



STATE OF MICHIGAN  
TERRI LYNN LAND, SECRETARY OF STATE  
DEPARTMENT OF STATE  
LANSING

May 30, 2003

Robert S. LaBrant  
Michigan Chamber of Commerce  
600 South Walnut Street  
Lansing, Michigan 48933-2200

Dear Mr. LaBrant:

This is a response to your two requests for a declaratory ruling under the Michigan Campaign Finance Act (MCFA), 1976 P.A. 388, as amended. Your requests reference two complaints that you filed in the fall of 2000, both of which concerned the Department's interpretation of the term "independent expenditure." Section 9(2) of the MCFA defines "independent expenditure" as "an expenditure by a person if the expenditure is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee." You have asked that the Department share its rationale regarding independent expenditures with the public.

REQUEST 1 – RECEIVED MARCH 6, 2003

Your first request concerns a complaint filed in the fall of 2000 against the Michigan Democratic Party (MDP) and candidate Herb Kehrl. Mr. Kehrl had placed various pictures, testimonials, and biographical information on his candidate committee website. The MDP procured some of this material for use in an advertisement (a flier). The MDP considered the advertisement's production and distribution costs to be an independent expenditure on behalf of the Kehrl campaign. Your complaint alleged that the MDP should have categorized the advertising costs as an in-kind contribution to the Kehrl campaign.

The Department, during the course of its investigation, found no evidence to indicate that the Kehrl committee was involved with the production or dissemination of the ads. Further, Kehrl's response indicated that the web site material was available for public use—including use by his political opponents. The Department, finding no reason to believe that the Kehrl committee directed or controlled the MDP's expenditure, dismissed the complaint.

The Department will apply the same reasoning to future complaints. The Department will not consider a 3<sup>rd</sup> party's use of candidate web site material to be prima facie evidence of candidate committee direction or control. Further, absent evidence to the contrary, it will consider

communications created with material accessible to the general public or news media to be evidence of an independent expenditure, rather than an in-kind contribution.

REQUEST 2 – RECEIVED MARCH 11, 2003

Your second request concerns a complaint filed in the fall of 2002 against the MDP and candidate Virg Bernero. The MDP produced and distributed political advertisements (fliers) on behalf of Bernero. The fliers included constituent letters, photographs, and testimonials. The MDP had categorized the communications as independent expenditures, while you alleged that they should be categorized as in-kind contributions.

The Department's investigation established the following facts:

1. The Bernero committee received several "thank you" letters from school children. Copies of those letters were provided to the MDP, which used them in the political advertisement.
2. The Bernero committee arranged for the MDP to take photographs of, and get commentary from, two constituents. Both the photographs and the commentary appeared in the political advertisement.
3. The Bernero committee placed photographs and information on its website. The MDP downloaded both and used them in the political advertisement.

The facts of the Bernero complaint, unlike those of the Kehrl complaint, indicated various discussions and exchanges between the candidate and the MDP. The Department faced the question: Do the discussions and exchanges—in effect, coordination—between the candidate committee and a 3<sup>rd</sup> party constitute direction or control by the candidate?

The MCFA's undefined "direction or control" standard stands in marked contrast to the "coordination" standard of the Federal Election Campaign Act (FECA), 2 U.S.C. 431 *et seq.* FECA requires expenditures to be categorized as in-kind contributions if coordination, cooperation, or consultation occurs between the candidate committee and the 3<sup>rd</sup> party making the expenditure. According to the FECA's regulations (2 CFR 100.23(c)) coordination occurs when a communication is created, produced or distributed—

1. At the request or suggestion of the candidate or the candidate's authorized committee; or
2. After the candidate or the candidate's agent has exercised control or decision making authority over the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of that communication; or
3. After substantial discussion or negotiation between the creator, producer, or distributor of the communication, or the person paying for the communication, and the candidate or candidate's committee regarding content, timing, etc. Substantial discussion or

negotiation may be evidenced by one or more meetings, conversations or conferences regarding the value or importance for a particular election.

While the FECA regulates nearly all coordination, cooperation, and consultation between a candidate committee and a 3<sup>rd</sup> party, the MCFA clearly does not. The FECA does not control the MCFA, but its language illustrates a very important point: Direction or control (essentially #2 above) is a form of coordination, but not all coordination—or cooperation, or consultation—constitutes direction or control by a candidate committee.

The Department, after applying the direction or control standard to the evidence of MDP-Bernero coordination, dismissed the complaint. The MCFA does not give the Department the authority to regulate those interactions and exchanges that do not constitute direction or control by the candidate committee. The Department concluded that providing constituent letters and contact information did not indicate that the Bernero committee was exercising direction or control over the expenditure.

In dismissing the complaint, the Department also noted that the Federal Election Commission has the ability to enforce their more stringent regulations. The FEC can subpoena documents and depose witnesses in order to create a factual record from which to establish coordination between committees. The Department of State cannot subpoena persons or records, and must rely on the evidence and pleadings of the parties.

### INTERPRETATIONS

To provide guidance on the meaning of the “direction and control” standard, we offer the following interpretations:

#### “Made at the direction of another person”

An expenditure, or a communication resulting from an expenditure, that is organized, supervised, or created by a candidate committee. An example would be a candidate committee that creates a proposed communication and gives it to an independent committee. If that independent committee then produced a communication that was substantially similar to the proposed communication it would have been made at the direction of the candidate committee. However, if an independent committee requested photographs or information from the candidate committee and then produced a communication, we would not view the candidate committee as directing the communication.

#### “Under the Control of Another Person”

“Control” would seem to be a higher degree of power exercised by the candidate committee than “direction.” A candidate committee’s ability to terminate a potential expenditure, or a communication resulting from an expenditure, would constitute control. Examples of control would be a candidate’s conscious decision to appear at a specific place at a specific time for filming, with the knowledge or understanding that the footage would be used in a communication. Another example would be a candidate committee that arranged for a

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contribution to be made to an independent committee, with the understanding that the independent committee run independent ads on the candidate's behalf. Finally, a candidate committee that has the ability to review a communication and either accept, reject, or modify it would be exercising control.

Because your request does not include a complete statement of facts sufficient to form the basis for a declaratory ruling, this response is informational only and constitutes an interpretive statement with respect to your inquiries.

Please contact the Bureau of Legal and Regulatory Services (517) 241-3463 if you have any additional questions.

Sincerely,

/s/

Brian DeBano  
Chief Operating Officer

BD/DEM/kc

cc: Bureau of Legal and Regulatory Services