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Arizona State Legislature

1700 West Washington
Phoenix, Arizona 85007

September 2, 2021

Arizona Corporation Commission
1200 W. Washington
Phoenix, AZ 85007

Madame Chairwoman and Commissioners,

Several concerns have been raised regarding the adopted Code of Ethics for Commissioners specifically related to campaign contributions. As such, I asked the Arizona Legislative Council to prepare a memo on the issue of whether Arizona Corporation Commission (ACC) Rule 6.1, 6.2(A) or 6.2(B) violates state statute, the Arizona Constitution, or the United States Constitution. The memo is attached for reference.

As noted in the memo dated July 27, 2021 by Legislative Council, several issues of concern are addressed, including the following:

- Structure of the rules and the unusual use of substantive requirements in the comments.
- Confusion on comments to rule application.
- Lack of clarity on whether comment language is meant to be mandatory.
- Ambiguous terminology regarding independent expenditures.
- Certain rule-based requirements may exceed ACC authority.
- Certain expenditure disclosure requirements are not statutorily required.
- Recusal rule may run counter to the Arizona Constitution.
- Certain limits on commissioner's participation in ACC activities may violate the First Amendment to the U.S. Constitution.

Since these issues are based upon valid concerns with potential conflicts between the ACC's code of ethics for commissioners and the Arizona Revised Statutes, the Arizona Constitution, and the U.S. Constitution, a prompt response addressing these concerns is warranted. Thank you for your consideration.

Sincerely,

Senator Rick Gray | Senator Sine Kerr | Representative Gail Griffin

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ARIZONA LEGISLATIVE COUNCIL

MEMO

July 27, 2021

TO: Senator Rick Gray

FROM: Ken Behringer, General Counsel

RE: ACC Ethics Rule 6 (R-55-45)

BACKGROUND

The Arizona Corporation Commission (ACC or commission) has adopted a code of ethics for commissioners. Regarding campaign contributions, the code provides in part:

1. Commissioners who receive campaign contributions must "conduct all necessary due diligence to properly and accurately document those contributions, to fully comply with campaign finance reporting laws." ACC Code of Ethics, rule (ACC Rule) 6.1.

2. If a commissioner elected to the ACC knowingly accepted individual contributions from a person who is a party to a matter before the ACC, the commissioner must recuse himself or herself from any matter before the ACC that involves the person who provided the contribution. ACC Rule 6.2(A).

3. Before voting on a matter before the ACC, a commissioner must declare any contributions that indirectly benefit the commissioner or that directly or indirectly benefit the commissioner's immediate family from:

(a) A business entity that is a party in the matter before the ACC if the aggregate contribution is $1,000 or more.

(b) An individual that is a party in the matter before the ACC if the individual's and the individual's family's contribution is $100 or more. ACC Rule 6.2(B).

QUESTION

Does ACC Rule 6.1, 6.2(A) or 6.2(B) violate state statute, the Arizona Constitution or the United States Constitution?

ANSWER

While there is no case law directly on point, it appears that the ACC does not have authority to adopt ACC Rules 6.2(A) and 6.2(B) and the posting requirement and the independent expenditure disclosure requirement of ACC Rule 6.1. Some parts of these rules are also contrary to statute. There are reasonable arguments on both sides of the issue of whether the rule provisions that address independent expenditures violate the First Amendment.

DISCUSSION

One problem in analyzing the ACC rules of ethics is the structure of the rules. A rule is set out and is followed by a comment. In other rules the comments provide information to understand the context and purpose of the rule. For example, the rules of civil procedure adopted by the Arizona Supreme Court include comments from the Court and the relevant state bar committee that provide reasons for the rule, the history of the rule and the interplay of the rules. *See*, *e.g.*, Ariz. R. Civ. P. 4.2 (court comment and state bar committee note). The comments to the court rules do not contain substantive requirements in addition to the text of the rule. The ACC rules of ethics appear to have substantive requirements in the comments.

ACC Rule 6.1 requires a commissioner who has received campaign contributions to properly and accurately comply with campaign finance laws. This provision does not require anything more than is required by statute. However, the comment to this rule prescribes, "[c]ommissioners shall make these disclosures available to the public on the Commission website." While this language is mandatory, it is not clear that this action is required because it is not part of the rule itself.

ACC Rule 6.2(A) prescribes the recusal requirement. The comment on the rule prescribes extensive definitions and a prohibition on earmarked contributions. Again, it is not clear whether the comment language is meant to be mandatory. Therefore, for the purposes of analyzing the ACC Rules, we considered everything in the comments as part of the rule.

Another ambiguity in the ACC Rules is the use of the term "independent expenditure". The term is defined in statute as an expenditure that expressly advocates the election or defeat of an identified candidate and that is not made in cooperation or consultation with the candidate. Arizona Revised Statutes (A.R.S.) section 16-901, paragraph 31. The ACC Rules do not define the term for the purposes of these rules. In the comment portion of ACC Rule 6.2(A), in discussing a contribution known to a commissioner, the comment provides the example: "a utility reveals in the press that it has provided funds to an independent expenditure group that has contributed funds to a Commissioner's campaign." This provision does not describe an independent expenditure because the monies contributed end up in the candidate's campaign coffers. It describes an earmarked contribution, in which a contributor makes a contribution to a third party who is instructed to transfer the monies to a candidate. *Id.*, paragraph 16. Earmarked

contributions are prohibited by statute, A.R.S. section 16-918, while independent expenditures are constitutionally protected. So, if the ACC Rules mean an earmarked contribution or an independent expenditure in using the term "independent expenditure", this could affect the validity of the ACC Rules.

The first question is whether the ACC has authority to adopt these rules. All hearings and investigations before the ACC are governed by the statutes and "rules of practice and procedure adopted by the" ACC. A.R.S. section 40-243. While this provision authorizes the ACC to adopt rules, the commission must also have the authority to prescribe the substance of the rules.

As noted above, ACC Rule 6.1 is essentially an exhortation for commissioners to comply with the campaign finance laws. However, the requirement that commissioners file the campaign finance reports on the ACC website exceeds the ACC's authority. Nothing in the statutes governing the ACC authorizes it to mandate disclosure of campaign finance reports. The statutes require the filing of ACC candidate campaign finance reports with the secretary of state. A.R.S. sections 16-926 and 16-928.

The comment to ACC Rule 6.1 provides that:

> Commissioners are not expected to know or disclose the funding source of any independent expenditures, unless these funding sources are confirmed by the donors . . . .

This provision requires a commissioner to disclose independent expenditures that benefit the commissioner if this funding is confirmed by the person making the independent expenditure. Almost any person who makes independent expenditures related to an office in excess of $500 must report the expenditures to the secretary of state. A.R.S. section 16-941, subsection D. Therefore, all of these independent expenditures would be confirmed and would have to be disclosed by the commissioner. However, statute only requires the person making the independent expenditure to report the independent expenditure. Candidates who receive the benefit of an independent expenditure are not required to include those expenditures in their campaign financial reports. Since ACC Rule 6.1 mainly requires a commissioner to comply with campaign finance laws, the independent expenditure disclosure requirement exceeds both the scope of ACC Rule 6.1 and the requirements of statute.

The validity of ACC Rules 6.2(A) and 6.2(B) depends on whether the ACC has authority to prevent a properly appointed or elected member of the commission from participating in ACC activities. No specific authority to do so is provided to the ACC by the Arizona Constitution or the statutes. The statutes do prohibit a commissioner from having certain relationships with a person or corporation that is regulated by the ACC. A.R.S. section 40-101. This section does not prohibit a commissioner from participating in ACC activities regarding a contributor to the commissioner's campaign, however.

The Arizona Constitution may prohibit the recusal rule, also. It provides that the commission is composed of five persons. Constitution of Arizona article XV, section 1. The constitution also provides:

> The corporation commission, and the several members thereof, shall have power to inspect and investigate the property, books, papers, business methods, and affairs of . . . any public service corporation doing business within the state . . . .

Constitution of Arizona article XV, section 4 (emphasis added).

Section 4 authorizes not only the ACC as a whole to participate in the commission's activities, it gives the individual member the authority to do so, also. Nothing in the constitution allows the ACC to limit this authority for individual members. While there is no case law on point, a good argument can be made that ACC Rules 6.2(A) and 6.2(B) unconstitutionally limit the authority provided to individual members by Constitution of Arizona article XV, section 4.

Even if the ACC has the authority to adopt rules limiting a commissioner's participation in ACC activities, the question remains whether the ACC may base the limitation on campaign contributions made directly or indirectly for the benefit of the commissioner. This limitation may violate the First Amendment of the United States Constitution.

The United States Supreme Court examined the constitutionality of several limitations on campaign contributions in *Buckley v. Valeo,* 424 U.S. 1 (1976) (*per curiam*). The Court addressed various challenges to the Federal Election Campaign Act of 1971 (FECA) as amended in 1974. The Court first upheld 18 United States Code (U.S.C.) § 608(b), FECA's limits on direct contributions to candidates. It recognized a "sufficiently important" governmental interest in "the prevention of corruption and the appearance of corruption." *Id.* at 25. This followed from the Court's concern that large contributions could be given "to secure a political *quid pro quo*." *Id.* at 26-27.

FECA also contained an independent expenditure ban that the Court found to be unconstitutional. *Id.* at 51. The Court found that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that "the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process", *id.* at 47–48, because "[t]he absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate," *Id.* at 47 (emphasis added).

A reasonable argument can be made that the Court's holdings in *Buckley* do not apply to the ACC's rules. The ethics code does not prohibit or limit contributions to a commissioner. It requires recusal or notification by the commissioner in matters concerning a contributor. A proponent of a similar recusal requirement for legislators

claims that recusal avoids the First Amendment problems that arise from campaign contribution limitations. John C. Nagle argues:

> This proposal also avoids the First Amendment problems posed by restrictions on campaign contributions and expenditures. Anyone can contribute any amount to any candidate. What they cannot do, though, is make such a contribution in the hope of encouraging the candidate to support their legislative agenda once in Congress. The constitutional objection to such a recusal requirement is hard to construct. There is no First Amendment right to bribery. Speech may be used to try to persuade an elected official to support a cause; money may not. Nor has the First Amendment been read to limit the application of bribery laws to campaign contributions. Several convicted campaign contributors and lobbyists have asserted that the First Amendment imposes a quid pro quo requirement on bribery statutes, but the courts have refused to impose such a constitutional limit on what qualifies as bribery.

John C. Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 Harv. J. on Legis. 69, 84 (2000), https://scholarship.law.nd.edu/law_faculty_scholarship/501 (footnotes omitted).

This argument may be consistent with the *Buckley* Court's conclusions regarding contributions to candidates. The Court found that the government has an important interest in preventing corruption in regulating contributions to candidates. *Buckley,* 424 U.S. at 25. However, the argument is less persuasive regarding independent expenditures. Government may place greater limitations on direct contributions because of the dangers of prearrangement and coordination. *Id.* at 47. By definition, an independent expenditure cannot be made in cooperation or consultation with a candidate. A.R.S. section 16-901, paragraph 31. Therefore, the government does not have sufficient interest to regulate independent expenditures.

Buckley concerned direct limitations and prohibitions on independent expenditures. As noted above, the ACC ethics rules do not limit or prohibit independent expenditures. Therefore, to invalidate the limitations related to independent expenditures a court would have to find that the recusal requirement significantly impairs a person's First Amendment right to make independent expenditures.

CONCLUSIONS

ACC Rule 6.1 mainly urges commissioners to comply with the campaign finance law. However, I could find no authority for the ACC to require that campaign finance reports be posted on the agency's website. Also, there is no authority for the ACC to require that commissioners disclose confirmed independent expenditures. Statute only requires that these reports be filed with the secretary of state by the person making the independent expenditure.

The requirement that a commissioner recuse himself or herself under ACC Rules 6.2(A) and 6.2(B) exceeds the authority of the ACC. This requirement may also be contrary to Constitution of Arizona article XV, sections 1 and 4.

It is not clear whether the independent expenditure provisions of the ACC Rules violate the First Amendment of the United States Constitution. First, the use of the term "independent expenditure" in the ACC rules is ambiguous. Also, the ACC Rules are not a direct limit or ban on independent expenditures. To find the ACC Rules in violation of the First Amendment, a court would have to find that the recusal requirement is such an imposition on independent expenditures that the ACC Rules are in effect a limit or ban on the right to make independent expenditures.

cc: Grant Hanna