



FAIR POLITICAL PRACTICES COMMISSION

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November 20, 2003

James R. Sutton
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731 Sansome Street, 5th Floor
San Francisco, CA 94111

**Re: Your Request for Advice
Our File No. A-03-253**

Dear Mr. Sutton:

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

QUESTION

Does the Act permit Noreen Evans, candidate for state Assembly, to amend her Candidate Statement of Intention, Form 501, to change designation of acceptance/rejection of voluntary expenditure limits?

CONCLUSION

No. The law provides only one instance under which a state candidate may change the election or rejection of voluntary expenditure limits made on the candidate's Form 501. That circumstance is not present here.

FACTS

On June 11, 2003, Ms. Evans filed a Form 501 with the Secretary of State, in which she states she mistakenly indicated that she would not accept the expenditure limit. After reviewing the form in July, Ms. Evans discovered the error and sent an amended form to the Secretary of State on July 22. She did not receive a response from the Secretary of State's office until September 10, 2003, when a staff member notified her that the office could not accept her amended form; you state the staff member also urged her to request advice from the Fair Political Practices Commission ("FPPC") on the question presented by her facts. Although she sent in such a request to the FPPC, she

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

never received a response, and thus now seeks formal advice from the FPPC. In order to demonstrate that she made a mistake on her original Form 501, Ms. Evans has prepared a declaration, under penalty of perjury, that she made this statement in error. That declaration was faxed to this office after business hours on November 18, 2003.

ANALYSIS

I. The law provides only one circumstance under which a state candidate may change the election or rejection of voluntary expenditure limits made on the candidate's Form 501.

Proposition 34, adopted by the voters in November of 2000, established a comprehensive contribution limit scheme and other provisions to the Act allowing candidates for elective state office, such as Governor, to accept voluntary expenditure limits. (§§ 85300 – 85321; 85400-85403.) Together these sections provide an overall framework that seeks to limit the corrupting influence of large donations and supports a system that reduces the need for large campaign war chests. As originally enacted by Proposition 34, section 85401 requires each candidate to file a statement of acceptance or rejection of the voluntary expenditure limits when the statement of intention is filed. (§ 85401, subd. (a).) The next year, section 85601 was amended by Senate Bill 34. Section 85601 provides that a candidate who has accepted the voluntary expenditure limits may purchase the space to place a statement in the state ballot pamphlet. (§ 85601, subd.(a).) As amended by Senate Bill 34, the Secretary of State “may not include in the state ballot pamphlet a statement from a candidate who has not voluntarily agreed to the expenditure limitations set forth in Section 85400.” (§ 85601, subd. (b).) The statute confers no discretion to vary from this rule. This selection is made on Form 501, the Candidate Statement of Intention, filed with the Secretary of State in elections for state office.

As can be seen from a cursory examination, the Form 501 is a relatively uncomplicated form. The form asks only the candidate's name, which office the candidate seeks, and finally whether the candidate accepts or rejects the voluntary expenditure limits. The candidate makes his or her selection and signs the form under penalty of perjury.

Once the Form 501 is filed, section 85401 speaks to the amendment of that form to alter the election or rejection of expenditure limits and provides just a single circumstance for amendment:

“(b) Any candidate for elective state office who declined to accept the voluntary expenditure limits but who nevertheless does not exceed the limits in the primary, special primary, or special election, may file a statement of acceptance of the expenditure limits for a general or special runoff election within 14 days following the primary, special primary, or special election.”

It is a common rule of statutory construction that when a law specifically enumerates certain conditions or exceptions, that list is exclusive. (*Clark v. Burleigh* (1992) 4 Cal.4th 474, 489 (Elections Code provision specifically listing permissible contents of a candidate statement gives rise to negative implication that the Legislature did not intend the statement to contain any other material); *FNB Mortgage Corp. v. Pacific General Group* (1999) 76 Cal.App.4th 1116, 1133 (where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed, absent a discernible and contrary legislative intent), *citing Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195; and *Andrus v. Glover Construction Co.* (1980) 446 U.S. 608, 616-617; *Garson v. Juarique* (1979) 99 Cal.App.3d 769, 774 (stating that under the doctrine of expression unius est exclusio alterius, expression of one thing in a statute implied intentional exclusion of the omitted thing).)

In addition, the Commission is obliged to interpret the Act "to accomplish its purposes." (§ 81003.) The Act declares as one of its purposes that the voters be "fully informed and improper practices [] be inhibited." (§ 81002, subd. (a).) Accordingly, under its authority to interpret provisions of the Act, the FPPC has advised on numerous occasions that, except for the limited circumstance described in subdivision (b) above, a candidate may not amend his or her Form 501. (*Daniels-Meade* Advice Letter, No. A-01-285; *Boling* Advice Letter, No. A-01-136.) Commission staff reiterated this conclusion in the *Daniels-Meade* Advice Letter, No. A-03-178, when the Office of the Secretary of State inquired whether this advice applied in the context of the election for Governor held on October 7, 2003. In that letter, the Secretary of State's office was advised that "[b]ecause nothing in the Act would allow a candidate to amend the expenditure limit designation in connection with a recall election," the amended filing of the Form 501 should be returned to the candidate. (*Daniels-Meade* Advice Letter, No. A-03-178, at p. 3.) Contrary to the argument in your request for advice that subdivision (b) of section 85401 is "silent" regarding amendment to the Form 501, this statute in fact expressly addresses the very issue of changing one's designation. If amendment of the form to change a designation were allowed in any other circumstances, the statute would have so described them – otherwise, subdivision (b) is meaningless.

The Act specifically addresses the binding nature of the expenditure limit selection in one other statute. In section 85402, the Act states a very narrow exception that allows a candidate to be free of his or her obligation to abide by expenditure limits (assuming they elected to abide by the limits) in the event an opponent contributes personal funds to his or her campaign in large amounts:

"85402. Lifting Expenditure Limits; Opponent's Use of Personal Funds.

"(a) Any candidate for elective state office who has filed a statement accepting the voluntary expenditure limits is not bound by those limits if an opposing candidate contributes personal funds to his or her own campaign in excess of the limits set forth in Section 85400.

"(b) The commission shall require by regulation timely notification by candidates for elective state office who make personal contributions to their own campaign."

From these two statutes, we can see that the Act's overall goal is to encourage candidates to abide by expenditure limits, through the carrot of the ballot pamphlet statement, and to provide only one very narrow circumstance under which the candidate can alter a previous selection. In section 85402, this policy is buttressed by describing a further limited circumstance under which a candidate can obtain relief from an earlier declaration accepting the limits.

By providing an incentive to abide by limits, the Legislature and voters attempt to prevent election costs from spiraling out of control that lead to the pressure to raise greater and greater sums, by reasonably providing a limited non-public forum at low-cost for these candidates to address the voters. The timeline for making the selection of whether to abide by expenditure limits reasonably sets that time at the filing of the Form 501 when the candidate enters the race, and provides stability and predictability for all candidates by limiting the circumstances under which the candidate may change his or her designation. By not allowing candidates to change these declarations, the statutory scheme advances important interests concerning fundamental fairness to other candidates and the avoidance of strategic gamesmanship. Under the provisions of Proposition 34, the decision to check that box on the Form 501 not only carries legal consequences to the candidate, but that decision is even *more* significant to the candidate's potential rivals because it provides them with important information on the cost of a campaign for that office.

To present a simple example, if a candidate indicates in advance of the filing deadline that she will abide by the voluntary expenditure ceilings, other potential candidates know that the cost of a campaign against that candidate will not exceed the statutory ceiling. If this early-filing candidate were able to "correct a mistake" at 4:59 on the filing deadline, opposing candidates would be trapped in a decision that *they* cannot reverse. On the other hand, the candidate who discloses an intent *not* to abide by the voluntary expenditure ceilings could frighten off potential rivals with the prospect of a ruinously expensive campaign, only to "correct a mistake" when it is too late for potential opponents to alter their own decisions to stay out of the race. Because the question of what the candidate really intended early on is necessarily a subjective one, there is simply no way for the Commission, other candidates or members of the public to determine whether the initial filing was indeed a mistake.

Allowing the other candidate, then, to change his or her designation – for whatever reason – traps opponents in a world that no longer exists and that was created by the initial candidate's "erroneous" filing. Opponents would then face a choice – sit by and cope with the burdens of the other candidate's mistake or *falsely* declare that he or she too made an error on the Form 501 and then amend the designation.² As can be seen,

² Of course, this assumes that an opponent is not caught flat-footed and unable to change his or designation. For instance, the opponent may have declined to abide by the limits and then spent funds in

such a scenario can only encourage unscrupulous behavior by candidates and cause an unraveling of the expenditure limit scheme – a direct contradiction of the policies of sections 85401 and 85402. At the very least, allowing such amendment in the first instance provides an incentive for unscrupulous candidates to game the situation for their own benefit knowing that their opponents are stuck with their choices. Nothing in the Act requires the Commission to allow such manipulation.

II. Nothing in section 81004.5 trumps section 85401.

In your letter requesting advice, you advance the argument that section 81004.5 allows your client to amend her Form 501 to change her designation rejecting the expenditure limits. Section 81004.5 states:

“Any report or statement filed pursuant to this title may be amended by the filer at any time. Amending an incorrect or incomplete report or statement may be considered as evidence of good faith.”

Because, you assert, your client mistakenly checked the wrong box on her Form 501 and thereby rejected the expenditure limits, the report is “incorrect” under the statute and she may be allowed to amend that report. To support this, you quote language from previous Commission advice, seemingly buttressing the argument that 81004.5 has a limitless application. Your omission of two key words (bolded text below) in that advice, however, reveals that the advice in fact supports the opposite conclusion:

“... Section 81004.5 allows for the filing of amendments to reports and statements which are incorrect or incomplete. This provision is intended to allow supplement information, **where appropriate**, to ensure the most complete disclosure possible to the public, but does not negate any violation that may have already occurred.”
(*Granlund* Advice Letter, No. A-96-343; emphasis added.)

Thus, the Commission has interpreted section 81004.5 as containing not a blanket proposition but one that must be applied with care and concern for the circumstances at hand and within the purposes of the Act. (See § 81003 (title shall be liberally construed to accomplish its purposes).) Because interpreting section 81004.5 to allow amendment in the circumstances you pose would violate the policies of sections 85401 and 85402 and by the voters in adopting Proposition 34, we decline your invitation to do so. Furthermore, there is no perjury liability in cases of genuine “mistake.” (§ 81004.)

excess of those limits prior to another candidate changing his or her designation. It seems indisputable in that event that the opponent could not change his or designation to accept the limits because they already would have been exceeded.

A. Section 81004.5 is a statute of general application and does not override the more specific provisions of section 85401.

In your request for advice, you argue that because section 81004.5 was enacted *prior* to section 85401, the voters must have been aware of section 81004.5 and could have “easily exempted Form 501” from the amendment provision, “but they did not.” This is incorrect both factually and legally.

First, you are correct that section 81004.5 was enacted in 1976 and that section 85401 was enacted by the voters in adopting Proposition 34 in November of 2000. Section 81004.5, however, is a general statute of general application, situated in the first chapter of the Act, titled, literally, “Chapter 1.-General.” In contrast, sections 85400-85403 establish, in its entirety, the voluntary expenditure ceiling structure. The altering of a declaration to abide by the limits, once made, is specifically addressed in subdivision (b) of section 85401. As discussed in part I of this letter, it is a common rule of statutory construction that when a law specifically enumerates certain conditions or exceptions, that list is exclusive. (*Clark v. Burleigh* (1992) 4 Cal.4th 474, 489.) Thus, the statute *does* speak to the world of amending the declaration and expressly provides only one circumstance under which amendment is permitted.

It also is a settled principle of statutory construction that a specific statute enacted to cover a particular subject “controls and takes priority over a general statute encompassing the same subject.” (*Estate of Kramme* (1977) 20 Cal.3d 567, 576; accord, *Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 445; *San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577; see also, *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 563 (holding that as between two statutes, one predating another enacted by a proposition, canons of statutory construction require the prior statute be harmonized in favor of the more recently enacted and more specific latter statute).) Thus, because section 85401 is both more specific and more recently enacted, it’s limiting provisions control. Section 85401 does not permit the type of amendment your client seeks.

B. Allowing amendment of the Form 501 to change the voluntary expenditure limit designation does not further the policies of sections 85400-85403.

While it is true that the Commission allows amendment of the Form 501 for certain purposes, such as when a candidate’s personal contributions to his or her campaign exceed the limit in an election where any opponent has accepted them (and thus triggering a lifting of the limits for the opponents pursuant to section 85402), the Commission has not allowed amendment to change a candidate’s designation itself (except under subdivision (b) of section 85401). (Reg. 18542, subd. (a).)³ This is consistent with section 81004.5 given the different purposes at play in campaign reports and statements versus the expenditure limit designation.

³ The Commission also would allow amendment of the Form 501 to correct an erroneous address, telephone number or misspelled name, for instance.

Reports of contribution and expenditure activity of a campaign, or the campaign's stated address, for instance, may properly be seen as a record of historical fact – to wit, the receipt or expenditure of funds, or the physical location of the campaign office. These facts may be verified objectively through an audit of pertinent records. For instance, the particular events surrounding a contribution, such as the date made, source and amount may be verified through records or reports kept or filed by the contributor. In addition, the check itself will contain information that can establish the accuracy of a campaign's report. Allowing a candidate to amend reports as errors become known or as additional information is gained allows the candidate to fulfill his or her obligations under the Act and also accomplishes the Act's goals of providing the voters with accurate and timely information about a campaign's activities. (See § 81002, subd. (a) (full and truthful disclosure in order that voters may be fully informed and improper practices inhibited.) Accordingly, the Act seeks to ensure that statements containing a description of a historical event are true and correct.

In contrast, the designation on the Form 501 regarding voluntary expenditure limits does not concern an independently verifiable historical fact. To the contrary, the voluntary expenditure designation is a statement of intent as to how the given campaign *will be conducted in the future*. The document serves to notify both the public and other candidates about the rules under which the campaign *will* be conducted. Because it is a statement of intent, there is nothing objectively or independently verifiable about it – whether one indeed had that intention at a given time is verifiable only by the Form 501 itself. By allowing amendment in only limited circumstances, as section 85401 does, the Act limits the potential for gamesmanship otherwise open to unscrupulous candidates, and prevents candidates from shifting the burden of their own mistakes onto other candidates, as shown earlier in this letter.

The issue is not whether a candidate made an “honest mistake” on the Form 501. The issue is whether allowing the amendment you propose furthers the policies of the expenditure limit scheme. It does not.

III. The Superior Court's recent ruling in *McClintock v. Shelley* agreed with the FPPC's interpretation of the law.

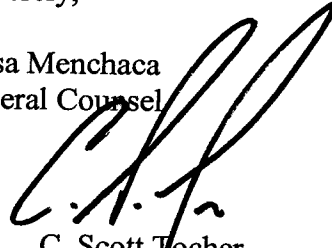
In the recent case of *McClintock v. Shelley*, Sacramento Superior Court Case No. 03CS01177, in which the FPPC intervened as a respondent, petitioner McClintock sought a writ of mandate for the same relief which is sought by your client. In the context of the recent recall election of the Governor, the candidate had filed a Form 501 declining to abide by the voluntary expenditure limits. Later, the candidate sought to amend the declaration to accept the limits. As the documents in the court file show, the petitioner alleged he made a mistake and sought to rectify his error. The court refused the relief sought, agreeing with the Commission that section 85401 “is the only statute addressing when a candidate who initially declined to accept voluntary spending limits in a primary or special election may later file a statement of acceptance. That provision does not apply here.” (Order of Judge Ohanesian, August 26, 2003.)

Once again, when seen in its entirety, the order has a different shape than apparent in the selected and reordered quotes in your request for advice. For the sake of a complete record, we attach a copy of the order in its entirety. Viewed accordingly, it can be seen that the court's ruling did not first construe the statute and then consider the proof offered by the petition and conclude the proof was insufficient. Rather, the order addressed the petitioner's failure of proof only insofar as was necessary to explain the court's refusal to consider the irrelevant and inadmissible evidence proffered. Once dismissing the evidentiary issue in paragraph four of the order, the court went on to construe the Act itself, as quoted above. Finding that the Act allowed only the specific circumstances of section 85401 to amend and finding that that exception was "exclusive," the court concluded that because the petitioner could not establish he was within section 85401's bounds he could not amend his designation. Nothing in your request indicates that your client is anymore within the scope of subdivision (b) of section 85401 than was the petitioner in the *McClintock* case.⁴

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

Sincerely,

Luisa Menchaca
General Counsel



By: C. Scott Tocher
Counsel, Legal Division

Enclosure

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⁴ The soundness of the Commission and the *McClintock* court's interpretation of these issues is further evidenced by the existence of Assembly Bill 1501 (Levine), currently pending before the California Legislature. That bill, as currently drafted, would amend section 85401 to allow a candidate to change his expenditure limit designation two times before the filing of candidate nomination papers. The existence of this legislation reinforces the interpretation that current law does not allow such amendments.