

A statute addressed in this opinion has changed.

Please consult current Florida law.

September 21, 2005

Ms. Chance Irvine, Chair
Florida Elections Commission
The Collins Building, Suite 224
107 W. Gaines Street
Tallahassee, FL 32300-1050

RE: DE 05-06
Meaning of “Expressly Advocates”; §106.011(5)(a),
106.011(17), and 106.011(18)(a), Florida Statutes

Dear Ms. Irvine:

This is in response to your request for a formal opinion regarding the meaning of the term “expressly advocates” as it is used in Chapter 106, Florida Statutes. You are Chair of the Florida Elections Commission and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has the authority to issue an opinion to you.

You ask essentially the following question:

When the 2004 Florida Legislature amended Chapter 106, Florida Statutes, in various sections to add the words “expressly advocates” or to similarly modify the term “advocates” as it existed in those sections, was it the Legislature’s intent to apply the “magic words” standard to political advertisements as set forth by the United States Supreme Court in Buckley v. Valeo, 96 S.Ct. 612 (1976).

The short answer to your question is yes.

As you note in your request, there is some history related to the concept of express advocacy which culminated in the landmark Buckley decision. In that case the United States Supreme Court created what is often referred to as the “magic words” standard for a communication to be considered to “expressly advocate.” That standard requires that the communication contain express words of advocacy of election or defeat of a candidate or issue such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” “oppose,” and “reject.”

A review of the staff analysis of the proposed legislation which resulted in the Chapter 2004-252, Laws of Florida, statutory changes to Chapter 106 provides some insight into the intent of the legislation. The analysis identifies the problem of “issue advocacy advertisements,” described as “political ads that typically attack or support candidates, without ever *expressly advocating* for or against any particular candidate (i.e., “vote for,” “vote against,” “support,” “oppose”).” Staff also noted that these advertisements “may also occur in connection with referendum issue elections.” Of concern was the fact that under then current law, groups and individuals publishing such advertisements that might include a reference to or likeness of a candidate but that did not “support or oppose” any candidate, the standard contained in the statutes at that time, were not required to report contributions and expenditures or to register with the Division of Elections. The analysis concluded that this

often enabled individuals and groups that engaged solely in that type of activity to conceal the sources of their funding.

Further, the analysis discussed that while section 106.1437, Florida Statutes, required a sponsorship identification disclaimer on advertisements intended to influence public policy or the vote of a public official, the lack of a concurrent registration and reporting requirement identifying the groups' principals allowed persons to conduct "shadow" campaigns under the guise of such benign names as the 'Citizens for Everglades Preservation' or 'Floridians for Fair Representation.'"

The analysis then discusses the effect of the proposed changes, which is described as "subjecting each person or group funding certain 'electioneering communications' (a/k/a, issue advocacy advertisements) to registration, periodic campaign finance reporting of contributions and expenditures, and sponsorship disclaimer requirements." It is clear that the legislation was intended to capture those communications that did not rise to the level of express advocacy as defined by Buckley.

As you note, these statutory changes came after the United States Supreme Court found Congress' 2002 regulation¹ of "electioneering communications," which included communications that did not use the Buckley "magic words", to be constitutional.² That ruling cleared the way for the Florida Legislature to create its own regulatory standard for such communications. In doing so, the Florida Legislature chose to create two distinct classes of communications, rather than trying to address all communications under a single approach. Further, as recently noted by the Division in opinion DE 05-04, when creating the class of "electioneering communications" the Florida Legislature did not include any regulation of activities of coordination or consultation between an entity or person engaging in an electioneering communication and a candidate who is depicted in, referred to or who may benefit from the electioneering communication.

Section 106.011(5)(a), Florida Statutes, as amended in 2004, states:

(5)(a) "Independent expenditure" means an expenditure by a person for the purpose of *expressly advocating* the election or defeat of a candidate or the approval or rejection of an issue, which expenditure is not controlled by, coordinated with, or made upon consultation with, any candidate, political committee, or agent of such candidate or committee. An expenditure for such purpose by a person having a contract with the candidate, political committee, or agent of such candidate or committee in a given election period shall not be deemed an independent expenditure.

(b) An expenditure for the purpose of *expressly advocating* the election or defeat of a candidate which is made by the national, state, or county executive committee of a political party, including any subordinate committee of a national, state, or county committee of a political party, or by any political committee or committee of continuous existence, or any other person, shall not be considered an independent expenditure if the committee or person.

1. Communicates with the candidate, the candidate's campaign, or an agent of the candidate acting on behalf of the candidate, including any pollster, media consultant, advertising agency, vendor, advisor, or staff member, concerning the preparation of, use of, or payment for, the specific expenditure or advertising campaign at issue; or

¹ The Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C., 18 U.S.C. § 607, 28 U.S.C. § 994, 36 U.S.C. § 510, 47 U.S.C. § 315).

² See McConnell v. FEC, 540 U.S. 93, 124 S.Ct. 619 (2003).

2. Makes a payment in cooperation, consultation, or concert with, at the request or suggestion of, or pursuant to any general or particular understanding with the candidate, the candidate's campaign, a political committee supporting the candidate, or an agent of the candidate relating to the specific expenditure or advertising campaign at issue; or
3. Makes a payment for the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign material prepared by the candidate, the candidate's campaign, or an agent of the candidate, including any pollster, media consultant, advertising agency, vendor, advisor, or staff member; or
4. Makes a payment based on information about the candidate's plans, projects, or needs communicated to a member of the committee or person by the candidate or an agent of the candidate, provided the committee or person uses the information in any way, in whole or in part, either directly or indirectly, to design, prepare, or pay for the specific expenditure or advertising campaign at issue; or
5. After the last day of qualifying for statewide or legislative office, consults about the candidate's plans, projects, or needs in connection with the candidate's pursuit of election to office and the information is used in any way to plan, create, design, or prepare an independent expenditure or advertising campaign, with:
 - a. Any officer, director, employee, or agent of a national, state, or county executive committee of a political party that has made or intends to make expenditures in connection with or contributions to the candidate; or
 - b. Any person whose professional services have been retained by a national, state, or county executive committee of a political party that has made or intends to make expenditures in connection with or contributions to the candidate; or
6. After the last day of qualifying for statewide or legislative office, retains the professional services of any person also providing those services to the candidate in connection with the candidate's pursuit of election to office; or
7. Arranges, coordinates, or directs the expenditure, in any way, with the candidate or an agent of the candidate. [Emphasis added.]

Section 106.011(17), Florida Statutes, as amended in 2004, states:

(17) "Political advertisement" means a paid expression in any communications media prescribed in subsection (13), whether radio, television, newspaper, magazine, periodical, campaign literature, direct mail, or display or by means other than the spoken word in direct conversation, which *expressly advocates* the election or defeat of a candidate or the approval or rejection of an issue. However, political advertisement does not include:

- (a) A statement by an organization, in existence prior to the time during which a candidate qualifies or an issue is placed on the ballot for that election, in support of or opposition to a candidate or issue, in that organization's newsletter, which newsletter is distributed only to the members of that organization.

(b) Editorial endorsements by any newspaper, radio or television station, or other recognized news medium. [Emphasis added.]

Finally, in section 106.011(18), Florida Statutes (2004), the Florida Legislature addressed a distinctly different type of communication, those that do not “expressly advocate” the election or defeat of a candidate or issue, but which still are intended to impact voters, and defined them as follows:

(18)(a) “Electioneering communication” means a paid expression in any communications media prescribed in subsection (13) by means other than the spoken word in direct conversation that:

1. Refers to or depicts a clearly identified candidate for office or contains a clear reference indicating that an issue is to be voted on at an election, *without expressly advocating the election or defeat of a candidate or the passage or defeat of an issue.*
2. For communications referring to or depicting a clearly identified candidate for office, is targeted to the relevant electorate. A communication is considered targeted if 1,000 or more persons in the geographic area the candidate would represent if elected will receive the communication.
3. For communications referring to or depicting a clearly identified candidate for office, is published after the end of the candidate qualifying period for the office sought by the candidate.
4. For communications containing a clear reference indicating that an issue is to be voted on at an election, is published after the issue is designated a ballot position or 120 days before the date of the election on the issue, whichever occurs first.

(b) The term “electioneering communication” does not include:

1. A statement or depiction by an organization, in existence prior to the time during which a candidate named or depicted qualifies or an issue identified is placed on the ballot for that election, made in that organization's newsletter, which newsletter is distributed only to members of that organization.
2. An editorial endorsement, news story, commentary, or editorial by any newspaper, radio, television station, or other recognized news medium.
3. A communication that constitutes a public debate or forum that includes at least two opposing candidates for an office or one advocate and one opponent of an issue, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum, provided that:
 - a. The staging organization is either:
 - (I) A charitable organization that does not make other electioneering communications and does not otherwise support or oppose any political candidate or political party; or
 - (II) A newspaper, radio station, television station, or other recognized news medium; and
 - b. The staging organization does not structure the debate to promote or advance one candidate or issue position over another.

(c) For purposes of this chapter, an expenditure made for, or in furtherance of, an electioneering communication shall not be considered a contribution to or on behalf of any candidate.

(d) For purposes of this chapter, an electioneering communication shall not constitute an independent expenditure nor be subject to the limitations applicable to independent expenditures. [Emphasis added.]

As a result, the statutes now specifically address both types of communications, those which expressly advocate for or against a candidate or for the approval or rejection of an issue as defined by Buckley and those which refer to or depict a clearly identified candidate for office or contain a clear reference indicating that an issue is to be voted on at an election, without expressly advocating the election or defeat of a candidate or the passage or defeat of an issue.

SUMMARY

It is clear that the Chapter 2004-252, Laws of Florida, statutory changes to Chapter 106 with regard to the term “expressly advocate” and the creation of the category of “electioneering communications” were intended by the Florida Legislature to capture and regulate both those communications that rose to the level of express advocacy as defined by Buckley and those that did not.

As a result, the statutes now address both types of communications, those which expressly advocate for or against a candidate or for the approval or rejection of an issue as defined by Buckley and those which refer to or depict a clearly identified candidate for office or contain a clear reference indicating that an issue is to be voted on at an election, without expressly advocating the election or defeat of a candidate or the passage or defeat of an issue.

Sincerely,

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