 campaign committee . . . becomes a political committee[] when that individual becomes a
8 candidate pursuant to 11 CFR 100.3").

9 Because the definition of "contribution" under 2 U.S.C. 431(8)(A)(ii) and 11 CFR 100.54
10 applies to services provided to a political committee "for any purpose" (other than services
11 specifically excepted by the Act and regulations), the Firm's compensation to you and other Firm
12 employees for the preparation of the *amicus* brief free of charge to the Wallace Committee would
13 be a "contribution." Accordingly, the Firm's payment of compensation to you and other Firm
14 personnel for such services would be an impermissible corporate contribution to the Wallace
15 Committee, unless the Wallace Committee pays the usual and normal charge for such services in
16 a timely manner. *See* 11 CFR 100.52(d) and 116.3(b).

17 In Advisory Opinion 1980-4 (Carter/Mondale Presidential Committee), on which you rely
18 in your request, the Commission applied a previous version of 11 CFR 100.54 (11 CFR
19 100.4(a)(5) (1977)). Although the relevant definition of "contribution" in the Act (2 USC
20 431(8)(A)) was amended in early 1980 to include compensation paid by one person for personal

⁶ Mr. Wallace's use of a radio ad to publicize his campaign and his statements referring to himself as a candidate indicate that he was well beyond "testing the waters" for a candidacy when the *amicus* brief was prepared and filed with the court. Nevertheless, even if he were treated as a "potential candidate," in the same position as an individual testing the waters, funds received and spent for such purposes are subject to the limitations and prohibitions of the

1 services of another that are rendered to a political committee without charge "for any purpose,"
2 *see* Pub. L. No. 96-187, 93 Stat. 1339 (1980), the Commission had not yet amended its
3 regulations to reflect the amended statute. Accordingly, in Advisory Opinion 1980-4 the
4 Commission stated that "Commission regulations indicate that contributions in the form of
5 compensation occur when the compensated services consist of 'political activity,' *i.e.*, services
6 engaged in for the purposes of influencing an election to Federal office." The Commission
7 concluded that a contribution did not result in Advisory Opinion 1980-4 because the
8 compensation paid for legal services that enabled the political committee in question to present a
9 defense to a complaint alleging violations outside the purview of the Act, as distinguished from
10 permitting compensated personnel to engage in the political committee's political activities.

11 The Commission's conclusion here, by contrast, rests on the implementation of the Act as
12 reflected in current Commission regulations, which specify that a contribution results from "the
13 payment of any person of compensation for the personal services of another person which are
14 rendered to a political committee without charge *for any purpose.*" 11 CFR 100.54 (emphasis
15 added). The Commission need not and does not address whether the legal services described by
16 the requestor are "for the purpose of influencing the election of any person to Federal office."
17 Due to material differences between the previous and current understanding of the Act and
18 between the versions of Commission regulations, the Commission determines that Advisory
19 Opinion 1980-4 does not apply here.

20

21

Act, and are contributions and expenditures subject to the Act's reporting requirements if the individual subsequently becomes a candidate. *See* 11 CFR 100.72 and 100.131.

