



STATE OF CONNECTICUT STATE ELECTIONS ENFORCEMENT COMMISSION

ADVISORY OPINION 2014-04: **Negative Communications Featuring Candidates for Different Offices**

At a regular meeting on October 17, 2014, the State Elections Enforcement Commission (the “Commission”) voted to issue an Advisory Opinion to respond to requests for clarification regarding the ability of candidates in the Citizens’ Election Program (“CEP”) to make expenditures for communications that refer to—and oppose or feature in a negative light—other candidates who are not their direct opponents.¹

As an initial matter, at its regular meeting on May 18, 2011, the Commission issued Declaratory Ruling 2011-03, which memorialized the Commission’s guidance regarding candidate committees and joint communications. That Declaratory Ruling addressed when and how to allocate and report certain communications that reference or include more than one candidate. The current request asks a similar question, but with a critical difference: here, the candidate proposed to be featured in the communication is not being promoted by the communication (but, rather, is being opposed) and is not a direct opponent of the candidate making the communication. An example would be a state senate candidate producing an ad that promoted such candidate but also disparaged a candidate for governor’s policies and performance, or an ad that claimed that if the challenging gubernatorial candidate won the election, the state would not perform well economically. The answer here is, essentially, the same as that provided in the 2011 Ruling, with additional guidance.²

Campaign finance law has long provided that a candidate committee may not make a contribution to another candidate committee. *See* General Statutes § 9-616 (a). In addition, a candidate committee may *only* make expenditures to promote the nomination or election of the candidate who established the committee. *See* General Statutes § 9-607 (g) (1) (A) (i).

In addition to these provisions, the CEP requires that a candidate seeking public funds demonstrate a threshold of public support for that candidate’s candidacy from the candidate’s own constituents before receiving such funds. CEP regulations provide that participating candidates shall not spend funds for “[c]ontributions, loans or expenditures to or for the benefit of another candidate, political committee or party committee. . . .”

¹ On August 16, 2016, a non-substantive typographical error in the original Advisory Opinion was corrected.

² Connecticut’s campaign finance law has changed since Declaratory Ruling 2011-03 was issued, but not in any way that would alter the ruling’s underlying conclusion, and in ways that actually strengthen the ruling. For example, in Public Act 13-180 the definition of expenditure was amended to become broader and more inclusive, and exceptions to the definition of expenditure were adopted that specifically exempt certain communications that contain endorsements of one candidate by another. *See* General Statutes §§ 9-601a (b) (22) & (23) (as amended by Public Act 13-180) & 9-601b (b) (10) & (11) (as amended by Public Act 13-180).

Regs. Conn. State Agencies § 9-706-2 (b) (8). Moreover, a CEP candidate voluntarily agrees that the committee's campaign funds will be spent only to "to *directly* further the participating candidate's nomination for election or election to the office specified in the participating candidate's affidavit certifying the candidate's intent to abide by Citizens' Election Program requirements." Regs. Conn. State Agencies § 9-706-1 (a). Additionally, CEP candidates agree to voluntary limits on their own expenditures. General Statutes §§ 9-703 (a) & 9-711 (g) (1). It is therefore particularly important for participating candidates to avoid spending campaign funds to promote another candidate and to refrain from accepting in-kind contributions in the form of advertising from other candidates that might cause an expenditure limit violation.

An expenditure is defined, in relevant part, as "(1) Any purchase, payment, distribution, loan, advance, deposit or gift of money or *anything of value, when made to promote* the success or *defeat of any candidate* seeking . . . election. . . and (2) Any communication that (A) *refers to one or more clearly identified candidates. . . .*" General Statutes § 9-601b (a) (1) & (2) (as amended by Public Act 13-180) (emphasis added). The statute also provides a definition of "expenditure" that depends on the timing of a communication. Specifically, this includes any communication made during the ninety-day period preceding a primary or election referring to one or more clearly identified candidates that is broadcast by radio, television, other than on a public access channel, or by satellite communication or via the Internet, or as a paid-for telephone communication, or appears in a newspaper, magazine or on a billboard, or is sent by mail. *See* General Statutes §§ 9-601 b (a) (2) & 9-601b (b) (7). There are also fifteen exceptions to the definition of expenditure. General Statutes § 9-601b (b) (as amended by Public Act 13-180). Unless such an exception applies, when a CEP candidate makes a communication that is not directly related to the candidate's own race and that also promotes the defeat of or attacks a candidate that is not a direct opponent of the candidate sponsoring the communication, but is in a different race, then the cost of that communication must be properly allocated.

While the candidate committee of a CEP participant may not attack candidates opposing other members of such candidate's party, the state central committees, the town committees, and any candidates in the race directly opposing the candidate being attacked may all bear the portion of the cost allocated to the negative advertising. *See* General Statutes § 9-601 (25) (as amended by Public Act 13-180) (expanding the definition of organization expenditure to include negative as well as positive communications); *see also* General Statutes § 9-718. Legislative leadership and legislative caucus committees may also bear the cost of negative advertising against opponents in General Assembly races. *Id.*

For example, if participating state senate candidate Jones ran an ad disparaging participating gubernatorial candidate Smith, it would generally not be considered a permissible expenditure by Jones' candidate committee. If candidate Jones wishes to produce such an ad, it would be permissible if it were paid for jointly with a committee that could legally support candidate Smith's opponent or oppose candidate Smith. In this example, that could be the candidate committee of Smith's opponent, or alternatively

could be a state central committee, or any town committee – all of which may make organization expenditures opposing candidate Smith.

Of course, in narrow circumstances, a candidate might choose to include another candidate who is running for election in campaign materials without creating such a joint expenditure. For example, when a candidate committee pays for an advertisement that includes an attack on the opponent of someone else in the candidate's party, outside such candidate's own race, there may be no need for allocation if there is no mention of the candidacy or record of the candidate being attacked and the communication is distributed only to individuals outside of the attacked candidate's district. Such determinations will always be fact-specific. But to reiterate advice from Declaratory Ruling 2011-03, in order to avoid making an impermissible expenditure from a CEP candidate committee, committees of candidates and political parties must pay their proportionate share of the communication's costs as a joint expenditure.

Declaratory Ruling 2011-03 describes in detail when and how campaigns and committees must allocate joint expenditures for video, audio, and printed advertisements, and provides a list of indicia that will factor into the analysis of whether a share of the costs of a communication must be allocated to a particular candidate committee, including but not limited to the following: whether the candidate appears or is identified in the communication; when the communication was created, produced, or distributed; how widely the communication was distributed; and what role the candidate or an agent of the candidate played in the creation, production and/or dissemination of the communication. Those factors will be examined in any case in which more than one candidate is featured in a communication.

The Commission recognizes that candidates do not always benefit equally from a joint communication, and accordingly, candidate committees will not always have to split the costs of a joint communication equally, and balancing these indicia is not an exact science. Traditionally, the Commission has not disputed a committee's determination of its proportionate share of a joint expenditure unless the Commission found that allocation to be clearly erroneous.

This constitutes an Advisory Opinion pursuant to General Statutes § 9-7b (a) (14). This Advisory Opinion is only meant to provide general guidance and addresses only the issues raised. Additional questions about the specific requirements for disclosure of independent expenditures should be directed to the Commission staff.

Adopted this 17th day of October, 2014 at Hartford, Connecticut by a vote of the Commission.

[adopted by Commission vote October 17, 2014]
Anthony J. Castagno, Chair