FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 18, 2006

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2006-22

Andrius R. Kontrimas, Esquire
Jenkens & Gilchrist
1401 McKinney
Suite 2600
Houston, Texas 77010-4034

Dear Mr. Kontrimas:

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

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

Background

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

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

1. The court case

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

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

On June 8, 2006, the Texas Democratic Party filed a lawsuit in State court, contesting the declaration of Mr. DeLay's ineligibility on constitutional grounds. *See Texas Democratic Party v. Benkiser*, No. D-1-GN-06-002089 (Dist. Ct. Travis County, Texas, June 8, 2006). After removal of the case to Federal court, the U.S. District Court for the Western District of Texas held the declaration of ineligibility to be invalid, and permanently enjoined the Republican Party of Texas from certifying to the Texas Secretary of State any candidate other than Mr. DeLay to appear as the Republican candidate on the general election ballot. *See Texas Democratic Party v. Benkiser*, __ F. Supp. __, 2006 WL 1851295 (W.D. Tex. July 6, 2006). The U.S. Court of Appeals for the Fifth Circuit upheld the District Court decision and the injunction. *See Texas Democratic Party v. Benkiser*, __ F.3d __, 2006 WL 2170160 (5th Cir. August 3, 2006).[1] On August 9, 2006, Mr. Wallace announced that he intended to qualify, under Texas law, as a "write-in candidate" for the House seat in the 2006 general election.[2] On August 21, 2006, Mr. Wallace announced that he no longer intended to pursue a write-in candidacy and withdrew from the House race.[3]

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

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[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).

2. The Firm's services

On July 11, 2006, the Firm entered into a legal representation agreement with the Wallace Committee. The Firm agreed to submit an *amicus curiae* brief to the Fifth Circuit Court of Appeals supporting reversal of the District Court judgment on constitutional grounds. The agreement specified that the Firm would seek an advisory opinion from the Commission as to whether the preparation of the brief without charge would be a contribution from the Firm to the Wallace Committee. If the Commission determined that it would be a contribution, the Wallace Committee would pay the Firm "a normal fee" for such services. The Wallace Committee agreed, in any event, to pay all routine expenses, such as photocopies and postage. You and the other Firm employees who provided the services will be compensated as usual by the Firm for your work. The Wallace Committee's *amicus* brief was filed on July 21, 2006.[4]

Question Presented

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

Legal Analysis and Conclusions

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

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

Similarly, Commission regulations provide that, with some exceptions, the "payment by any person of compensation for the personal services of another person if those services are

[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.

rendered without charge to a political committee *for any purpose*" is a contribution to the political committee. 11 CFR 100.54 (emphasis added); *see also* 11 CFR 114.2(b)(1). The Firm's provision of free legal services to the Wallace Committee would not come within the exception to the definition of "contribution" for legal services provided solely to ensure compliance with the Act or the presidential campaign funding provisions of Title 26. *See* 2 U.S.C. 431(8)(B)(viii)(II); 11 CFR 100.86 and 114.1(a)(2)(vii). Nor would they come within the exception for services provided without compensation by an individual volunteer on behalf of a candidate or political committee. *See* 2 U.S.C. 431(8)(B)(i); 11 CFR 100.74.

You contend that Mr. Wallace was not a candidate but merely a potential candidate when the Firm rendered its legal services to the Wallace Committee, because no district committee selection process had yet been scheduled. Under the Act and Commission regulations, a "candidate" is "an individual who seeks nomination for election, or election, to Federal office." 2 U.S.C. 431(2); 11 CFR 100.3(a). An individual becomes a candidate for Federal office when that individual, or a person acting on the candidate's behalf and with his or her consent, "has received contributions aggregating in excess of $5,000 or made expenditures aggregating in excess of $5,000." 11 CFR 100.3(a)(1) and (2); *see* 2 U.S.C. 431(2)(A) and (B). According to its 2006 July Quarterly Report, the Wallace Committee raised over $200,000 in contributions before July 1 and spent over $45,000, including $20,000 for a "radio buy." Moreover, as of August 1, 2006, its website, davidwallaceforcongress.com, made clear that Mr. Wallace considered himself a candidate for election to the House in 2006. For example, the website (i) asked readers to contact precinct chairs in support of his nomination; (ii) attacked the Democratic general election candidate in a number of articles; (iii) posted a committee radio ad expressly advocating Mr. Wallace's election and the Democratic candidate's defeat; and (iv) noted that, prior to July 1, Mr. Wallace received commitments for $800,000 in contributions, over and above the amounts already received.[6] Thus, Mr. Wallace was a Federal candidate at the time the Firm rendered its services, and the Wallace Committee, as Mr. Wallace's principal campaign committee, was a political committee. *See* 11 CFR 100.5(d) ("An individual's principal campaign committee . . . becomes a political committee[] when that individual becomes a candidate pursuant to 11 CFR 100.3").

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

[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 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.

In Advisory Opinion 1980-4 (Carter/Mondale Presidential Committee), on which you rely in your request, the Commission applied a previous version of 11 CFR 100.54 (11 CFR 100.4(a)(5) (1977)). Although the relevant definition of "contribution" in the Act (2 U.S.C. 431(8)(A)(ii)) was amended in early 1980 to include compensation paid by one person for personal services of another that are rendered to a political committee without charge "for any purpose," *see* Pub. L. No. 96-187, Title I, § 101, Jan. 8, 1980, 93 Stat. 1339, the Commission had not yet amended its regulations to reflect the amended statute.[7] Accordingly, in Advisory Opinion 1980-4, the Commission stated that "Commission regulations indicate that contributions in the form of compensation occur when the compensated services consist of 'political activity,' *i.e.*, services engaged in for the purpose of influencing an election to Federal office." The Commission concluded that a contribution did not result in Advisory Opinion 1980-4 because the compensation paid for legal services that enabled the political committee in question to present a defense to a complaint alleging violations outside the purview of the Act, as distinguished from permitting compensated personnel to engage in the political committee's political activities.

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

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Michael E. Toner
Chairman

Enclosure (Advisory Opinion 1980-4)

[7] Advisory Opinion 1980-4 was issued on February 1, 1980. The amended regulation, which is also the current regulation, became effective on April 1, 1980, and appeared at 11 CFR 100.7(a)(3). *See* 45 Fed. Reg. 21211 (Apr. 1, 1980). The Commission re-numbered the regulation as 11 CFR 100.54 after enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). *See* 67 Fed. Reg. 50582, 50586-7 (Aug. 5, 2002).