

OFFICE OF THE SECRETARY OF STATE

STATE OF COLORADO

IN THE MATTER OF GREAT JUDGES FOR A GREAT COLORADO'S PETITION FOR
DECLARATORY ORDER AND ADVISORY OPINION

ADVISORY OPINION

I, Suzanne Staiert, Deputy Secretary of State, have reviewed the Petition for Declaratory Order and Advisory Opinion filed by Great Judges for a Great Colorado on September 6, 2018. I also requested and received public comment on the Petition from September 12 through September 19, 2018.

As stated more fully below, I decline to issue a declaratory order in this matter but instead issue the following advisory opinion.

Procedural Facts

Great Judges for a Great Colorado (Petitioner) is a Colorado non-profit organization that seeks to advocate for or against the retention of judges or justices in Colorado, without contributing to or coordinating with any judicial candidate for retention.

Petitioner filed its Petition for Declaratory Order and Advisory Opinion (Petition) with the Secretary of State on September 6, 2018, requesting a determination of whether the Petitioner should register as an independent expenditure committee (IEC) or a political committee; and if a political committee, whether contributions limits apply.¹

On September 12, 2018, the Secretary of State posted the Petition on the Secretary of State's website² and requested public comment. The Secretary received several written comments related to the Petition and published them on the website.³

Having reviewed the Petition and all written comments, and being fully advised in this matter, I decline to issue a declaratory order and instead issue an advisory opinion under Campaign and Political Finance (CPF) Rule 18.2.10.⁴

¹ Petition, p. 6.

² <http://www.sos.state.co.us/>.

³ <http://www.sos.state.co.us/pubs/elections/CampaignFinance/opinion.html>.

⁴ 8 CCR 1505-6, Rule 18.2.10.

Analysis

1. The Secretary of State declines to issue a declaratory order.

The Colorado Administrative Procedure Act mandates that every agency “provide by rule for the entertaining, in its sound discretion, and prompt disposition of petitions for declaratory orders.”⁵

Accordingly, Secretary of State Rule 1.1 states that “[a]ny person may petition the Secretary of State for a declaratory order to terminate controversies or to remove uncertainties as to the applicability to the petitioner of any statutory provisions or any rule or order of the Secretary of State as required by CRS 24-4-105(11).”⁶

The Petitioner has the burden of proving all facts stated in the Petition, all facts necessary to show the nature of the controversy or uncertainty, the manner in which the statute, rule, or order in question applies or potentially applies to the Petitioner, and any other facts the Petitioner wants the Secretary to consider.⁷ The Secretary may refuse to grant declaratory relief where it will not terminate the uncertainty or conflict giving rise to the proceedings.⁸

Here, Petitioner does not cite to any formal or informal matter or investigation currently pending before the Secretary or a court dealing with this question and involving Petitioners or any other person. Nor does the Petitioner cite to any current controversy related to its question.

But Petitioner states sufficient facts to show there is uncertainty related to its filing status.⁹ And Petitioner asserts that it will receive contributions and make independent expenditures to advocate for or against judges or justices standing for retention in the 2018 general election, making the question neither moot nor hypothetical.¹⁰

While the Secretary agrees there is uncertainty in this area of CPF law, the Secretary declines to issue a declaratory order in this case because it will not finally resolve Petitioner’s uncertainty. A declaratory order will not prevent a person from filing a complaint related to the proposed activity, even under the Secretary’s new CPF complaint rules. An advisory opinion, which the Petitioner may rely on as an affirmative defense to any campaign finance complaint,¹¹ will best address Petitioner’s uncertainty.

⁵ Section 24-4-105(11), C.R.S.

⁶ 8 CCR 1505-3, Rule 1.1.

⁷ 8 CCR 1505-3, Rule 1.4(B).

⁸ See *Lakewood Fire Protection Dist. v. Lakewood*, 710 P.2d 1124, 1126 (Colo. Ct. App. 1985).

⁹ See Petition, pp. 4-5; See also *Colo. Ethics Watch v. Clear the Bench Colorado*, 277 P.3d 931 (Colo. Ct. App. 2012).

¹⁰ Petition, p. 1-2.

¹¹ 8 CCR 1505-6, Rule 18.2.10.

2. Advisory opinion regarding independent expenditure committees under Colorado law.

The purpose of this advisory opinion is to provide written clarification regarding the Secretary's interpretation of current campaign finance laws. CPF Rule 18.2.10 permits "any person seeking guidance on the application of" CPF law to request that the Secretary of State issue an advisory opinion regarding their specific activities.¹² A person may rely on the advisory opinion as an affirmative defense to a CPF complaint.¹³

This advisory opinion is confined to the specific conduct proposed in the Petition and is based solely on the facts provided.

a. Colorado law permits Petitioner to register as an independent expenditure committee.

Judges and justices of any court of record who seek retention under Colo. Const. art. VI, section 25, are candidates for purposes of campaign finance.¹⁴ But judges and justices seeking retention in Colorado are unlike typical candidates for public office in several respects.

Judicial candidates are subject to restrictions that are not applicable to other candidates for public office.¹⁵ They are required to "abstain from any campaign activity in connection with the judge's own candidacy unless there is active opposition to his or her retention in office."¹⁶ If there is active opposition, "a nonpartisan citizens' committee or committees advocating a judge's retention in office may be organized by others, either on their own initiative or at the request of the judge."¹⁷ But the judge "should not be advised of the source of funds raised by the committee or committees."¹⁸ As a result, only when there is active opposition to a judge's retention may a retention committee form, and even then, the judge's involvement with the committee is limited.¹⁹

Although these limitations on judges as candidates emanate from rules adopted by the judiciary to govern its own members, The Secretary considers them when determining the type of committee Petitioner should register when independently supporting or opposing judicial candidates.

¹² *Id.*

¹³ *Id.*

¹⁴ Colo. Const. art. XXVIII, sec. 2(2); *See also Colo. Ethics Watch*, 277 P.3d at 934.

¹⁵ Colorado Code of Judicial Conduct, Canon 4

¹⁶ *Id.* at Rule 4.3(A)

¹⁷ *Id.* at (A)(3)

¹⁸ *Id.* at (A)(5)

¹⁹ *See Id.* at (A)(1) – (6).

There are two primary types of committees²⁰ in Colorado that may support or oppose candidates: political committees²¹, which may contribute directly to and coordinate spending with candidates and political parties;²² and independent expenditure committees²³, which may not coordinate with or contribute to candidates.²⁴ The Secretary's CPF rules define what constitutes coordination with a candidate committee or political party.²⁵

Consistent with the U.S. Supreme Court's holding in *Buckley v. Valeo*, limitations on expenditures for advertising in support of a candidate "must yield to the First Amendment unless the expenditures have been coordinated with or controlled by the candidate and thus are, in the Supreme Court's words, 'disguised contributions.'"²⁶ Further, the Supreme Court's holding in *Citizens United v. Fed. Election Comm'n*, requires the Secretary to "give the benefit of any doubt to protecting rather than stifling speech."²⁷ As a result, political committees who contribute to and coordinate with candidates in Colorado are subject to contribution limits, while IECs are not.²⁸

The Colorado Court of Appeals has considered how a group opposing the retention of judicial candidates must register and report in Colorado. In *Colo. Ethics Watch v. Clear the Bench Colorado*, the Court reviewed whether such a group must register as a political committee or an issue committee.²⁹ There, the Court found that the group should register as a political committee.³⁰ But at the time that case was decided, IECs were a novelty in Colorado, and the

²⁰ Other committees, such as small donor committees and political party committees may directly support or oppose Colorado candidates. Based on the facts submitted in the Petition, Petitioner does not meet the registration requirements for these types of committees.

²¹ A political committee is any person, other than a natural person, or any group of two or more persons, including natural persons that have accepted or made contributions or expenditures in excess of \$200 to support or oppose the nomination or election of one or more candidates. Colo. Const. art. XXVIII, sec. 2(12)(a).

²² Expenditures that are controlled by or coordinated with a candidate or candidate's agent are deemed to be both contributions by the maker of the expenditures and expenditures by the candidate committee. Section 1-45-103.7(2.5), C.R.S.

²³ Any person that accepts a donation that is given for the purpose of making an independent expenditure in excess of one thousand dollars or that makes an independent expenditure in excess of one thousand dollars must register with the appropriate officer within two business days of the date on which an aggregate amount of donations accepted or expenditures made reaches or exceeds one thousand dollars. Section 1-45-107.5(3)(a), C.R.S.

²⁴ Section 1-45-103.7(2.5), C.R.S.

²⁵ See 8 CCR 1505-6, Rule 21.

²⁶ *Buckley v. Valeo*, 424 U.S. 1, 9 (1976).

²⁷ *Citizens United*, 538 U.S. 310 (2010).

²⁸ See Colo. Const. art. XXVIII, sec. 3(1); section 1-45-103.7(2.5)(b), C.R.S.

²⁹ *Colo. Ethics Watch*, 277 P.3d 931, 933.

³⁰ *Id.* at 935.

parties did not raise, nor did the court discuss, whether the group could be properly registered as an independent expenditure committee.

Since its decision in *Clear the Bench*, the Court of Appeals has supported the right of any person to form an IEC for the purpose of independently supporting or opposing Colorado Candidates.³¹

Here, the Petitioner proposes to receive contributions and make independent expenditures to advocate for the retention or non-retention of judges or justices standing for retention.³² The Petitioner will not contribute to or coordinate its expenditures with any judicial candidate's retention committee.³³ Because Petitioner will act independently from any judicial candidate or committee, it need not register a political committee.

Instead, Petitioner's proposed conduct fits squarely within the purpose of an IEC. Under Colorado law, any person³⁴ may form an IEC to make independent expenditures related to Colorado candidates. The IEC may raise funds in any amount from any permissible source.³⁵ An independent expenditure is an expenditure that is not controlled by or coordinated with any candidate or agent of the candidate.³⁶

Because Petitioner's expenditures will not be coordinated with or controlled by any judicial candidate or judicial candidate committee, Petitioner should register as an IEC. Furthermore, Petitioner's assertion that it is permitted to accept unlimited contributions to further its purpose is also allowed under Colorado law.³⁷

b. Petitioner must ensure the absence of coordination to avoid the potential for corruption or the appearance of corruption.

Whether an expenditure is truly independent, *i.e.* not coordinated with a candidate, candidate committee or political party, is a question of fact and not a legal presumption.³⁸

³¹ *Colo. Republic Party v. Williams*, 370 P.3d 650 (Colo. Ct. App. 2016).

³² Petition, p. 2.

³³ *Id.*

³⁴ Colo. Const. art. XXVIII, Sec. 2(11) "Person" means any natural person, partnership, committee, association, corporation, labor organization, political party, or other organization or group of persons.

³⁵ See *Colo. Republican Party*, 370 P.3d 650; See also Section 1-45-107.5(3)(a), C.R.S.; section 1-45-103.7(2.5)(b), C.R.S.

³⁶ Colo. Const. article XXVIII, sec. 2(9).

³⁷ See *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (holding, post-*Citizens United*, that limits on contributions for the purpose of making independent expenditures promote no anti-corruption interest); see also *Buckley*, 424 U.S. at 19-21 (holding that spending in support of a candidate is subject to greater First Amendment protection from regulation than is a contribution to a candidate because limits on spending generally curb expressive and associational activity more than do contribution limits.).

Courts have consistently upheld restrictions on coordinated contributions, finding that such restrictions reflect “the importance of the interests that underlie contribution limits—interests in preventing ‘both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.’”³⁹

But courts have also repeatedly struck down limits on independent expenditures, reasoning that independent expenditures do not pose the same risk of corruption or the appearance of corruption as direct contributions.⁴⁰ As a result, it is critical that Petitioner’s proposed activity be truly independent of the candidates.⁴¹

While state law does not define coordination, under CPF Rule 21⁴² an expenditure is coordinated with a candidate or political party if the expenditure or spending is “at the request, suggestion, or direction of, in consultation with, or under the control of” a candidate committee or political party.⁴³ The rule also states that the terms “candidate committee or political party” include an agent, employee, board member, director, or officer of that candidate committee or political party.⁴⁴

Where Petitioner is opposing a judicial candidate’s retention, it is not difficult to presume a lack of coordination with the candidate or candidate committee. But when supporting retention, Petitioner must be certain not to coordinate with the candidate, even when the candidate is prohibited from forming his or her own committee.

Any person who believes that a violation of Article XXVIII or the FCPA has occurred, including improper coordination with a candidate or political party, may file a written complaint regarding such conduct.⁴⁵

³⁸ See *Colo. Rep. Federal Campaign Committee v. FEC*, 518 U.S. 604, 619-620 (1996) (stating that “we cannot take the cited materials as a empirical, or experience-based, determination that, as a factual matter, all party expenditures are coordinated with a candidate.”).

³⁹ *McConnell v. FEC*, 540 U.S. 93, 137 (2003) (quoting *FEC v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982); *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 440-441 (2001) (Colorado II)).

⁴⁰ See *Buckley*, 424 U.S. 1; see also *Colo. Rep. Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *FEC v. Nat’l Conservative PAC*, 470 U.S. 480 (1985); *Citizens United v. FEC*, 558 U.S. 310 (2010); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁴¹ See *King*, 2013 U.S. App. LEXIS at FN4 (“coordination breaks the essential independence of the expenditure and has always been deemed the functional equivalent of a candidate contribution.”).

⁴² 8 CCR 1505-6, Rule 21.1.1.

⁴³ *Id.*

⁴⁴ 8 CCR 1505-6, Rule 1.4.5.

⁴⁵ 8 CCR 1505-6, Rule 18.2.

Conclusion

For the reasons set forth above, the Secretary of State concludes that Petitioner may operate an independent expenditure committee in the State of Colorado to independently support or oppose candidates for judicial retention, and may raise funds in any amount from any permissible source.

Dated September 28, 2018.



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