Commonwealth
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Office of Campaign and Political Finance
One Ashburton Place, Room 411
Boston, MA 02108

Advisory Opinion

August 9, 2002
AO-02-31

Alan R. Goldstein, Treasurer
Pines Committee
40 Helene Road
Newton, MA 02468

Re: Joint Campaign Expenditures

Dear Mr. Goldstein:

This letter is in response to your June 28[1] request for an opinion regarding joint campaign expenditures.

You have asked for clarification regarding the allocation of joint expenditures between candidate committees. Specifically, you have pointed to a footnote in the Supreme Judicial Court's opinion in Weld for Governor v. Director of the Office of Campaign and Political Finance, 407 Mass. 761 (1990) in urging OCPF to find that committees should consider the relative name recognition of participating candidates in allocating costs for shared expenses.

QUESTION

Should committees making joint expenditures consider name recognition as a factor in allocating costs?

DISCUSSION

No. The Supreme Judicial Court, in Weld, held that expenditures by candidates running as a team for governor and lieutenant governor to jointly purchase buttons, signs and bumper stickers did not result in unlawful contributions between the campaigns.[2] In so ruling, the court rejected an OCPF Interpretive Bulletin regarding joint expenditures that emphasized the resulting transfer and receipt of value, i.e. contribution, between committees, and instead determined that the focus should be limited to

[1] In your letter you requested the opportunity to submit a brief on the topic of joint campaign expenditures. To date, we have received no submissions on the Committee's behalf. Accordingly, this opinion is being issued.
[2] The campaign finance law prohibits statewide candidates from making contributions to any other political committees or campaigns. See M.G.L. c. 55, § 6.

the intent of the committees in making the expenditures. The Court reasoned that the purchases made by each committee were legitimate expenditures because the candidates were a bona fide team for companion offices and the primary purpose of each candidate in making the expenditure was to promote his own election to office. In this regard any benefit to the "team" or other candidate was secondary. Id. at 770-72.

As to the particular facts in that case, the court suggested in a footnote:

> Because [William F. Weld and A. Paul Cellucci] are seeking high political office, and appear to share comparable recognition among voters, there is no indication that the 50/50 allocation of costs used here was unreasonable. The situation could be quite different, if, for example, one candidate enjoyed a widespread, favorable public reputation, while his or her cocandidate was a relative political unknown. In such a case, an allocation of cost in proportion to the benefit received would likely require a higher percentage to be borne by the latter candidate. Id. at 767, fn 8.

The court went on to anticipate that there may be "problems posed by the general prospect of joint campaigns in other situations," and suggested that "the Legislature may wish to consider suitable revisions of [M.G.L. c. 55], or the director, consistent with his power to implement the statute's directives, may wish to frame rules and regulations more carefully tailored to avert anticipated harms." Id. at 772.

OCPF, in fact, did promulgate regulations to govern joint campaign activity. Expanding on the Weld opinion, 970 CMR 2.12 authorizes joint campaign expenditures for a wide range of goods and services in addition to bumper stickers, signs and buttons, including but not limited to political advertisements and campaign literature, and 970 CMR 2.13 permits joint fundraising activity. The regulations also allow joint activity between all candidate and political party committees, not just teams for governor and lieutenant governor. Purposely omitted from these regulations was the requirement that committees allocate costs for joint expenditures based on the public's perception of the relevant candidates.

The provisions of M.G.L. c. 55 apply equally to all candidates, whether they are known or unknown, popular or unpopular, statewide or local. Notwithstanding the Weld court's *dicta* in footnote 8, there is no authority in the campaign finance law to evaluate campaign expenditures based on an intangible, and subjective, factor such as name recognition. For an expenditure, joint or otherwise, by a statewide candidate to be consistent with the campaign finance law it need only be "a reasonable and necessary [expense] directly related to the campaign of [the] candidate" and not for the candidate's or any individual's personal use.[3] See M.G.L. c. 55, § 6. Thus, it is a committee's *primary intent in making an expenditure*, not a candidate's prominence, that is the relevant factor in determining whether the cost allocation of a joint expenditure is consistent with campaign finance law. 406 Mass. at 770-1.

Of course, where committees share costs for joint purchases there must be a correlation between the amount paid by a committee and the benefit derived by that committee. Anything else

[3] Expenditures for all other committees are limited to those that are "for the enhancement of the political future of the candidate or the principle for which the committee was organized so long as such expenditure is not primarily for the candidate's or any other person's personal use." See M.G.L. c. 55, § 6.

might suggest that a committee's expenditure was for a purpose other than to promote the candidate or principle for which is was organized. That said, the only meaningful way to divide costs for joint expenditures is to utilize an objective criteria.

Not only would it be confusing, if not impossible, to advise on or enforce a standard for allocating joint expenses that turned on an assessment of an indeterminate factor such as name recognition; it would be improper for OCPF to impose such a vague criterion on a regulation that, due to its source in M.G.L. c. 55, § 6, may carry a criminal penalty where it is willfully violated. See Commonwealth v. Rhodes, 389 Mass 641, 646-7 (1983) ("A criminal statute must be sufficiently explicit to give clear warning as to proscribed activities, with any ambiguities to be construed strictly against the Commonwealth.") (cites omitted).

Moreover, OCPF questions whether cost allocation based on name recognition would place an unconstitutional burden on committees' rights of speech and association where the committee of the more obscure candidate is not in a position to assume an enhanced financial burden. See e.g., Weld, 407 Mass at 769-70 (discussing the need for a compelling state interest in order to restrict the first amendment rights of political committees).

Based on the foregoing, OCPF regulations contemplate that only measurable factors be considered in the allocation of costs for joint expenses. These factors include print space, amount of airtime, distribution, consultant or staff time devoted to a particular committee, the market value of services received by committees, etc. See 970 CMR 2.11(4) and (5); also AO-02-11. This opinion advised that committees are in a better position than OCPF to gauge the primary intent of their expenditures in order to determine how costs for joint expenditures should be allocated. However, the committees must be able to articulate a reasonable basis for the allocation pursuant to the standards set forth in the regulations).

This opinion is issued within the context of the campaign finance law and is provided solely on the basis of representations in your letter. Please contact us if you have further questions.

Sincerely,

Michael J. Sullivan
Director

MJS/bp