November 28, 1986

Stephen M. Eckis, Esq.
City Attorney
13325 Civic Center Drive
P.O. Box 789
Poway, CA 92064

Dear Mr. Eckis:

Under letter of October 16, 1986, you requested an indepen-dent evaluation of complaints asserting that a campaign mailer constituted a violation of one or more sections of Chapter 2.28 of the Poway Municipal Code dealing with Campaign Contributions and Expenditures. In analyzing these complaints I have:

1) Reviewed and analyzed Chapter 2.28
2) The mailer sent by "Tarzy for City Council Committee"
3) Correspondence from Corrine D. Clark, Esq.
4) Correspondence from Richard I. Lyles, Ph.D.
5) Correspondence from you to both of the above individuals, and
6) Consolidated Campaign Statements particularly the statement of Bruce J. Tarzy filed on September 25, 1986.

After a review of all the facts, the ordinance and legal guide-lines as referenced hereinafter, I find no violation of Chapter 2.28. My analysis follows.

The facts are uncontroverted so they can be briefly summarized. An undated mailer was sent to Poway residents in September of 1986 listing the accomplishments of the incumbents and urging the recipient to "reelect Lind Oravec, Carl Kruse and Mary Shepardson." Signed by Mssrs. Emery and Tarzy, it has printed on the mailer "Paid for by Tarzy for City Council Committee."

The mailer cost $1,472 and is listed on the Tarzy for City Council's Schedule E attached as Exhibit A. Of note is the code assigned to the mailer, Code I for independent expenditure. Indeed no evidence is suggested or present that the mailer was requested, encouraged or solicited by the three (3) incumbents that it purports to support.

The complaints arising from this action assert that the mailer a) is a contribution to the three (3) campaigns that exceeds $100 in violation of Section 2.28.030 and (b) the mailer does not have the proper disclaimer as required by Section 2.28.040. Neither claim could be successfully maintained under

Chapter 2.28.

Since all contribution limitations operate as a restriction on fundamental First Amendment activities, their limitation must be narrowly construed. Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 685 (1976). Both the definition of "contribution" (Sec. 2.28.020) and the "limitation" section (Sec. 2.28.030) to be constitutional would require some control by the recipient since the only reason to limit contributions is to guard against "political quid pro quo's" Buckley, supra at 692. Absent any control via either solicitation or receipt, there is no contribution to a candidate. Hence an independent expenditure such as the Tarzy mailer, is not a contribution since it is not received, solicited, encouraged or controlled by the candidate or his committee.

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.
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> Buckley, supra at 704. (Emphasis added.)

The second claim that the mailer was not properly identified presents a more troublesome issue. Again the facts are not in dispute since the mailer has a printed disclaimer of "Paid for by Tarzy for City Council." Chapter 2.28.040 requires uncontrolled (independent) expenditures to "indicate clearly" that it was not authorized by a candidate subject to the contribution limitations. Again delicate First Amendment freedoms abound as to how much disclosure can be compelled.
Schuster v. Municipal Court, 109 Cal.App.3d 887 (1980).

The state can compel identification to help a) evaluate candidates b) expose large contributions and c) provide data to detect violations. Buckley, supra at 715. The identification of the mailer satisfies all of these since it shows citizens who it is from and identifies the source if violations are claimed. Since the identification meets all the constitutionally articulated reasons for identification, we cannot say that the identification is inadequate.

Secondarily, we note that a violation of this identification section could be a criminal infraction. Section 2.28.110. The

term "indicate clearly" has potential vagueness problems since "clearly" may be interpreted differently by reasonable men.

Where definiteness is always required it is accented when the mantel of the First Amendment protects the speech. United States v. Harriss, 347 U.S. 612, 98 L.Ed. 989 (1954). Hence while the identification does not contain a negative disclaimer, it supplies sufficient information to indicate a source other than the supported incumbents.

To initiate a prosecution on such a phrase would have serious due process concerns.

> Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." United States v. Harriss, 347 U.S., 612, 617 98 L.Ed. 989, 74 S.Ct. 808. See also Papachristou v. City of Jacksonville, 405 U.S. 156, 31 L.Ed.2d 110, 92 S.Ct. 839 (1972). Where First Amendment rights are involved, an even "greater degree of specificity" is required. Smith v. Goguen, 415 U.S., at 573, 39 L.Ed.2d 605, 94 S.Ct. 1242. See Grayned v. City of Rockford, 408 U.S. 104, 109, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972); Kunz v. New York, 340 U.S. 290, 95 L.Ed. 280, 71 S.Ct. 312 (1951).
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> Buckley, supra at 721.

Hence the failure to print a negative i.e. "not authorized by candidate X" would not in my judgment survive a due process challenge.

For all the above reasons I find no prosecutable violations of Chapter 2.28, of course civil enforcement is accessible to the complainants under Section 2.28.100 C. and D. should they disagree with this analysis. However, as a public lawyer with over four (4) years of election law enforcement and after a thorough review of these facts, I would neither recommend nor initiate any criminal enforcement action on the foregoing facts.

Sincerely yours,

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

TB:js

Attachment
MS-86-11