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November 16, 2023
AO-23-01

Thomas O. Bean, Esq.
Verrill Dana LLP
One Federal Street, 20th Floor
Boston, MA 02110

Re: Candidate Support of Ballot Question

Dear Mr. Bean,

This letter is in response to your September 18, 2023 request for an advisory opinion on behalf of the Committee for Transparent Democracy, a ballot question committee organized under M.G.L. c. 55 ("the Committee") in which you sought guidance.

You have asked if the Committee may pay for an advertisement in which the State Auditor, Diana DiZoglio, will appear and endorse the ballot question, but will not refer to her title as Auditor. You ask if the following advertisement may be paid for by the Committee:

"Hello. My name is Diana DiZoglio. Massachusetts taxpayers deserve transparency from their Legislature. That is why I am supporting a ballot initiative that would expressly authorize an audit of the Legislature by a public official. I urge you to sign ballot initiative petitions so that this question may appear on the state-wide ballot in November 2024. I also ask that you support the ballot question committee by going to www.ctdcommittee.com and making a financial contribution to the Committee for Transparent Democracy, the ballot initiative committee that is supporting this effort. Thank you."

Answer

Yes, the Committee may make the expenditure. As discussed herein, based on the timing of the proposed expenditure in relation to when the candidate may next appear on a ballot and the content of the advertisement, the Committee's expenditure would be consistent with the campaign finance law. Specifically, it would comply with M.G.L. c. 55, § 6B, which states that ballot question committees may not make expenditures to influence the election of a candidate or to aid, promote or antagonize the interests of a political party.



Discussion

A. Procedural background.

On August 16, 2023, you asked if the Auditor may appear in an advertisement supporting the ballot question. OCPF responded, stating that the campaign finance law does not prohibit an elected official from supporting a ballot question. As noted in OCPF's response, an elected official may, with certain limitations, engage in a variety of activities to support a ballot question, including sending emails to the elected official's personal or campaign email list in support of the question, speaking on behalf of the question, and asking for contributions to be made directly to the ballot question committee. A statewide elected official may also use their committee funds to pay for advertisements, emails, or social media posts in support of the question, if the expenditure is reasonable, necessary, and directly related to the official's campaign, and if the official does not solicit or receive funds into their own campaign account for purposes of supporting a ballot question. OCPF noted that certain activities by the official, including paying for advertisements with personal or candidate committee funds, or providing an email list to a ballot question committee, would be considered in-kind contributions that must be reported by the ballot question committee on its relevant reports.

The office advised, however, that in the circumstances presented in your August 16 inquiry, and to ensure compliance with Section 6B, the Auditor should not appear in advertisements paid for by the Committee.

You have now revised your question to include a proposed advertisement that does not use the title "Auditor" in the endorsement. In addition, you rely on informal email advice from OCPF's legal department provided last year in response to similar questions concerning compliance with Section 6. OCPF stated at that time that a candidate could endorse a ballot question and the ballot question committee could make an expenditure to publicize the endorsement if the endorsement does not lead a reasonable viewer to believe its purpose is both to support the ballot question and the candidate. The office noted that its determination would be based on a consideration of various factors regarding the proposed expenditure, and that one factor is how prominently the candidate appears in the ad. The advice did not, however, include a detailed analysis of the various factors that may be considered, or the weight that might be assigned to the factors.¹

¹ Advisory opinions, unlike informal guidance offered by phone or email, are based on more in-depth analysis, and are summarized on OCPF's website to provide prospective guidance to other candidates and committees. We welcome your inquiry and your interest in receiving an advisory opinion.

B. Statutory background.

The pertinent section of the campaign finance law is found at M.G.L. c. 55, § 6B, which was adopted as part of a package of major legislative changes to the campaign finance law in 1994², and reads as follows:

Section 6B: Ballot question committee; contributions:

A ballot question committee may receive, pay and expend money or other things of value solely for the purpose of favoring or opposing the adoption or rejection of a specific question or questions submitted to the voters. A ballot question committee shall not contribute to any other political committee, except that it may contribute to another ballot question committee if such contribution is consistent with the purpose for which it was organized. A ballot question committee shall not make any expenditure that is primarily for the personal use of any candidate or other person, nor shall it make any expenditure inconsistent with the purpose for which it was organized. A ballot question committee shall not receive, pay or expend money or other things of value for the purpose of influencing the nomination or election of a candidate or for the purpose of aiding or promoting or antagonizing the interest of any political party.

In the same legislation, the Legislature also established a new definition specifically referencing ballot question committees as follows:

"Ballot question committee", a political committee which receives or expends money or other things of value for the purpose of favoring or opposing the adoption or rejection of a specific question or questions submitted to the voters including, without limitation, a charter change, an initiative or referendum question or a constitutional amendment.³

Prior to this change to the campaign finance law, a committee organized to influence a ballot question fell under the definition of a political committee.⁴ As such, the ballot question committee could contribute an aggregate of \$1,000 annually to a candidate or candidate's committee.⁵ Following the adoption of the legislation, however, expenditures by ballot question committees to influence the election of a candidate and contributions to a candidate were prohibited.

Section 6 was also amended, in the same 1994 legislation, to limit contributions by political committees not organized on behalf of a candidate to other political committees. The first sentence of Section 6 as revised reiterates the restrictions on ballot question committees. Ballot question committees, unlike other political committees, are prohibited from making

² See Section 26 of Chapter 43 of the Acts of 1994; IB-95-01.

³ See Section 9 of Chapter 43 of the Acts of 1994.

⁴ See M.G.L. c. 55, § 1.

⁵ See M.G.L. c. 55, § 6.

expenditures to influence the nomination or election of a candidate or to aid, promote or antagonize the interests of any political party. Specifically, the revised Section 6 provides as follows:

“Except as otherwise provided in section six A or six B, a political committee not organized on behalf of an individual candidate may contribute to another political committee not organized on behalf of an individual candidate; provided, however, that the aggregate of all such contributions for the benefit of the political committees of any one political party shall not exceed in any one calendar year the sum of five thousand dollars; and provided, further, that the aggregate of all such contributions for the benefit of any one such political committee other than a political party committee shall not exceed in any one calendar year the sum of five hundred dollars. A political committee not organized on behalf of an individual candidate, other than a political party committee, may contribute to the campaign fund of a candidate; provided, however, that the aggregate of all such contributions for the benefit of any one candidate and such candidate's committee shall not exceed the sum of five hundred dollars in any one calendar year.”⁶

Also, the legislation permitted ballot question committees to receive unlimited contributions from individuals, which was in addition to their existing authority to accept unlimited corporate contributions.⁷ The Legislature revisited Section 6 in 2009⁸ and again in 2014⁹ without revising any of these provisions.

OCPF further notes that, although the campaign finance law recognizes and regulates independent expenditures, such expenditures may only be made by an entity “to expressly advocate the election or defeat of a clearly identified candidate.”¹⁰ This contrasts with the provisions of Section 6B which allow a ballot question committee to make expenditures “solely for the purpose of favoring or opposing the adoption or rejection of a specific question or questions submitted to the voters.”

The definition of “independent expenditure” was added to the campaign finance law in 2009. At that time, such expenditures were limited to those by “an individual, group, or association.”¹¹ In 2014, the definition was amended to broadly include “an individual, group, association, corporation, labor union, political committee or other entity.”¹² It is noteworthy that the provisions relating to ballot question committees in Sections 1, 6 and 6B remained unchanged. In fact, although the legislature amended Section 6 in 2014, after the campaign

⁶ See Section 24 of Chapter 43 of the Acts of 1994.

⁷ See Section 27 of Chapter 43 of the Acts of 1994.

⁸ See Section 32 of Chapter 28 of the Acts of 2009.

⁹ See Section 9 of Chapter 210 of the Acts of 2014.

¹⁰ See M.G.L. c. 55, s. 1.

¹¹ See Section 25 of Chapter 28 of the Acts of 2009.

¹² See Section 4 of Chapter 210 of the Acts of 2014.

finance law was further revised relative to the permissibility of independent expenditures, the limitations imposed by Section 6B and referenced in Section 6 remained unchanged and in effect to this day.

The legislative intent is clear. A political committee can be formed for the purpose of favoring or opposing the adoption or rejection of a ballot question. However, any expenditure made by the committee is limited “solely for the purpose of favoring or opposing the adoption or rejection of a specific question or questions submitted to the voters.” The ballot question committee may not make an expenditure for the purpose of influencing the election of a candidate or for the purpose of aiding, promoting or antagonizing the interest of any political party. To that end, OCPF has consistently interpreted the above statutory provisions as prohibiting ballot question committee funds from being used to support or oppose candidates or from aiding, promoting, or antagonizing the interests of any political party. *See* AO-17-02 (recognizing that a ballot question committee may refer to a candidate if the reference is incidental and not involving an expenditure by the ballot question committee).

C. Relevant factors for assessing compliance.

OCPF considers the content and timing of proposed expenditures by a ballot question committee to determine if the expenditures would comply with Section 6B. Weighing whether a proposed advertisement to be paid for by a ballot question committee would be made in part to support a candidate referenced in the advertisement, the office will take into account several factors, including, but not limited to: (1) the timing of the advertisement (e.g., whether the candidate will, is expected, or intends to be on the ballot in the same year and on the same ballot as the question), (2) whether the advertisement references the office held by the candidate, the candidate’s election, or the candidate’s status as an elected public office holder or candidate, and (3) how prominently the candidate appears in the advertisement.

The first factor listed above (the timing of the advertisement) carries the most weight in the determination. If an advertisement supporting a ballot question references a candidate’s endorsement and the candidate is on the ballot during the same calendar year as the ballot question, or within 6 (six) months of the question appearing on a ballot if the candidate and the question are on a ballot in different calendar years, the inference that the candidate will be substantially benefited by the advertisement would be significant. Even if the intent of the candidate might be solely to support the ballot question, the advertisement would have a strong secondary influence in support of the candidate by boosting the candidate’s visibility, and by placing the candidate in a favorable position relative to a ballot question being favorably described in the advertisement. The office routinely considers the timing of campaign finance activity in determining whether certain activities are subject to regulation.¹³ Timing is similarly important in this context.

¹³ *See, e.g.*, 970 CMR 2.21(6), defining when expenditures such as payments to consultants or former staff, are presumed to be coordinated.

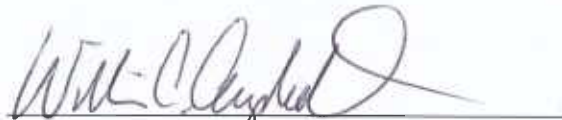
The second and third factors are also significant. Not referring to a candidate's office or especially the candidate's status as a candidate further removes any inference that might otherwise exist that the advertisement is intended to influence the candidate's election. The entire content of an advertisement or other ballot question related communication may be considered in this analysis. It is not necessary that a communication include words such as "reelect" or "support" in the context of a reference to a candidate for the communication to be considered a contribution to the candidate. Symbols, indicia of office, or other information in the communication may indicate that the communication is subject to Section 6B and should therefore not be paid for by a ballot question committee.

D. Application of the factors: the proposed expenditure by the ballot question committee would be consistent with Section 6B.

Turning to the circumstances presented in your most recent question, most significantly, the candidate and the ballot question are not expected to be on the same statewide ballot, as the candidate will presumably be on the ballot in 2026, but the ballot question will be on the ballot in 2024. Where there is a significant difference, e.g., two years, between when the question will be on the ballot and when the candidate will be on a ballot, there is a strong presumption that the communication is not intended to support the candidate. Finally, removing references to the candidate's state office, and the absence of any reference to her campaign weighs significantly in favor of permitting the expenditure.

For the reasons stated above, it is the opinion of OCPF that the advertisement may be paid for by the ballot question committee and would not result in the receipt of a contribution by the candidate.

This opinion is issued within the context of the Massachusetts campaign finance law and is based on the information in your emails and conversations with OCPF staff. Please contact us if you have any further questions regarding this opinion or any other campaign finance issue.


William C. Campbell, Director