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August 10, 1998

By Hand

Lawrence M. Noble, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

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FEDERAL ELECTION COMMISSION

Re: Request for Advisory Opinion—Washington State Democratic Committee

Dear Mr. Noble:

On behalf of our client, the Washington State Democratic Committee (the "State Party") we are requesting an advisory opinion, pursuant to 11 C.F.R. § 112.1, with respect to an issue that, to our knowledge, has not previously been addressed by the Commission. In summary, the issue is how the State Party should pay for the costs of a "testing the waters" poll for an individual that considered running, but decided not to become a candidate, for election to the U.S. House of Representatives. Specifically, the question is whether such costs should be paid for entirely with funds not subject to the limitations of the Federal Election Campaign Act of 1971, as amended (the "Act"); whether the costs should be allocated in accordance with 11 C.F.R. § 106.5; or whether such costs should be paid entirely from funds subject to the limitations and prohibitions of the Act, i.e., entirely from the State Party's federal account.

The relevant facts are as follows. In May, 1998, the State Party contracted for a polling firm to conduct a poll of voters for a particular congressional district in Washington State. The purpose of the poll was to determine the viability of potential Democratic candidates for U.S. Congress in that district. One potential candidate was mentioned in the poll, along with the names of Republican candidates and other federal and state elected officials not serving in or running for the U.S. House.

The one potential U.S. House candidate named in the poll decided not to run for U.S. Congress or any other office in the 1998 election cycle. The results of the poll were disclosed to the potential U.S. House candidate and the Democratic Congressional Campaign Committee but have not been shared with or disclosed to any person actually

running for any federal office, or the committee of any such person. The invoice for the poll has now been received by the State Party and the State Party wants to pay it.

The Commission's rules provide that the term "contribution" does not include "funds received solely for the purpose of determining whether an individual should become a candidate." 11 C.F.R. § 100.7(b)(1)(i). If an individual subsequently becomes a candidate, "the funds received are contributions subject to the reporting requirements of the Act." *Id.* Similarly, the Commission's rules provide that the term "expenditure" does not include "[p]ayments made solely for the purpose of determining whether an individual should become a candidate," and that such payments are reportable as expenditures only "[i]f the individual subsequently becomes a candidate." *Id.* §100.8(b)(1)(i).

Under this regulation, it is clear that the State Party's disbursement for the poll would not be an in-kind "contribution" to or "expenditure" for the person who never became a candidate. Such a result also implies that such a disbursement may be made entirely from funds not subject to the limitations and prohibitions of the Act, i.e., 100% from non-federal funds.

At the same time, the regulations provide that but that "Only funds permissible under the Act may be used for such activities." 11 C.F.R. § 100.8(b)(1)(i). Indeed, as you know, section 101.3 was amended in 1985 to make clear that funds received by a candidate for testing the waters must be subject to the Act's limitations and prohibitions, and to overrule previous Advisory Opinions suggesting that funds not subject to the Act's limitations and prohibitions could be received and then refunded once a person became a candidate. At first blush, that amendment suggests that all payments for testing the waters activities should be made 100% from funds subject to the limitations and prohibitions of the Act.

It appears, however, that the situation contemplated by these regulations, even after the amendment, is the use of such funds for testing the waters by a person who actually does become a candidate. Section 101.3 of the Commission's rules provides that "[w]hen an individual becomes a candidate, all funds received or payments made in connection with [testing the waters activities] prior to becoming a candidate shall be considered contributions or expenditures under the Act. . . ." (emphasis added). Further, the Explanation and Justification for this amended regulation stated that--

the revised rules will remedy the situation that results under the present regulations when funds that are permissible when donated subsequently become illegal and must be refunded when the individual becomes a candidate. Moreover, the revised rules are intended to clear up any misconceptions that the 'testing the waters' provisions may be used to raise 'seed money' for prospective candidates.

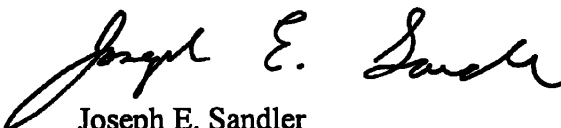
Payments Received for Testing the Waters Activities, Final Rule & Transmittal to Congress, 50 Fed. Reg. 9992 (1985)(emphasis added).

In this situation, the status of party disbursements for testing the waters activities for a person who never becomes a candidate is left unclear. On the one hand, it is not possible for a disbursement to be influencing a federal election where the individual who benefits from the poll never becomes a federal candidate. That logic suggests that the payments for such a poll should be made entirely from funds not subject to the limitations and prohibitions of the Act. A second possibility is to apply the general rule of section 106.5 of the Commission's rules that whenever a party committee makes a disbursement not attributable to a specific candidate, the costs should be subject to allocation between the federal and non-federal accounts. A third possibility is that the Commission's rules contemplate that disbursements for testing the waters should be made entirely from funds subject to the Act's limitations and prohibitions—even if the person never becomes a candidate.

The State Party, therefore, respectfully requests an Advisory Opinion addressing the question of how the costs of this poll should be paid, specifically, whether the costs are (i) payable entirely from its non-federal account; (ii) subject to allocation between the State Party's federal and non-federal accounts under 11 C.F.R. § 106.5(e) or (iii) required to be paid entirely from funds subject to the Act's limitations and prohibitions, i.e., entirely from the State Party's federal account.

Thank you for your time and attention to this matter.

Sincerely yours,



Joseph E. Sandler
Neil P. Reiff
Special Counsel to Washington State Democratic
Committee

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September 3, 1998

By HandBradley Litchfield, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

AOR 1998-18

Dear Mr. Litchfield:

This letter is a follow-up to our conversation regarding the request for an advisory opinion on behalf of our client, the Washington Democratic Party. As you know, our earlier letter requested an advisory opinion regarding payment by the state party of the costs of a poll that was conducted to determine the viability of a particular candidate to run for the House of Representatives in Washington State. I address the questions posed by you in our conversation:

- 1) **How was the poll conducted, and how many questionnaires were completed?**

The poll was conducted by a random telephone survey. Four hundred surveys were completed. The poll was conducted exclusively in the referenced congressional district.

- 2) **What was the cost of the poll?**

The poll cost eight thousand dollars (\$8,000.00).

- 3) **Describe the contents of the poll.**

The poll consisted of 17 questions, of which 3 were demographic. Of the remaining 14, five tested the Republican candidate for U.S. House head to head against the individual whose prospects the party was testing for a possible Democratic candidacy. One questions tested favorability of the incumbent, the possible Democratic candidate, and other Democratic and Republican leaders, President Clinton, Speaker Gingrich and an industry. Another question tested approval of President Clinton, Senator Slade Gorton, Senator Patty Murray, Governor Gary Locke, the Republican candidate for U.S. House, the possible Democratic candidate and the Republicans in Congress.

Two questions, one with 6 subparts and one with 5 subparts, tested reaction to various statements about the Republican candidate for U.S. House and the possible Democratic candidate. Another question tested ideological characterization of these same individuals. One question asked generically as to which party the individual would vote for Congress. One question asked the individual of their impression of the direction of the country. One question asked about the likelihood that the individual would vote. Finally, one question asked about likelihood that the voter would vote by mail.

- 4) **When was the poll shared with the DCCC? When did the potential Democratic candidate announce that he would not seek the Democratic nomination?**

The poll was shared with the DCCC in early June 1998. The potential candidate had never publicly manifested any interest in running for the seat and therefore, there was no occasion for him to announce that he would not seek the nomination.

- 5) **Are there any Democrats who have qualified for the ballot for this congressional district?**

There appears to be one Democrat who has qualified for the ballot in this district. A review of FEC records indicate that this individual not yet filed an FEC Statement of Organization with the FEC.

- 6) **Describe the value of the poll to the Washington Democratic Party and/or DCCC with respect to federal elections.**

There is a minimal, unquantifiable benefit to the State Party in its general efforts to influence federal and non-federal elections. There is no value whatsoever to the DCCC.

If you have any questions, please call me at (202) 543-7680.

Sincerely,



Neil Reiff