

September 18, 2007

Mr. Jon Kislak
Florida Red and Blue, Inc.
9999 NE 2nd Avenue, Suite 306
Miami Shores, Florida 33138

RE: DE 07-05
Political Committees
§§ 106.011(3), 106.055, 106.07(1)
and 106.17, Florida Statutes

Dear Mr. Kislak:

By this letter, the Division of Elections *sua sponte* rescinds its prior opinion, DE 07-03, dated August 20, 2007, provided to you in response to the request by Ms. Alicia H. Apfel, attorney for the Florida Red and Blue, Inc. Political Committee. We now issue the following opinion in response to the request for an advisory opinion regarding proposed polling activities by the political committee.

Pursuant to Rule 1S-2.010, Florida Administrative Code, we address this opinion to you as the chairperson for Florida Red and Blue, Inc. Political Committee. Your political committee proposes to engage the services of a professional polling firm in connection with its opposition to a proposed ballot initiative to amend Florida's Constitution. Because the political committee has questions about compliance with Florida's election laws with respect to its proposed actions, the Division has the authority to issue you an opinion pursuant to section 106.23(2), Florida Statutes (2007).

Your political committee's attorney asked essentially the following questions:

1. Does section 106.17, Florida Statutes (2007), or any Florida statutory provision, preclude two or more Florida political committees from jointly conducting an *issue-oriented* poll, survey or measurement of voter sentiment (jointly referred to hereafter as "poll") as the term "issue" is defined in section 106.011(7), Florida Statutes (2007)?
2. If the answer to question #1 is answered "No," may two or more political committees jointly conduct such a poll in one of the following ways?

- a. May the political committees jointly engage the services of a professional polling firm with each political committee paying a portion of the cost of the polling directly from its own campaign account, with each political committee reporting such expenditure in its own campaign finance report and each reporting the balance of the cost of the polling covered by the other political committee as an in-kind contribution from the other participating political committee?
- b. May the political committees jointly engage the services of a professional polling firm with one political committee paying the entire portion of the cost of the polling directly from its own campaign account and the other participating political committee making a contribution from its campaign account to the first political committee for a portion of the cost? If so, should both political committees report their respective expenditures from their campaign accounts along with the first political committee reporting the contribution from the second political committee?
- c. If a political committee pays for the entire cost of the professionally conducted poll directly from its own campaign account and then shares the confidential results of the poll with another political committee, is the second political committee which receives the poll results required to report this as an in-kind contribution and, if so, should it be valued at the full cost of the poll to the political committee which commissioned the poll?
- d. If one political committee contributes only the time of paid staff to the polling activity and receives the confidential results of the poll from the political committee responsible for paying for the cost of the poll, should the political committee which paid for the poll report on its campaign report the in-kind contribution of the other political committee's staff time and should the other political committee report on its campaign report the value of the in-kind contribution of the poll results?

With regard to Question 1, the Division of Elections is authorized to issue advisory opinions only regarding Florida's Election Code (chapters 97-106, Florida Statutes (2007)). The question goes beyond our jurisdiction in asking whether "any Florida statutory provision" precludes the proposed action. We limit our response only to an interpretation of the Florida Election Code and conclude that section 106.17, Florida Statutes (2007), does not apply to issue-only polling. The section states:

Any candidate, political committee, committee of continuous existence, electioneering communication organization,¹ or state or county executive committee of a political party may authorize or conduct a political poll, survey,

¹ This section will not apply to committees of continuous existence or electioneering communication organizations until January 1, 2008. Ch 2007-30, § 47, Laws of Fla.

index, or measurement of any kind relating to candidacy for public office so long as the candidate, political committee, committee of continuous existence, electioneering communication organization, or political party maintains complete jurisdiction over the poll in all its aspects. [*Emphasis supplied.*]

Section 106.17, Florida Statutes (2007), appears to perform two functions: authorizes polls relating to candidacy for public office and simultaneously places a limiting condition on that authorization. Meanwhile, the statute is silent as to political polling relating to “issues.”² Because Section 106.17 is limited to polls “relating to candidacy for public office,” and the Election Code contains no similar express authorization or limitation on political committees conducting a political poll regarding an “issue,” the question arises whether the statute’s silence regarding issue polling should be interpreted as a lack of authorization to conduct such polling, or a lack of limitation upon how issue polling is to be conducted.

Section 106.17, Florida Statutes (2007), evolved from a 1963 enactment which expressly prohibited candidates and political committees from authorizing expenditures for any political poll “relating to candidacy for public office,” except for a poll conducted by the candidate or political committee in which the candidate or political committee maintained complete control over all aspects of the poll. Ch. 63-520; Laws of Fla.; Ch. 73-128, § 17, Laws of Fla. In 1981, the Legislature created the current version of section 106.17 by transforming the exception to the former prohibition on polling “relating to candidacy for public office” into a specific recognition of the authority of candidates, political committees, and state or county executive committees of political parties to conduct polls “relating to candidacy for public office” if they maintained complete jurisdiction over all aspects of the poll. Ch. 81-304, § 32, Laws of Fla.

As a matter of statutory construction, the authorization of one type of poll in Section 106.17 implies an intention to exclude authorization of any other type of poll not mentioned. *E.g.*, *Maggio v. Fla. Dept. of Labor & Emp. Sec.*, 899 So. 2d 1074, 1080 (Fla. 2005) (applying doctrine of *expressio unius est exclusion alterius*; the mention of one thing in a statute implies the exclusion of another). Additionally, principles of statutory construction require that every word and phrase in a statute be given meaning, and that no part of a statute should be construed as mere surplusage. *E.g.*, *Gulfstream Park Racing Ass’n, Inc. v. Tampa Bay Downs*, 948 So. 2d 599, 606 (Fla. 2006). These principles suggest that the Legislature intended to limit its authorization to the polling expressly addressed in Section 106.17, and by implication, to prohibit other types of polling not expressly mentioned. On the other hand, however, given the history of the statutory provision and because polling activities implicate the First Amendment right to free speech, it is reasonable to conclude the legislature did not intend to infringe upon this right any more than necessary to accomplish its expressed goal of regulating candidate polls. Therefore, although the language of the statute is not entirely clear, we believe the better

² Section 106.011(7), Florida Statutes (2007), defines an “issue” as:

[A]ny proposition which is required by the State Constitution, by law or resolution of the Legislature, or by the charter, ordinance, or resolution of any political subdivision of this state to be submitted to the electors for their approval or rejection at an election, or any proposition for which a petition is circulated in order to have such proposition placed on the ballot at any election.

interpretation is to construe its purpose as being to impose restrictions upon candidate polling without imposing any similar restrictions upon issue polling.

So, based upon the above analysis, the Election Code does not preclude a political committee from joining forces with one or more political committees to employ the services of a professional polling firm in conducting a political poll relating solely to an “issue.”

With regard to Question 2a, the Election Code imposes reporting requirements on a political committee for its contributions and expenditures related to its campaign activities. Section 106.07(1), Florida Statutes (2007), requires each campaign treasurer of a political committee to “file regular reports of all contributions received, and all expenditures made, by and on behalf of such...political committee.” Also, included within the definition of a “contribution,” are “contributions in kind having an attributable monetary value in any form...” Section 106.011 (3)(a), Florida Statutes (2007). Section 106.055, Florida Statutes (2007), indicates when and how to determine the value of an in-kind contribution:

Any person who makes an in-kind contribution shall, at the time of making such contribution, place a value on such contribution, which valuation shall be the fair market value of such contribution. Travel conveyed upon private aircraft shall be valued at the actual cost of per person commercial air travel for the same or substantially similar route.³

Therefore, if two political committees jointly engage the services of a professional polling firm with each political committee paying a portion of the costs from its own campaign accounts, the committees must report the expenditures each makes to the polling firm. Moreover, to the extent that an attributable monetary value can be placed on the polling firm’s report, if a political committee receives more than its pro rata expenditure for the poll results, the political committee must report the excess value as an in-kind contribution on its campaign finance report. The in-kind contribution is to be valued at its fair market value. (*See* the response to Question 2c, below, regarding fair market value determinations.) If we assume that each political committee pays half the cost for employing the polling firm, then each political committee would report this amount as an expenditure on its campaign financial report and, *assuming* that the fair market value of the report is the other half of the cost, then each political committee would report on its campaign finance report an in-kind contribution from the other political committee in an amount equating to half of the cost the polling firm’s report.

Question 2b asks if, instead of the two political committees paying the polling firm from their campaign accounts, may one political committee pay the entire cost to the polling firm with the second political committee paying a sum of money to the first political committee to also obtain the results of the poll. As stated previously, each political committee must report its own campaign contributions and expenditures. Section 106.07, Florida Statutes (2007). Also, as explained in *Division of Elections Opinion 78-42* (October 19, 1978), “contributions by one

³ The last sentence of the statutory provision is effective January 1, 2008. Ch. 2007-30, § 43, Laws of Fla.

political committee to another political committee are permissible, provided they are made through the campaign treasurer and deposited in the receiving committee's primary depository campaign account." If the situation occurs as described in Question 2b, each political committee would be required to report its expenditures on its campaign financial report, *i.e.*, the first political committee would report its expenditure to the polling firm to conduct the poll and the second political committee would report its expenditure to the first political committee to obtain the poll results. The first political committee which actually paid the polling firm would also report the monetary contribution it received from the second political committee. Moreover, as explained in the response to Question 2a, to the extent that the polling firm's report has an attributable monetary value, the second political committee must report as an in-kind contribution on its campaign financial report any monetary value in excess of what it paid for the polling firm's report, to the first political committee.

With regard to Question 2c, based upon the rationale explained above, if one political committee pays for the entire cost of the polling firm to conduct the issue-only poll and then decides to share the confidential poll results with another political committee (which does not pay anything to the first political committee), then an in-kind contribution may result. "[A]n 'in-kind' contribution is anything, and in any form, given for the purpose of influencing an election to which a monetary value may be attributed." *Division of Elections Opinion* 04-06 (June 2, 2004). If the poll results satisfy this definition at the time one political committee provides them to another political committee, the poll results are an in-kind contribution that the receiving political committee must report. Per section 106.055, Florida Statutes (2007), it is the person (in this case, the political committee) making the in-kind contribution that places the value on the poll results based upon their fair market value at the time the political committee provides them to another. Whether the fair market value of the poll results equals the full cost of the poll to the political committee which commissioned the poll is a matter to which the Division of Elections cannot provide one universal answer. The fair market value for such poll results at the time they are given to the other political committee will vary according to individual circumstances. Like newly purchased automobiles, such results (assuming they have an attributable value) may depreciate over time. Furthermore, the poll results may have been obtained below fair market value. Therefore, we cannot answer whether the poll results should be valued as an in-kind contribution at their full cost to the commissioning political committee. "Fair market value" has, its classic definition, "the amount a purchaser willing but not obliged to buy, would pay to one willing but not obliged to sell." *Walter v Schuler*, 176 So 2d 81 (Fla. 1965) If there is attributable value to the poll results, the political committee making the in-kind contribution places the fair market value on the poll results at the time it provides the poll results to the other political committee. Section 106.055, Florida Statutes (2007).

Finally, with regard to Question 2d, the question presents the situation of one political committee providing its paid staff to the other political committee to assist with polling activities on an issue-only poll. Section 106.011(3)(c), Florida Statutes (2007), indicates that "contribution" includes:

The payment, by any person other than a candidate or political committee, of compensation for the personal services of another person which are rendered to a

candidate or political committee without charge to the candidate or committee for such services.⁴

Therefore, the providing of paid staff by one political committee to another political committee to perform personal services is a “contribution.” By not paying for the personal services of the staff members, the political committee receiving the free services must report on its campaign finance report the contribution of the staff time. However, this is not an in-kind contribution to be valued at the fair market rate. As section 106.011(3)(c), Florida Statutes (2007) specifies, the value of the contribution is the “payment” that the political committee pays its staff while working for the other political committee. Also, as noted above, the political committee that pays for the professional polling firm must list on its campaign finance report the cost to obtain the services of the polling firm as an expenditure.

As explained above, to the extent that the polling firm’s report has an attributable monetary value, the political committee providing its staff to the political committee that commissioned the polling firm must list on its campaign finance report as an in-kind contribution any monetary value of the poll results that it receives that is in excess of the salary it paid its staff members for working on the polling activities.

SUMMARY

The Election Code does not prohibit two or more political committees from jointly conducting a political poll, survey, index, or measurement of voter sentiment relating to an “issue.” If two political committees jointly engage the services of a professional polling firm with each political committee paying a portion of the costs from its own campaign accounts, the committees must report the expenditures each makes for the polling firm’s report. To the extent that a committee receives any fair market value in excess of what it paid for the polling firm’s report, it must report the value as an in-kind contribution on its campaign financial report. If one political committee pays for the entire cost of the polling firm to conduct a poll and then shares the poll with another committee, an in-kind contribution will result if there is attributable value to the poll results. The political committee making the in-kind contribution places the fair market value on the poll results at the time it provides the poll results to other political committees. Also, the providing of paid staff by one political committee to another political committee to perform personal services for polling activities is a reportable contribution under the Election Code and its value is the payment that the political committee pays its staff while working on the polling activity for the other political committee. To the extent that the polling firm’s report has

⁴ We contrast the situation presented in the question to the situation in the concluding paragraph to section 106.011(3), Florida Statutes (2007), in which the Legislature excepted services by “volunteers” from the definition of “contribution.” Because the staff members in your situation are being paid by the other political committee, they are not “volunteers” in the sense intended by the statutory provision:

Notwithstanding the foregoing meaning of “contribution,” the word shall not be construed to include services, including, but not limited to, legal and accounting services, provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee. This definition shall not be construed to include editorial endorsements.
Section 106.011(3), Florida Statutes (2007).

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an attributable value, the political committee which provided the staff members to the other political committee must report an in-kind contribution for any monetary value in excess of what it paid in the form of staff time for the polling firm's report.

Sincerely,

Amy K. Tuck
Director, Division of Elections

Prepared by:
Gary J. Holland
Assistant General Counsel

cc: Alicia H. Apfel, Esq.