



FAIR POLITICAL PRACTICES COMMISSION

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January 25, 2002

Gregory Reese
117 Third Street
Rodeo, CA 94572

**Re: Your Request for Advice
Our File No. A-02-016**

Dear Mr. Reese:

This letter is in response to your request for advice regarding provisions of the Political Reform Act (the "Act").¹

QUESTION

Is a brochure mailed in support of a candidate an "independent expenditure" if the brochure includes a photograph of the candidate taken specifically for inclusion in the brochure, and a candidate statement also drafted specifically for the brochure?

CONCLUSION

No. The involvement of the candidate in the composition of a photograph designed specifically for use in the brochure, and in the drafting of a candidate statement to the specifications of the person designing the brochure, amount to coordination between the candidate and the person creating the brochure, requiring that the brochure be classified as an "in kind contribution" made "at the behest of" the candidate.

FACTS

You are preparing a brochure to be mailed out in support of a candidate for the California State Assembly. You wish to classify your expenditure on this brochure as an "independent expenditure," and in particular you do not want the expenditure to be characterized as an "in kind contribution" to the candidate. You want to arrange a meeting with the candidate in front of a building so that you may have a photograph

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

taken of the candidate, along with members of your committee and other supporters, for use in the brochure. You also wish to ask the candidate for a written statement of support for police officers, and will ask him to include particular words in that statement.

ANALYSIS

“Expenditure” is defined under the Act to include virtually any payment made for a political purpose. (Section 82025, Regulation 18225.) It is apparent from your inquiry that your anticipated expenditure on the brochure will be made for a political purpose. One subclass of “expenditure” pertinent to your inquiry is defined at § 82031:

“‘Independent expenditure’ means an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, 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.” (Section 82031.)

An expenditure of the sort described in § 82031, but which is made at the behest of an affected candidate or committee, is a “contribution” (Section 82015), which may be subject to limits under §§ 85301 et seq. The crucial distinction between a contribution and an independent expenditure is whether the expenditure is made “at the behest” of the candidate or committee. Regulation 18225.7 explains when a payment or expenditure is made “at the behest of” a candidate:

“(a) ‘Made at the behest of’ means made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of. Such arrangement must occur prior to the making of a communication described in Government Code Section 82031.

(b) An expenditure is presumed to be made at the behest of a candidate or committee if it is:

(1) Based on information about the candidate's or committee's campaign needs or plans provided to the expending person by the candidate, committee, or agents thereof; or

(2) Made by or through any agent of the candidate or committee in the course of their involvement in the current campaign.

(c) An expenditure is not made at the behest of a candidate or committee merely when:

(1) A person interviews a candidate on issues affecting the expending person, provided that prior to making a

subsequent expenditure, that person has not communicated with the candidate or the candidate's agents concerning the expenditure; or
(2) The expending person has obtained a photograph, biography, position paper, press release, or similar material from the candidate or the candidate's agents.”

Regulation 18225.7(a) makes it clear that an expenditure made in cooperation, consultation, coordination, or concert with the candidate would be made “at the behest of” that candidate and, therefore, would be a contribution to the candidate. It is equally clear that the plans for your brochure are founded on the candidate’s cooperation.

However, Regulation 18225.7(c) provides that certain activities will not cause an otherwise independent expenditure to be considered “made at the behest of” a candidate. Thus if you merely interviewed the candidate on issues affecting you (or your committee if the committee is “the expending person”), it is entirely possible that the subsequent expenditure might not be made “at the behest of” the candidate, even though the interview process naturally includes some degree of cooperation between candidate and supporter. Regulation 18225.7(c)(1) expressly provides that granting an interview is not “cooperation” or “coordination” within the meaning of subdivision (a).

But as you have explained, you do not intend simply to interview the candidate. You intend to elicit a specific written statement from him, including words that you wrote. Whether the candidate agrees to provide a statement including your proposed language, or whether it becomes necessary to negotiate the content of the statement, it is clear that you will have stepped beyond a simple “interview” into a bargaining process over the specific content of your brochure. Whatever the content of an agreed statement crafted for the brochure, it would be regarded as made in “cooperation, consultation, coordination, or concert with” the candidate.

Regulation 18225.7(c)(2) provides an exception for both “position papers” and photographs obtained from candidates. However, this exception has only been applied to documents and photographs already in existence, and has never been applied to materials created by candidates at the request – and to the specifications – of particular supporters, who want to use them in a particular advertisement or brochure.

Generally, exceptions to a statutory scheme are read and applied narrowly. (*Korean American Legal Advocacy Foundation v. City of Los Angeles, et al.* (1994) 23 Cal.App.4th 376, 396.) The Act itself expressly directs that its provisions be read in a manner that will accomplish its purposes. (Section 81003.) If Regulation 18225.7(c)(2) were interpreted in such a manner that candidates were free to create documents and materials to the specification of supporters for use in “independent” ad campaigns, the distinction between contribution and independent expenditure would all but disappear. Yet this distinction is critical, for example, in preservation of the contribution and voluntary expenditure limits recently enacted by Proposition 34.

Regulation 18225.7(c)(2) cannot therefore be read to mean that candidates and supporters may consult together and negotiate the creation of particular photographs and statements designed to meet particular advertising needs of the candidate's supporters – unless it be recognized that the parties are coordinating their efforts and that the resulting advertisements are “contributions” made “at the behest of” the candidate.

In summary, your expenditure on the brochure would not be an “independent expenditure” if you asked the candidate to draft a particular statement that you want to disseminate in your brochure, or if you asked the candidate to pose for a photograph composed to your specifications (in a particular location together with specified persons) that you want to feature in your brochure. Such active participation by the candidate in the design or creation of materials specifically for your advertisement would prohibit any characterization of the advertisement as an “independent expenditure.”

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

Sincerely,

Luisa Menchaca
General Counsel



By: Lawrence T. Woodlock
Senior Counsel, Legal Division

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