



California Fair Political Practices Commission

April 27, 1987

Clayton Roche
Deputy Attorney General
Department of Justice
350 McAllister Street, Room 6000
San Francisco, CA 94102

Re: Your Request for Input
Our File No. I-87-103
Your Opinion No. 87-301

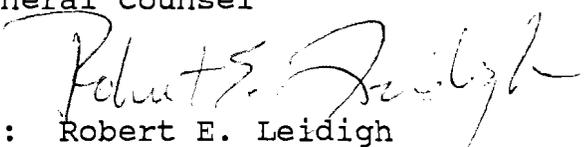
Dear Mr. Roche:

You have written seeking this agency's views regarding your agency's Opinion Request No. 87-301 from the Santa Barbara County District Attorney. The question involves the constitutionality of Penal Code Section 556, which prohibits advertising being placed on public property, as applied to a campaign poster for a candidate for public office.

You are already aware of the case of City Council of Los Angeles v. Taxpayers for Vincent (1984) 466 U.S. 780 [80 L.Ed. 2d 772, 104 S.Ct. 2118]. You may wish to contact the deputy city attorney who handled that litigation for the city. He is Anthony Saul Alperin (213) 485-5440. This agency has no specific views on the issues raised by the question.

Sincerely,

Diane M. Griffiths
General Counsel


By: Robert E. Leidigh
Counsel, Legal Division

REL:plh

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE



350 McALLISTER STREET, ROOM 6000
SAN FRANCISCO 94102
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March 27, 1987

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(415) 557-1586

John H. Larson, Chairman
Fair Political Practices Commission
P. O. Box 807
Sacramento, Calif 95804

Dear Mr. Larson:

Re: Opinion No. 87-301

Enclosed is a copy of an opinion request we have received from the District Attorney of Santa Barbara County relating to the constitutionality of section 556 of the Penal Code with respect to political advertising and other possible applications.

In accordance with our policy to request views of interested parties and associations, you are invited to submit whatever views you may have on this request.

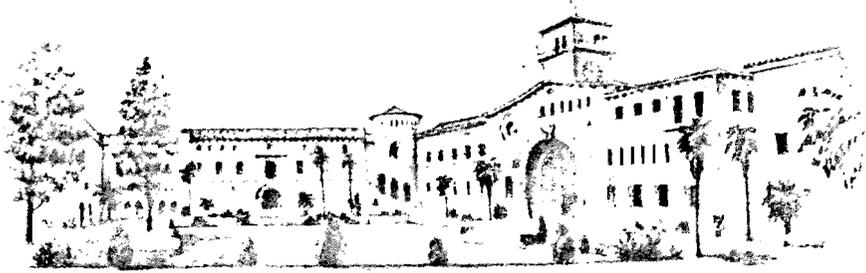
Very truly yours,

JOHN K. VAN DE KAMP
Attorney General


CLAYTON P. ROCHE
Deputy Attorney General

CPR:is
Encl.





THOMAS W. SNEDDON, JR.
District Attorney

PATRICK J. McKINLEY
Assistant District Attorney
STEVEN B. PLUMER
Assistant District Attorney

COUNTY OF SANTA BARBARA
DISTRICT ATTORNEY

March 2, 1987

Jack R. Winkler
Assistant Attorney General
Opinion Unit
Department of Justice
1515 "K" Street
Suite 511
Sacramento, California 95814

Dear Mr. Winkler:

We are requesting the Attorney General's Office to give us an opinion whether Penal Code section 556 can constitutionally be applied to a candidate for public office who without permission places his or her campaign signs on public property. If not, is section 556 constitutionally valid for any application?

Penal Code section 556 came to the attention of this office just prior to the November, 1986 election when we were asked to consider whether a candidate for local office had violated section 556 by placing his campaign posters on light standards, utility poles, guy wires, and other such structures located on public property.

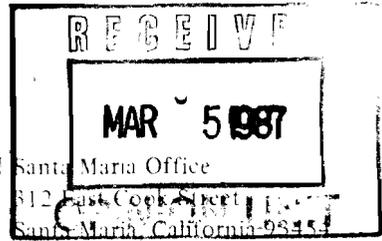
After considering the matter, we had substantial questions whether the section unconstitutionally infringed on the candidate's freedom of speech and whether the section was properly applied to political advertisements.

Section 556 was enacted in 1953 [Chapter 32, Section 10]. Although we have not found much legislative history on the section, we are informed that the enactment codified a provision which had been a matter of uncodified, general law since early in the century.

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Santa Barbara, California 93101
(805) 963-6158

Lompoc Office
115 Civic Center Plaza
Lompoc, California 93436
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Santa Maria Office
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Jack R. Winkler
March 2, 1987
Page 2

Penal Code section 556 provides:

It is a misdemeanor for any person to place or maintain, or cause to be placed or maintained without lawful permission upon any property of the State, or of a city or of a county, any sign, picture, transparency, advertisement or mechanical device which is used for the purpose of advertising or which advertises or brings to notice any person, article of merchandise, business or profession, or anything that is to be or has been sold, bartered or given away.

It is well settled that laws which regulate speech involve free speech issues. *Metromedia Inc. v. San Diego* (1980) 453 U.S. 490 [69 L.Ed.2d 800, 101 S.Ct. 2882]; *City Council of Los Angeles v. Taxpayers For Vincent* (1984) 466 U.S. 789 [80 L.Ed.2d 772, 104 S.Ct. 2118]; *Wirta v. Alameda - Contra Costa Transit District* (1967) 68 C.2d 51 [64 Cal.Rptr. 430, 434 P.2d 982]. However, the fact that "an ordinance presents a First Amendment issue is not necessarily to say that it constitutes a First Amendment violation." *City Council of Los Angeles v. Taxpayers For Vincent* (1984) 466 U.S. 789, 803-04 [80 L.Ed.2d 772, 104 S.Ct. 2118], quoting *Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490 [69 L.Ed.2d 800, 101 S.Ct. 2882]. For, even though a communication is potentially entitled to constitutional protection, it is not necessarily immune from regulation. *Konigsberg v. State Bar* (1961) 366 U.S. 36 [6 L.Ed.2d 105, 81 S.Ct. 997].

The citizens of California derive free speech rights from the First Amendment, applied to the states through the Fourteenth amendment, and from Article I, section 2 of the California Constitution.

The First Amendment provides, in pertinent part, "Congress shall make no law abridging the Freedom of Speech or of the press;"

The California Constitution provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

Several cases have held that the provisions of the California Constitution are broader and more inclusive than the First Amendment's. *Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal.3d 501 [217 Cal.Rptr. 225, 703 P.2d 1119];

Jack R. Winkler
March 2, 1987
Page 3

Laguna Publishing Co. v. Golden Rain Foundation (1982) 131 Cal.App.3d 816; *Pruneyard v. Robins* (1980) 447 U.S. 74 [64 L.Ed.2d 741, 100 S.Ct. 2035].

In the *Pruneyard* case the United States Supreme Court, affirming the California Supreme Court's ruling, held that a state has the right to adopt individual liberties which are more expansive than those which the First Amendment confers and that, under the California Constitution, a private shopping center could not prohibit the use of its facilities for political activities, although the First Amendment did not compel such a holding.

Constitutional analysis is always challenging, especially when analyzing a law which restricts speech.

This process begins with the basic premise that generally speaking the government may not regulate the content or subject matter of First Amendment freedoms. [Citations omitted] As the high court has pointed out, to restrict the content of expression would be to erode the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270 [11 L.Ed.2d 701, 84 S.Ct. 710, 95 A.L.R.2d 1412]). *Dulaney v. Municipal Court* (1974) 11 Cal.3d 77, 85 [112 Cal.Rptr. 777, 520 P.2d 11].

Generally speaking, the government may only directly abridge or curtail the right to speak on any subject if the speech is not entitled to protection [*Spiritual Psychic Science Church v. City of Azusa*, *supra*, 39 C.3d at 513-514] or if there is a clear and present danger to the safety of the state. (13 Cal.Jur.3d, Constitutional Law, sections 257-58, pp. 477-84.)

Where the purpose of the law is to regulate nonspeech activities, its application is content neutral, and its effect on protected communications is incidental, a regulation may be upheld as constitutional if it meets the test set out in *United States v. O'Brien* (1968) 391 U.S. 367, 377 [20 L.Ed.2d 672, 88 S.Ct. 1673]:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free

Jack R. Winkler
March 2, 1987
Page 4

expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

See, *City Council v. Taxpayers for Vincent*, supra, 104 U.S. at 2129; *Spiritual Psychic Science Church v. City of Azusa*, supra, 30 C.3d at 516; *Dulaney v. Municipal Court*, supra, 11 C.3d at 84.

Or, in the case of commercial speech, if the statute meets the test in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n* (1980) 430 U.S. 557 [65 L.Ed.2d 341, 100 S.Ct. 2343], it may incidentally restrict speech without violating constitutional principles.

The *Central Hudson* case extended limited first amendment protection to truthful commercial speech which concerned a lawful activity. Once it is determined that commercial speech is entitled to constitutional protection, the speech may be restricted only if the governmental interest is substantial and if the restriction directly advances the governmental interest and is no more restrictive than necessary to serve that interest. *Id.* at 2351.

Thus, restraints on protected speech are constitutional only if the inhibition of speech is the incidental effect of a law aimed at achieving some other, substantial governmental goal, and only if such laws apply without regard to the content of that speech. In other words, the law must be content neutral.

Penal Code section 556 is not content neutral. By its express terms it applies only to advertising. The only way to determine if section 556 would apply to any given sign, posted on public property, is to characterize the content of the message. If it is a "sign, picture, transparency, advertisement, or mechanical device which is used for the purpose of advertising or which advertises or brings to notice any person, article of merchandise, business or profession, or anything that is to be or has been sold, bartered, or given away," then section 556 applies and forbids the use of public property unless permission has first been obtained.

Section 556 is not necessarily constitutionally defective because it discriminates based on speech content, for it is well settled that commercial speech is not entitled to the

Jack R. Winkler
March 2, 1987
Page 5

same constitutional protection that other forms of speech enjoy. *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico* (1986) ---U.S.--- [---L.Ed.2d ---, 106 S.Ct. 2968]; *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, supra 430 U.S. 557; *City of Indio v. Arroyo* (1983) 143 Cal.App.3d 151 [191 Cal.Rptr. 565]. Thus, a regulation which affects "commercial" speech may not require the same governmental justification as one affecting more protected speech.

In *City of Indio v. Arroyo*, supra, 143 Cal.App.3d at pg. 158, the appellate court struck down a local sign ordinance as being unconstitutionally overbroad. However, the court specifically held that the statute was constitutional as applied to purely commercial speech since "... asserted governmental interests "may well support regulation directed at [some] activities, but be insufficient to justify such as diminished the exercise of rights so vital to the maintenance of democratic institutions.'" (*Shad v. Mount Ephraim*, supra, 452 U.S. at p.69)." *Id.* at p. 158.

In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, the Supreme Court, in a 5-4 decision, upheld a Puerto Rican law which prohibited local gambling casinos from advertising to citizens of Puerto Rico against a claim of facial unconstitutionality. The majority held that "because this case involves the restriction of pure commercial speech which does 'no more than propose a commercial transaction,'" it was permissible to restrict the advertising practices of local casinos. The Court appeared to rely heavily on the legislature's power to completely ban gambling in Puerto Rico to justify the imposition of speech restrictions.

The Court specifically acknowledged that restrictions of the type approved in *Posadas de Puerto Rico Associates* would not be appropriate if the speech, although commercial, involved underlying conduct which enjoyed constitutional protection and could not have been prohibited by the state, such as the commercial speech in *Carey v. Population Services Int'l* (1977) 431 U.S.678 [52 L.Ed.2d 675, 97 S.Ct. 2010] and *Biglow v. Virginia* (1975) 421 U.S. 809 [44 L.Ed.2d 600, 95 S.Ct. 2222].

Proper constitutional analysis, therefore, is dependent upon the correct characterization of speech as commercial or non-commercial.

There is no clearly articulated test to determine what constitutes commercial speech. Rather,

Jack R. Winkler
March 2, 1987
Page 6

phrases from certain opinions of the United States Supreme Court have been used to evaluate types of speech. Thus commercial speech has been referred to as "speech which does 'no more than propose a commercial transaction'" (*Va. Pharmacy Bd. v. Va. Consumer Council*, *supra* 425 U.S. 748, 762 [48 L.Ed.2d 346, 358], quoting from *Pittsburgh Press Co. v. Human Relations Comm'n* (1973) 413 U.S. 376, 385 [37 L.Ed.2d 669, 677, 93 S.Ct. 2553]), and as "expression related solely to the economic interests of the speaker and its audience." (*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 561 [65 L.Ed.2d 341, 348, 100 S.Ct. 2343].) *Spiritual Psychic Science Church v. City of Azusa*, *supra*, 39 Cal.3d at p. 510.

The California Supreme Court concluded that "[t]he principle emerging from these cases is that commercial speech is that which has but one purpose--to advance an economic transaction. By contrast, noncommercial speech encompasses activities extending beyond that purpose." *Id.* at p. 511.

The Court further found that when the content of a message goes beyond that related to the bare economic interests of the parties, it involves the passing of ideas and information, which removes the speech from being properly classified as commercial and invests it with greater constitutional protection.

Thus, the fact that speech may promote a product or a service or the fact that it may be necessary for the speaker to pay to obtain the use of the forum in question, will not remove the speech from the protection of the First Amendment where the speech also involves a principle entitled to full constitutional protections. *Id.* at p. 511; *Wirta v. Alameda-Contra Costa Transit District* (1967) 68 Cal.2d 51 [64 Cal.Rptr. 430, 434 P.2d 982], *Welton v. City of Los Angeles* (1976) 18 Cal.3d 497 [134 Cal.Rptr. 668, 556 P.2d 1119].

It is, therefore, essential to determine whether or not the provisions of section 556 apply only to "pure" commercial speech. In order to make that determination, it is necessary to determine the meaning or application of the terms "advertise" and "advertising" as used in section 556. Black's Law Dictionary (5th ed. 1979) p. 50, col. 1, defines "advertise" thusly:

To advise, announce, apprise, command, give notice of, inform, make known, publish. On [sic] call to

Jack R. Winkler
March 2, 1987
Page 7

the general public attention by any means whatsoever. Any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business and includes, without limitation because of enumeration, statements and representations made in a newspaper or other publication or on radio or television or contained in any notice, handbill, sign, catalog, or letter, or printed on or contained in any tag or label attached to or accompanying any merchandise.

In interpreting statutes, words are generally given their common or ordinary meaning. *In Re Rojas* (1979) 23 Cal.3d 152 [151 Cal.Rptr. 649, 588 P.2d 289]; *Madrid v. Justice Court for Dinuba Judicial District* (1975) 52 Cal.App.3d 819 [125 Cal.Rptr. 348]. Applying that principle to section 556, the common and ordinary meaning of the word "advertise" would refer to all signs which attempted to induce the public to buy, support, or approve of the subject presented, an application which encompasses more than offering a commercial transaction and would include political advertising, excluding the ordinance as one regulating purely commercial speech. *Spiritual Psychic Science Church v. City of Azusa, supra*, 39 Cal.3d at p. 512.

As a content-discriminatory statute with non-commercial application, section 556 would be constitutional only on a showing of a significant state interest justifying the section's limitations and the existence of a clear and present danger in the absence of the challenged limitations.

However, if the application of the word "advertise" is construed narrowly to limit the application of the statute to market-place advertising, which does no more than propose a commercial transaction, the fact that the section is not content neutral would not necessarily be a constitutional defect, because of the lesser protection afforded such speech.

Such a limited application of the term "advertising" might be acceptable, since the general rule is that a statute should be construed to preserve its constitutionality. *Welton v. Los Angeles* (1976) 18 Cal.3d 497, 505 [134 Cal.Rptr. 668, 556 P.2d 1119]

A determination that section 556 is not constitutionally defective for being content oriented does not resolve the question of the section's constitutionality.

Jack R. Winkler
March 2, 1987
Page 8

In *Dulaney v. Municipal Court*, *supra*, 11 Cal.3d at p. 77, the California Supreme Court struck down a content-neutral San Francisco ordinance which forbid posting signs on utility poles "unless permission be obtained from the person, firm or corporation owning or controlling such poles, and from the Department of Public Works." The Court found the ordinance to be facially defective under both the federal and state constitutions.

The Court stated that the city had "opened the forum" when it provided for granting permission to use the poles. However, since the ordinance lacked any criteria for the permitting officials' exercise of discretion in granting or withholding permission to use the poles, the regulation was unconstitutional because it left the licensing authorities the power to control the content of speech.

The city urged the Court to uphold the ordinance because it met the *O'Brien* test in serving the governmental interest of maintaining the aesthetic quality of the city. In rejecting the city's contention, the Court stated:

The People's argument is beside the point. The issue raised in these proceedings is not whether the ordinance bears a rational relationship to a legitimate governmental interest for that seems to have been taken for granted at the start. Indeed it is undisputed that the purpose of the ordinance is to promote the general welfare of the city whether that be defined in terms of the prevention of littering or of the unsightliness of utility poles. The issue here is whether after making the poles available for the posting of signs and thus for the exercise of First Amendment rights, the City may regulate their use as such by means of a standardless licensing scheme "which allows licensing officials wide or unbounded discretion in granting or denying permits" [citation omitted], thereby effecting an invalid prior restraint on freedom of speech." *Id.* at p. 88.

In *Baldwin v. Redwood City*, *supra*, 540 F.2d 1360, the Ninth Circuit upheld an injunction issued by the District Court against the enforcement of certain provisions of the city's sign ordinance which severely limited the placing of campaign signs on public and private property. Among the provisions held unconstitutional were limitations on the total aggregate area of signs on behalf of a single candidate or issue, that allowing summary removal of signs, and that requiring an

Jack R. Winkler
March 2, 1987
Page 9

application before posting a campaign sign. The provisions requiring a \$1.00 inspection fee and a \$5.00 refundable deposit were also held to unconstitutionally restrain and limit political expression. While the court recognized the legitimate interest the community has in preserving environmental aesthetics, it held that those objectives might be effectively served by more narrowly drawn provisions.

Sussli v. City of San Mateo (1981) 120 Cal. App.3d 1 [173 Cal.Rptr. 781], was a case in which the appellate court upheld a city ordinance which forbid placing signs on public property "except as may be required by ordinance or law." The court characterized the statute as being a content neutral, regulatory enactment. The court found that the public had a compelling interest in maintaining "some semblance of visual harmony" and that the goal could not be more narrowly achieved than by the use of the blanket prohibition on all signs on all public property.

Interestingly, although the *Sussli* court cites both *Delaney* and *Baldwin* in its decision, it does not distinguish or reconcile those cases. Further, as justification for finding the restrictions to be constitutional, the court cited the availability of an alternate forum, provided by a local ordinance which allowed campaign posters to be placed on private property to support its decision, despite San Mateo's requirement, clearly contra to the holding in *Baldwin*, that a permit had to be obtained and a \$25 refundable deposit made for each such sign.

In *City Council of Los Angeles v. Taxpayers for Vincent*, *supra*, 466 U.S. 789, the United States Supreme Court considered the constitutionality of a Los Angeles ordinance which prohibited the posting of all signs on certain, identified public property. The ordinance made no provision for exceptions to its application and the city routinely removed signs posted in violation of the ordinance

Because the ordinance established a blanket ban on all signs, regardless of the content, it was truly content neutral. The Court analyzed the law under the *O'Brien* test and found that the city's interest in "attempting to preserve [or improve] the quality of urban life . . ." (quoting *Young v. American Mini Theatres* (1976) 427 U.S. 50, 71 [96 S.Ct. 2440, 2453, 49 L.Ed.2d 310]) was sufficiently substantial and the provisions of the ordinance sufficiently limited to serve that interest so that the ordinance was a constitutional time, place, and manner regulation.

Jack R. Winkler
March 2, 1987
Page 10

It is interesting to note that *Vincent* was decided on the basis of federal law, apparently without considering whether the more extensive free speech rights granted by the California Constitution and recognized in *Pruneyard Shopping Center v. Robins*, supra, 447 U.S. 76, would provide a different result.

When one attempts to apply these precedents to analyze section 556, it is apparent that the section does not fit squarely within any of these holdings. As previously established, the section is not content neutral. Moreover, section 556 provides for posting signs with prior, "lawful permission." If this permissive language is construed to "open the forum" as the *Delaney* ordinance was, then, under the holding in that case, section 556 would be an unconstitutional prior restraint.

Even if the language were held to be an enabling provision which would permit each controlling public entity to establish properly limited access to its public property for the purpose of posting advertisements, the section's constitutionality is not assured.

As noted previously, the original enactment of the section 556 occurred about seventy years ago; it was codified thirty-three years ago. Thus, the legislative intent in enacting the section is unknown. Usually any rational basis, which logic would suggest, could be imputed to the legislature. However, when First Amendment rights are at issue,

... the ordinary deference a court owes to any legislative action vanishes "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." [citations omitted] *Spiritual Psychic Science Church v. City of Azusa*, supra, 39 Cal.3d at p. 514;

See, *Wirta v. Alameda-Contra Costa Transit Dist.*, supra, 68 Cal.2d at p. 60.

Whether the balancing criteria of *O'Brien* or of *Central Hudson*, is used, the right of individuals to engage in protected expression must be weighed against the interest of the state in protecting its interests. Even if the state's interest is substantial, it may only be pursued by narrow and limited means, which directly advance the governmental

Jack R. Winkler
March 2, 1987
Page 11

interest and only incidentally affect the exercise of free speech.

Thus, establishing an appropriate legislative intent and public purpose underlying the enactment of the statute is essential to a determination of its constitutionality. Without a determinable, substantial state interest, the statute cannot be constitutionally defended, since the government bears the burden of establishing the validity of the regulation in question. *Verrilli v. City of Concord* (1977) 548 F. 2d 262, 265; *Talley v. California* (1960) 362 U.S. 60, 66-67.

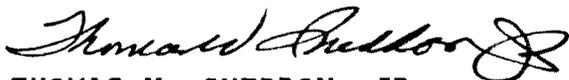
Assuming that the preservation of aesthetic values and other, similar interests, which have been accepted as sufficient by the courts in similar First Amendment contexts, could be established as underlying the enactment of section 556, doubt still exists that such interests would be sufficiently compelling to justify a blanket ban on the use of all public property, wherever located in the state. The concern for urban blight which provided sufficient justification for the Vincent court would have far less importance in a rural area where both the numbers and impacts of such advertising would surely be far less compelling.

To date most of the California cases which have upheld laws prohibiting signs on public property or have endorsed blanket restrictions on commercial speech have been decided based on federal free speech standards. It is quite possible that, under the broader protections afforded by the California Constitution, commercial speech would be entitled to greater protection in California than elsewhere.

Given the California Supreme Court's recent ruling in *Spiritual Psychic Church* and its earlier holding in *Delaney*, cases decided under the California Constitution's standards, it seems unlikely that section 556 could survive constitutional analysis.

Please accept our thanks in advance for your consideration of the substantive issues raised by this letter and for your opinion on the correct resolution of those issues. If you have any questions regarding our request or the legal research, please call Carolyn Dee Wulfsberg at (805) 963-6174.

Very truly yours,



THOMAS W. SNEDDON, JR.
District Attorney



California Fair Political Practices Commission

April 9, 1987

Clayton P. Roche
Deputy Attorney General
350 McAllister Street, Room 6000
San Francisco, CA 94102

Re: 87-103

Dear Mr. Roche:

Your letter requesting advice under the Political Reform Act was received on March 30, 1987 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Robert E. Leidigh, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days. You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

A handwritten signature in cursive script that reads "Diane M. Griffiths".

Diane M. Griffiths
General Counsel

DMG:plh

Memorandum

To : Greg Baugher
Executive Director

Date : April 2, 1987

From : FAIR POLITICAL PRACTICES COMMISSION
Chariman Larson *JHL*

Subject :

Attached hereto is a letter from the Attorney General's office relating to their Opinion Request No. 87-301. The subject matter is political advertising, although I don't think there is anything in it that would involve the jurisdiction of the Commission. If you think an answer is appropriate, please do the necessary. Otherwise, I think we can just advise them that it's just not in our jurisdiction.

JHL:km