

Memorandum

TO: Elections Commission

FROM: Richard Doyle
City Attorney

SUBJECT: Disclosure Statements on
Campaign & Electioneering
Communications

DATE: October 5, 2007

BACKGROUND

At the September 5, 2007 meeting of the Elections Commission, the Commission referred the following issue to the City Attorneys Office for review: May a disclaimer such as the following: *"this piece or communication was paid for by an independent committee with funds that were raised in amounts greater than the limits imposed on campaign committees"* be required to be placed in campaign communications which are paid for by independent expenditure committees?

This memorandum will provide an analysis of the question raised by the Commission and a summary of requirements imposed by other jurisdictions regarding communications funded by independent expenditures.

DISCUSSION

A. First Amendment Issues

Generally, the courts in reviewing First Amendment challenges to campaign communication disclosure requirements have allowed for disclosure of certain information on campaign communications funded by independent expenditures. For example, a requirement that campaign communications that support or oppose a candidate be accompanied by a statement indicating who financed the communication has been upheld. Additionally, a provision requiring a statement that the literature or advertisement was not authorized, paid for, or approved by the candidate was similarly approved by the court. Alaska Right to Life Committee v. Miles 441 F.3d 773 (9th Cir. 2006).

The court in Alaska Right to Life Committee relied on the U.S. Supreme Court's decision in McConnell v. Federal Election Commission, 540 U.S. 93, 124 S.Ct. 619 (2003) which concluded that there is a compelling state interest in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions" McConnell, 540 U.S. at 196. The court in Alaska Right to Life, *supra*,

concluded that the required disclosure provisions were justified as to entities making independent expenditures.

B. Disclaimer – Funds Raised in Greater Amounts than Limits for Campaign Committees

The disclaimer referred by the Elections Commission for review raises several concerns. For example, if funds were raised by independent expenditure committees in amounts lower than contribution limits, then the disclaimer could not apply to all communications. The proposed disclaimer also raises an issue as to the City's interest in informing voters that funds for a communication by an independent expenditure committee were raised in amounts greater than contribution limits for candidates and campaign committees controlled by candidates. The proposed disclaimer should not be recommended as a requirement for communications funded by independent expenditures. None of the jurisdictions which have been surveyed require such a disclosure.

On the other hand, a disclosure informing the voters where campaign funds come from and the total amounts spent for or against a candidate has been determined to be supported by a compelling state interest in informing voters who or what entity is trying to persuade them to vote in a certain way. Alaska Right to Life Committee, supra, at 793. As discussed below, several jurisdictions also require a disclaimer that a communication is not authorized or approved by a candidate.

If the Election Commission recommends requiring a disclosure or disclaimer for communications funded by an independent expenditure committee, it should consider requiring the identity of the source of funding and the amount spent for the communication rather than the proposed disclaimer.

C. Other Jurisdictions – Required Disclosures on Communications

The following summarizes what other California jurisdictions require with respect to required disclosures on campaign communications.

Los Angeles

Candidates or committees that pay for a campaign communication are required to print, display or incorporate the following words in a communication: "Paid for by" immediately followed by the name, address and city of that candidate or committee. Campaign communications funded by independent expenditures supporting or opposing candidates must include the phrase "not authorized by a City candidate," and must also include the name of any contributor of \$25,000 or more to a committee funding the independent expenditure.

San Diego

San Diego requires candidates or committees that pay for mass campaign literature to

include the words "paid for by" followed by the named, address and city of the candidate or committee.

Every electioneering communication (any form of communication that mentions or refers to a clearly identified candidate, but does not expressly advocate the election, defeat, or recall of the candidate that is disseminated, broadcast, or published within 90 calendar days of an election not including independent expenditures or slate mailers) must include the words "paid for by" followed by the name, address and city (for written communications) of the person who paid for the communication. Disclosure reports are required for payments of \$1,000 or more.

San Francisco

Candidates who pay for mass mailings must include "paid for by" information. Like San Diego, every electioneering communication must include the words "paid for by" in the communication.

A person who makes an independent expenditure (not an electioneering communication) for a mass mailing which supports or opposes any candidate must include the following statement on the mailing:

*"Notice to Voters
(Required by the City and County of San Francisco)
This mailing is not authorized or approved by
any candidate for City and County office
or by any election official. It is paid for by
(name and committee identification number).
(address, city, state).
Total cost of this mailing is (amount).*

This requirement applies to television or radio programming and communications placed in newspapers and periodicals of general circulation. Filing and disclosure is required for mass mailings and advertisement paid by independent expenditures and electioneering communications.

Oakland

Any person who makes independent expenditures for a mass mailing, slate mailing or other campaign materials which support or oppose any candidate is required to place the following statement on the mailing:

*Notice to Voters
(Required by the City of Oakland)
This mailing is not authorized or approved by any City candidate or election
Official. It is paid for
By (name) _____*

_____ (address, city, state)
Total cost of this mailing is: (amount)

CONCLUSION

Required disclosures on communications funded by independent committees which have been upheld by the courts are those that inform the voters where campaign funds come from and the total amounts spent for or against a candidate. The proposed disclaimer relating to funds raised in amounts greater than limits on campaign committees should not be recommended. The Commission may consider a disclaimer that provides that a communication funded by an independent expenditure committee is not authorized or approved by a candidate.

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By 
_____ Norm Sato

Cc: Lee Price