

August 11, 2014

Betty Ann Downing, Esq.
California Political Law, Inc.
3605 Long Beach Blvd., Suite 426
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Re: Request for Advice
FPPC File No. A-14-148

Dear Ms. Downing:

This letter responds to your request for advice regarding campaign provisions of the Political Reform Act (Act).¹ This letter should not be construed as assistance on any conduct that may have already taken place. (See Regulation 18329(b)(8)(A).) The Fair Political Practices Commission (Commission) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Accordingly, this letter is based on the facts presented.

QUESTION

May a candidate-controlled committee make independent expenditures to support or oppose other candidates given the recent Sacramento County Superior Court decision in *Charles R. "Chuck" Reed, et al. v. Fair Political Practices Commission* (Reed case),² finding Section 85501 unconstitutional on its face and enjoining the Commission from enforcing that provision of the Act in a manner inconsistent with the rights protected by the First Amendment?

CONCLUSION

If a candidate-controlled committee elects to make independent expenditures pursuant to the *Reed* case, existing law would require that any such expenditure be made from the candidate's one campaign contribution account established under Section 85201, and from funds

¹ The Political Reform Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Sacramento County Superior Court, Case No. 34-2013-80001709, decision filed April 2, 2014.

raised subject to contribution limits under Sections 85301 and 85302 or any other applicable contribution limit imposed upon the candidate by a local jurisdiction.

FACTS

You represent various state candidates who may wish to use existing campaign funds to make independent expenditures in support of or in opposition to other candidates. Section 85501 of the Act expressly prohibits candidate-controlled committees from making such independent expenditures, stating: “A controlled committee of a candidate may not make independent expenditures and may not contribute funds to another committee for the purpose of making independent expenditures to support or oppose other candidates.”

However, in the recent *Reed* case, the Mayor of San Jose challenged the restriction of Section 85501. Relying on the United States Supreme Court decision in *Citizens United v. Federal Election Commission* (2010) 558 U.S. 310, the Superior Court declared that section 85501 is unconstitutional on its face as a violation of a candidate’s right to free speech under the First Amendment, and issued an injunction prohibiting the Commission from enforcing that provision of the Act in a manner inconsistent with the rights protected by the First Amendment. The court’s order became final on July 19, 2014.

ANALYSIS

Section 85201 requires individuals that file a statement of intention to run for election to establish “one campaign contribution account” into which *all* contributions to the candidate must be deposited, and from which *all* campaign expenditures must be made. Sections 85301 and 85302 (as well as local rules) also impose limits on the contributions candidates can raise into their one campaign contribution account. The Commission has consistently interpreted these provisions to prevent a candidate from controlling any committee other than his or her committee for election to a specific office, unless expressly permitted otherwise. (See, e.g. *Nelson* Advice Letter, No. A-14-010; *Hicks* Advice Letter, No. 1-99-120.) Since the Act does not permit a candidate to control an independent expenditure committee, we consider the present issue in light of existing restrictions on contributions and expenditures.

A “contribution” is, in relevant part, a payment made to a candidate for political purposes. (Section 82015.) Candidates hold contributions in trust and must use the funds to make political “expenditures,” including forgiveness of loans, payment of loans by third parties, or enforceable promises to make payments. (Sections 82025 and 89510.) And an “independent expenditure” is defined in Section 82031, in relevant part, as:

“[A]n expenditure made by any person . . . in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate . . . or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.”

Thus, pursuant to existing law, any payment made to, or used by, a candidate for purposes of making an independent expenditure in support of or in opposition to another candidate is made for a “political purpose” and is a “contribution” to the candidate. Similarly, any independent expenditure by the candidate, or contribution to another committee for the purpose of making an independent expenditure, is made for a “political purpose” and is an “expenditure” under the Act. Consequently, any campaign funds used by a candidate’s controlled committee for elective office to make independent expenditures in support of or in opposition to another candidate (or to make contributions to another committee for the purpose of making such independent expenditures), must be made from the candidate’s one campaign contribution account and from funds raised subject to the applicable contribution limits under the Act or other contribution limits imposed upon the candidate by a local jurisdiction.

Finally, in addition to the one campaign contribution account and contribution limits, any independent expenditure made by a candidate must also comply with all other provisions of the Act. In particular, an independent expenditure under Section 82031 must be made without any cooperation, consultation, or coordination with the candidate benefitting from the independent expenditure or any controlled committee or agent of the candidate. (See Section 85500 and Regulation 18225.7.) Furthermore, any independent expenditure made by a candidate must carry a clear “Paid for by” disclaimer naming the committee paying for the independent expenditure, and containing the information required by the sender identification and advertisement disclosure provisions of Sections 84305, 84506, and 84506.5.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

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By: Hyla Wagner
Senior Counsel, Legal Division

HW:jgl