



CITY OF PHILADELPHIA

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The Board's Regulation 8 (Political Activity), effective March 28, 2011, represents the Board's interpretation of Charter Section 10-107, and supersedes this advisory opinion to the extent that it is inconsistent with the regulation.

GC-2008-527

Philadelphia Board of Ethics Nonpublic Advice of Counsel

December 5, 2008

Re: Exploratory Committee for Potential Candidacy for Elective Office

A City employee on the payroll of City Council requested nonpublic advice on a number of questions related to the possibility of seeking elective office. The requestor advised that he/she had been approached about running for office and that some have expressed a desire to open an exploratory committee. The requestor advised that such a committee would include a candidate's political action committee (PAC). The requestor's specific questions are as follows:

- Would the formation of such PAC constitute a declaration of office?
- Would the formation of such PAC cause me, as an individual and employee of the City, to violate any provision of the City Code, Charter or State Law?
- Would this PAC be permitted to use my name in fundraising activities?

Scope of this advice

Please note that this Advice of Counsel can address only matters within the jurisdiction of the Board of Ethics. Paragraph 4.1(b) of the Board's Regulation No. 4 addresses this jurisdiction:

(b) Permissible subjects of requests. In accordance with Section 4-1100 of the Home Rule Charter, the Board or its staff, as provided below, shall provide advice concerning provisions of the Home Rule Charter and City ordinances pertaining to ethical matters, which matters shall include conflicts of interest, financial disclosure, standards of governmental conduct, campaign finance matters, prohibited political activity, disclosures required by Code Ch. 17-1400, and such other matters as may be assigned by Council.

It is important to note that the named subjects, such as “campaign finance matters” and “prohibited political activity” are only within our jurisdiction to the extent that they are “provisions of the Home Rule Charter and City ordinances” as stated earlier in the same sentence. Thus, the requestor was advised that, to the extent that he/she may have questions about the application of the State Election Code, Title 25 of the Pennsylvania Statutes, such questions are not addressed in this Advice of Counsel. The one exception is that we do provide an analysis of the State Ethics Act, since many of the issues under that Act are very similar to issues under ethics provisions of the Charter and the City Ethics Code. See the caution later in this Advice that final authority rests with the State Ethics Commission.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, this advice is predicated on the facts that have been provided. The Board of Ethics does not conduct an independent inquiry into the facts. Although previous opinions of this office or the Law Department that interpret statutes are guidance to how this office will likely interpret the same provision in the future, previous opinions do not govern the application of the law to different facts. Ethics opinions are particularly fact-specific, and any official or employee wishing to be assured that his or her conduct falls within the permissible scope of the ethics laws is well-advised to seek and rely only on an opinion issued as to his or her specific situation. In that regard, to the extent that this Advice states general principles, and there are particular fact situations that the requestor may be concerned about, the requestor was encouraged to contact the Board of Ethics for specific advice on the application of the ethics laws to those particular facts.

Becoming a Candidate

The issue of when one becomes a “candidate” is important for two of the statutory provisions that are within the jurisdiction of the Board of Ethics: Section 10-107(5) of the Charter and Chapter 20-1000 of The Philadelphia Code. For purposes of Chapter 20-1000, “candidate” is defined in the definitions section of that Chapter, at Section 20-1001(2), as follows:

(2) Candidate.

- (a) An individual who files nomination papers or petitions for City elective office;
- (b) An individual who publicly announces his or her candidacy for City elective office.

See Board of Ethics Opinion No. 2006-003 at page 1, n.1. This is essentially the same definition long used by the Law Department for the “resign to run” provision of the Charter, Section 10-107(5). The one distinction is that Section 10-107(5) applies to any elective office, whether serving the City or Commonwealth or not. (The requestor did not advise as to the office that he/she may seek.) See the Law Department Political Activity Guide, at the last Q & A on page 7, as posted on our web site. See also Opinion No. 95-06, *1994-1996 City Solicitor's Opinions* at 88, especially footnote 1, citing *McMenamin v. Tartaglione*, 590 A.2d 802, 810 (Pa. Commw. 1991), *aff'd without op.* 590 A.2d 753 (Pa. 1991).

In *McMenamin*, the court addressed factual findings related to the fund-raising restriction under Charter Section 10-107(3), when now-Justice Castille was considering a run for Mayor of Philadelphia:

The only factual findings which pertain to alleged financial activities on the part of Castille are No. 4, which indicates only that a cocktail party was planned and that invitations were sent for the purpose of raising campaign funds, and No. 5, which indicates only that Castille met with certain persons "to assess the availability of funds" for his mayoral campaign. . . . We are unpersuaded, as was the trial court, that a mere inquiry (even if posed at a cocktail party) as to whether certain individuals would consider lending financial support to a campaign constitutes a violation of Section 10.10-107(3) of the Home Rule Charter.

Id. As to the question of when Mr. Castille became a candidate, the court held:

As to the other [public] conversations in which Castille or others acting at his behest took part, the trial court determined that they involved statements indicating only Castille's willingness and availability to run for Mayor. *Mayer* is clear that such statements do not constitute a present declaration of candidacy.

Id. (*citing Mayer v. Hemphill*, 411 Pa. 1, 190 A.2d 444 (1963)). The court in *McMenamin* also relied on the definition of “candidate” in the Election Code, which deems a person to be a candidate if the person:

Received a contribution or made an expenditure or has given his consent for any other person or committee to receive a contribution or make an expenditure, for the purpose of influencing his nomination or election to such office, whether or not the individual has made known the specific office for which he or she will seek nomination or election at the time the contribution is received or the expenditure is made.

25 P.S. §3241(a)(1)¹. However, the requestor was advised that contributions received by an exploratory committee are not deemed to be “for the purpose of influencing . . . nomination or election,” so long as there is no other indication that the person who is exploring a possible candidacy has announced his/her actual candidacy.

Assuming that the requestor has not filed nomination papers or petitions for elective office (and up to the time that such papers are filed), the question as to whether formation of an exploratory committee PAC would constitute a declaration of office requires a determination of whether the formation of, or activities of, such a committee and PAC would amount to a public announcement of candidacy. Here it is important to emphasize, as noted above, that we do not conduct an independent inquiry into the facts; this Advice of Counsel is predicated on the facts provided to us. The requestor has not advised, and we have no independent information, that there is any particular legally-defined or commonly-understood single description of the scope of the activities of what may be called an “exploratory committee.” Provided that any exploratory committee and PAC associated with it make it clear in their activities and communications that the requestor is not yet a candidate for any office, but that they are merely exploring whether there is sufficient interest among the electorate and/or potential donors of campaign contributions for the requestor to consider such a candidacy, he/she was advised that the mere formation and existence of an “exploratory committee” would not constitute a “declaration of candidacy” for purposes of either Section 10-107 of the Charter or Chapter 20-1000 of the Philadelphia Code.

¹ *Mayer* did not cite subsection (2), which provides that the person also becomes a candidate if he/she has:

(2) taken the action necessary under the laws of this Commonwealth to qualify himself for nomination or election to such office.

Philadelphia Code Chapter 20-1000

Generally, Code Ch. 20-1000 applies to candidates (and only candidates for City elective office). Some provisions apply to any individual, such as the \$2600 limit on contributions to any candidate. Section 20-1002(1) (as adjusted January 1, 2008 per Section 20-1002(8)). Except for provisions applying to any individual and for provisions requiring filings with the Board of Ethics of disclosures otherwise required to be filed with the City Commissioners,² the requestor was advised that Code Chapter 20-1000 would not apply to the formation and activities of an exploratory committee, so long as the subject of the committee did not qualify as a “candidate” as discussed above. (This advisory does not address any questions related to how Chapter 20-1000 might apply to any campaign finance matters after any announcement of candidacy for City elective office. Specifically not addressed is the treatment of any funds remaining in the PAC at such a time.)

For general reference, attached to this Advice is the document entitled, “Philadelphia’s Political Campaign Finance Law: A Plain English Explanation,” which is also posted on our web site. Interested parties may wish to refer also to “Campaign Donation Limits FAQs,” also posted on our web site.

State Ethics Act

Although Charter Section 4-1100 gives the Board of Ethics the power to “administer and enforce” only matters under the Charter and City ordinances, Section 4-1100 does refer to the Board’s “concurrent authority” with the Law Department to “render advisory opinions” in matters “regarding State law.” It is clear that this language refers to the necessity, in order to advise on many ethics matters, to include, for completeness, how the State Ethics Act, 65 Pa.C.S.A. §§1101 *et seq.*, might apply. Nevertheless, only the State Ethics Commission has complete statutory authority to provide advice interpreting the Act. As noted above, under “Scope of our advice,” there is no other State Law that is within our jurisdiction to provide advice, and accordingly this Advice of Counsel does not address any other law.

The Act does provide for some advice to be obtained from a local solicitor. Advices of Counsel of this Board that include reference to the Act always include a statement that the Act provides that: “A public official of a political subdivision who acts

² Code Section 20-1006 requires copies to be filed with the Board of Ethics of certain reports required by State law to be filed with the Secretary of the Commonwealth. As noted above, the extent to which State election law applies is not addressed in this Advice of Counsel.

in good faith reliance on a written, nonconfidential opinion of the solicitor of the political subdivision . . . shall not be subject to the penalties provided for in [certain provisions of the Act]." 65 Pa.C.S. §1109(g). *See Charter §4-1100* (giving Law Department concurrent jurisdiction with the Board regarding ethics matters under State law). Since the Board of Ethics is not "the solicitor" of the City, requestors have the option to obtain an opinion from the Law Department as to the application of the State Ethics Act. Any such request, to receive the protection, could not be confidential, and will only protect the subject from the criminal penalties in subsections 1109(a) and (b) and from treble damages under subsection 1109(c) of the Act. (A violation of the Ethics Act can still be found, and restitution can still be ordered.)

In other words, to obtain advice on which one may rely as against any possible enforcement by the State Ethics Commission, a City official/employee should seek advice from the State Ethics Commission or the Law Department of the City.

In order to fulfill the "concurrent authority" of this Board, however, this advisory will attempt to identify issues under the Act that may be raised by this query. The only provision of the State Ethics Act that appears to apply to this query is the requirement in Section 1104(b) that a candidate for State or local office file a statement of financial interests with the Commission. The Act, however, defines "candidate" differently from the definition applied above to the Philadelphia Code and the Charter. The term "candidate" is defined in Section 1102 of the Act as follows:

"Candidate." Any individual who seeks nomination or election to public office by vote of the electorate, other than a judge of elections, inspector of elections or official of a political party, whether or not such individual is nominated or elected. An individual shall be deemed to be seeking nomination or election to such office if he has:

- (1) received a contribution or made an expenditure or given his consent for any other person or committee to receive a contribution or make an expenditure for the purpose of influencing his nomination or election to such office, whether or not the individual has announced the specific office for which he will seek nomination or election at the time the contribution is received or the expenditure is made; or
- (2) taken the action necessary under the laws of this Commonwealth to qualify himself for nomination or election to such office.

The term shall include individuals nominated or elected as write-in candidates unless they resign such nomination or elected office within 30 days of having been nominated or elected.

65 Pa.C.S.A. §1102. This definition is identical to that of the Election Code, as discussed above. As also noted above, the Board of Ethics has no authority to interpret the Election Code. However, considering the language of *McMenamin*, it is at least arguable that the Commission and the courts would interpret the above definition to permit contributions to an exploratory committee for the purpose of allowing that committee to incur expenses related to exploring a possible candidacy, where such expenses were not actually intended to influence “nomination or election.”³ Nevertheless, the requestor was advised that he/she may wish to seek the definitive ruling of the State Ethics Commission or Law Department, as suggested above.

Home Rule Charter

The requestor’s potential activities related to formation of such an exploratory committee raise several issues under various subsections of Section 10-107 of the Charter.

1. Subsection 10-107(3). This subsection clearly applies to the requestor as an employee of the City. See Advice of Counsel of October 9, 2008. Thus, the requestor is prohibited from being in any manner concerned in demanding, soliciting, collecting or receiving, any assessment, subscription or contribution, whether voluntary or involuntary, intended for any political purpose whatever. The requestor was advised that, to the extent that an exploratory committee or a PAC associated with it solicits or receives donations to fund its activities, there is a significant issue that those donations would be “for a political purpose.” This conclusion is not without doubt, and there is no prior interpretation that provides guidance in this matter. However, if possible, the better course would be to avoid such fund-raising. Thus, the suggestion was that the requestor not be “in any manner concerned in” soliciting or receiving such donations. Nevertheless, it was advised that this means personal active, not passive, involvement. The fact that the exploratory committee may bear the name of the requestor or refer to the fact that it is exploring the possibility of a candidacy by him/her by and name does not necessarily involve the requestor in all such activities. However, the requestor was advised not to personally make any in-person appeal for donations, make any telephone solicitations, or

³ For example, such expenses might include rental of office space, payment of utilities, purchase of printing services, and payment of staff to the committee, provided that all the activities were limited to exploring whether there is sufficient interest among the electorate and/or potential donors of campaign contributions for the subject individual to consider such a candidacy.

sign any letter appealing for any such donations. Similarly, the requestor should not be personally involved in receiving donations. Provided that these restrictions are observed, it was advised that the mere fact that an exploratory committee is soliciting and receiving donations would not, in itself, raise an issue that the requestor would be violating Charter Subsection 10-107(3).

2. Subsection 10-107(5). This subsection clearly applies to the requestor, as an appointed employee of the City. The requestor would be required to resign his/her position as an employee of City Council upon becoming a candidate for public office, as described in "Becoming a Candidate" above. As discussed in that section of this Advice, it was advised that the mere formation and existence of an "exploratory committee" would not constitute a "declaration of candidacy" for purposes of Subsection 10-107(5), and thus the formation of such a committee would not necessarily require the requestor to resign his/her City position.

3. Subsection 10-107(4). The requestor was advised that subsection 10-107(4) does not apply to one in the requestor's position. Opinion No. 50, *1952 City Solicitor's Opinions* at 111. Hence, to the extent that any activity related to the formation of, or operation of, an exploratory can be considered to be the "management or affairs of any political party or in any political campaign," the Charter would not restrict the requestor's involvement in such activity.

Conclusion

To address the requestor's stated questions, based on the facts provided, the requestor was advised as follows:

1. On the question, "Would the formation of such PAC constitute a declaration of office?," it was advised that, under the Philadelphia Code and Home Rule Charter, the formation of a PAC serving as an "exploratory committee" or part of such a committee would not, in and of itself, constitute a declaration of candidacy for elective office, provided that any exploratory committee and PAC associated with it make it clear in their activities and communications that the subject individual is not yet a candidate for any office, but are merely exploring whether there is sufficient interest among the electorate and/or potential donors of campaign contributions for that individual to consider such a candidacy, and unless and until he/she makes a public announcement of candidacy or files nomination papers or petitions for elective office.

2. On the question, "Would the formation of such PAC cause me, as an individual and employee of the City, to violate any provision of the City Code, Charter or State Law?," this Advice can address only City Code, Charter, and State Law provisions related to our

authority as established under Charter Section 4-1100. Particularly not addressed is the State Election Code. However, the formation of such a PAC would not itself violate any provision of Code Chapters 20-1000 or 20-600, nor any provision of the Charter. Whether any possible activities of such a PAC could potentially raise any issue under the ethics laws is too broad a question for this Advice.

3. On the question, "Would this PAC be permitted to use my name in fundraising activities?," similar to question #1, use of the requestor's name would not, in and of itself, constitute a declaration of candidacy for elective office, provided that any exploratory committee and PAC associated with it make it clear in their activities and communications that the subject individual is not yet a candidate for any office, but are merely exploring whether there is sufficient interest among the electorate and/or potential donors of campaign contributions for him/her to consider such a candidacy, and unless and until there is a public announcement of candidacy or the individual files nomination papers or petitions for elective office. Unless and until the requestor becomes a candidate, there are no issues under Code Chapters 20-1000 or 20-600, nor any provision of the Charter, with the possible exception of Charter subsection 10-107(3), as noted above.

The requestor was advised that if he/she has any additional facts to provide, we will be happy to consider if they change any of the conclusions in this opinion. Since nonpublic advice was requested, we are making public this revised version, edited to conceal the identity of the requestor, as required by Philadelphia Code Section 20-606(1)(d)(iii).

Evan Meyer
General Counsel

Attachment (Plain English Explanation)

cc: Richard Glazer, Esq., Chair

J. Shane Creamer, Jr., Esq., Executive Director

CITY OF PHILADELPHIA BOARD OF ETHICS

Philadelphia's Political Campaign Finance Law: A Plain English Explanation¹

Overview:

The Philadelphia political campaign finance law applies to candidates for the following City elective offices:

- Mayor;
- City Council;
- District Attorney;
- Sheriff;
- City Commissioners;
- City Controller;
- Clerk of Quarter Sessions; and
- Register of Wills.

The campaign finance law is located in Chapter 20-1000 of the Philadelphia Code.

As described in more detail below, the City's political campaign finance law has three main features: (1) it sets limits on political contributions to candidates for City elective offices; (2) it requires candidates and political committees to disclose campaign finance information to the City's Ethics Board; and (3) it gives authority to the Ethics Board to enforce and provide guidance on the law.

The contribution limit provisions of the City's political campaign finance law were recently upheld by the Pennsylvania Supreme Court, which found that the City, as a Home Rule municipality, had the authority to enact contribution limits for its municipal candidates.

¹ This statement is provided to promote familiarity with the law. Review of its contents is not intended to substitute for review of the law itself. Nor does this statement provide any information regarding state or federal legal requirements that might apply in this area or regarding limitations on eligibility for City contracts based on campaign contributions.

1. Contribution Limits²

Beginning on January 1, 2008, individuals are limited to contributing no more than **\$2,600** (in money or things of value), to any particular candidate for City elective office in any calendar year. All others, including businesses and political committees, are limited to contributing no more than **\$10,600** to any particular candidate for City elective office in any calendar year. The law also prohibits candidates for City elective office and political committees from accepting any contribution that exceeds these limits.

A “candidate” for City elective office is someone who has either filed documents with the City Commissioners seeking to be placed on the ballot or who has publicly announced his or her candidacy.

A contribution made at any time during the same calendar year in which an individual becomes a candidate counts towards these contribution limitations. Volunteer labor and contributions from a candidate’s personal resources are not subject to these limitations.

During 2006 and 2007, the contribution limits for Mayoral candidates were doubled because a declared candidate for Mayor lawfully contributed \$250,000 or more from his own resources to his own campaign. In future elections, the doubling provision will not apply unless the Board determines that a candidate has contributed \$250,000 or more to his or her own campaign.

The doubling rule is more fully explained in Advisory Opinion 001-06 of the Board of Ethics and is available at:
www.phila.gov/ethicsboard/pdfs/Advisory_Opinion_2006-001.pdf.

2. Other Rules For Candidates

Candidates for City elective office are prohibited from using more than one political committee and more than one checking account for the purpose of receiving contributions for that candidacy or making expenditures for that candidacy.

² As required by Section 20-1002(8) of the Philadelphia Code, the contribution limits were revised, effective January 1, 2008.

Candidates and candidates' political committees are prohibited from spending "excess pre-candidacy contributions" for the purpose of influencing the candidate's election. Pre-candidacy contributions are contributions that were made before the candidate announced his or her candidacy for a City elective office. Excess pre-candidacy contributions are the portion of a pre-candidacy contribution that would have exceeded the contribution limits, if it had been made to an announced candidate.

In non-election years, candidates for the office of Mayor are limited to receiving no more than \$250,000 in total contributions from political committees; candidates for District Attorney and Controller are limited to receiving no more than \$100,000 in total contributions from political committees; and candidates for all other City offices are limited to receiving no more than \$75,000 in total contributions from political committees.

3. Electronic Filing Rule

Candidates and political committees that contribute to candidates for City offices must submit the same campaign finance information to the Ethics Board that they are required to file under the Pennsylvania Election Code, but in an electronic format. The Ethics Board has adopted Regulation No. 1, which sets forth the electronic format in which candidates and political committees must file their campaign finance information with the Department of Records (on behalf of the Ethics Board). Regulation No. 1 became effective on January 17, 2007 and is available on the Ethics Board's website at: <http://www.phila.gov/ethicsboard/pdfs/Reg-1-Campaign-FIN-with-attachment.pdf>. Under Regulation No. 1, filers of campaign finance reports are required to make filings in electronic form, in addition to the paper filings now made with the City Commissioners and the Secretary of the Commonwealth. The Department of Records (on behalf of the Ethics Board) will maintain a publicly available and searchable database containing the campaign finance information for all candidates and political committees. The campaign finance database can be accessed at: <http://www.phila.gov/records/CampaignFinance/CampaignFinance.html>.

4. Penalties And Remedies

A violation of the City's campaign finance provisions is subject to a civil penalty of \$700 for each violation committed during calendar year 2005;

\$1,100 for each violation committed during calendar year 2006; \$1,500 for each violation committed during calendar year 2007; and \$1,900 for each violation committed during calendar year 2008.

In addition to these monetary fines, potential non-monetary penalties for certain violations of the disclosure requirements under the Law may include the possibility of being forever disqualified from holding an elected or appointed City office, or employment with the City, its agencies, authorities, boards or commissions. The Ethics Board has the authority to seek the imposition of fines and penalties for violations of the Law. In addition, any person may file a lawsuit to compel compliance with any of those provisions.

5. Jurisdiction of the Ethics Board

The City's campaign finance provisions are within the jurisdiction of the Board of Ethics, which may provide training, provide advisory opinions, receive complaints, investigate compliance with and seek enforcement of those provisions.

More Information:

For more information about the City's Campaign Finance Law, please go to the Ethics Board's web site: <http://www.phila.gov/ethicsboard/index.html>, or call 215 686-9450.

About the Ethics Board:

The five-member, independent Philadelphia Board of Ethics was established by ordinance, approved by voters in May 2006, and installed on November 27, 2006. It is charged with providing ethics training for all city employees and enforcing City campaign finance, financial disclosure, and conflict of interest laws, and has authority to render advice, investigate complaints and issue fines.