



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

COMMISSIONER STATEMENT IN ADVISORY OPINION 1996-30

of

CHAIRMAN LEE ANN ELLIOTT

As I expressed during the open meeting discussion of this matter, I am troubled by the sincerity of the questions asked here by counsel on behalf of the Democratic Senatorial Campaign Committee ("DSCC") and the Democratic Congressional Campaign Committee ("DCCC"). It is perplexing that the current request vaguely outlines a plan of potential activity that is not only unethical, but in fact is illegal in part. I am even more confused by the request given that I know the requesters' counsel to be thoroughly versed in election law. Furthermore, I am appalled that the draft response submitted by the Office of the General Counsel does not even mention these blatant illegalities. As I pointed out during the Commission's discussion, the lack of detail put forward in the request leads me to conclude that the fact pattern outlined here is not in actuality one which the requester intends to undertake, and thus presume that it is therefore speculative at best. For these reasons the request does not meet the standards established by our regulations for Commission consideration of an advisory opinion request. Specifically, at 11 CFR 112.1 (b) the Commission requires the following:

The written advisory opinion request shall set forth a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future. Requests presenting a general question of interpretation, or posing a hypothetical situation, or regarding the activities of third parties, do not qualify as advisory opinion requests.

As part of the factual background the request notes that the DSCC and the DCCC "have communicated with these candidates' polling firms about polling information and its strategic implication for message, allocation of campaign resources, and advertising strategy. The Committees have also communicated with these candidates' media advisors about the proposed strategic direction of its advertising." Given that such consultations constitute a service to the DSCC and DCCC, or otherwise amount to "something of value," I cannot see how they would not therefore also be seen as illegal corporate in-kind contributions in violation of 2 USC 441b. Commission regulations at 11 CFR 106.4 are clear on how the cost of polling results must be allocated. Nowhere does the request indicate that the DSCC and DCCC have maintained ongoing contractual arrangements with these polling and media corporations, and thus have made payments for services rendered.

Furthermore, such a sharing of raw (non-publicly available) data is a violation of the Code of Standards for Survey Research by which all polling firms are regulated. Sections II(B)(5) and (6) of that Code read as follows:

(5) Research Organizations will hold confidential all information that they obtain about a Client's general business operations, and about matters connected with research projects that they conduct for a Client.

(6) For research findings obtained by the agency that are the property of the Client, the Research Organization may make no public release or revelation of findings without expressed, prior approval from the Client.

I have seen hundreds of polling contracts, and such confidentiality provisions are the hallmark of almost all of them. Finally, Section III(D) of the Code of Standards for Survey Research reads in part as follows:

A Survey Research Organization will seek agreements from Clients so that citations of survey findings will be presented to the Research Organization for review and clearance as to accuracy and proper interpretation prior to public release.

Such a provision would be unenforceable if polling data is being shared with a non-client such as the DSCC or DCCC. For all of these reasons the circumstances outlined by the request in my view would likely violate any contract between the polling firms and the client-candidate committees, would certainly be unethical, and most likely would result in corporate prohibitions and reporting violations outlined in the Federal Elections Campaign Act, as amended.

The circumstances outlined by this request are so ludicrous and beyond belief that I doubt their true existence, and therefore would choose not to proceed further with this Advisory Opinion. One commentor has already noted that Advisory Opinion Request 1996-30 fails to present any facts concerning a specific transaction or activity that the requester intends to undertake. This fact is reflected in the resulting speculative nature of those answers which the Office of the General Counsel attempts to provide to certain questions, and by the General Counsel's complete inability to respond to questions 6 and 7 in the present draft. Given the hypothetical nature of this request, and the Commission's inevitable rulemaking grappling with the impact of *Colorado Republican Federal Campaign Committee v. FEC*, 116 S.Ct. 2309 (1996), it is in the best interest of the Commission, not to mention the requester, that no response be issued to this hypothetical request.

9/16/96