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July 21, 2003

Frederick A. O. Schwarz, Chair
New York City Campaign Finance Board
40 Rector Street, 7th floor
New York, New York 10006

Dear Mr. Schwarz:

We have reviewed the New York City Campaign Finance Board's recently released Advisory Opinion 2003-2 and, as long-time election law practitioners with significant experience and familiarity with the laws affecting elections and campaign finance, we believe that the advisory opinion presents serious legal and constitutional infirmities and should be withdrawn and reconsidered.

In pertinent part the advisory opinion states:

...participants may not use their principal committees to make expenditures in connection with a position on any ballot proposal, nor may public funds be used for this purpose, unless that activity is in the contexts of and incidental to promoting the candidate's candidacy... For example, if support of or opposition to a ballot proposal is listed in campaign literature among other positions of the candidate, this could be permissible.

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We believe that the limitation on the use of campaign funds, including those raised by the candidate as well as public funds is unwise and will face serious legal challenges. One of the purpose of the New York City Campaign Finance Act is to enable a broader range of candidates to communicate their positions to the voters so that the voters may make the most informed decision about those individuals who they chose to represent them in city government. Election Law §14-130 permits campaign funds to be "expended for any lawful purpose" provided that such funds "shall not be converted to a personal use which is unrelated to a political campaign or the holding of a public office or party position." NYC Campaign Finance Act §3-704 permits public funds to be used to "further the participating candidate's nomination for election or election..." While this section presents a number of exceptions for which public funds may not be spent, none of those exceptions relate to the public presentation and dissemination of positions taken by a participating candidate in the candidate's campaign for office. The advisory opinion, therefore, appears to be at odds with the New York State Election Law as well as the New York City Campaign Finance Act.

The advisory opinion creates a situation which is anomalous and irrational. A participating candidate may distribute campaign literature or run ads devoted solely to setting forth the candidate's position on any issue that the candidate believes may be of interest to the voters in the candidate's district and may, in the candidate's estimation, affect the results of the election. Thus, a candidate could distribute a piece of literature setting forth the candidate's position on rent control or recycling or run a television ad about lead paint or benefits for gay partners. Or, if the candidate thought it might be important in the candidate's community, the candidate could distribute a piece of literature or run an ad about the Israeli-Palestinian conflict. But, the advisory opinion prohibits the candidate from setting forth the candidate's position on what may be the most hotly debated issue being considered in the election in which the candidate is running - a ballot proposal to eliminate party primaries because, the advisory opinion rules, it is impermissible "make expenditures in connection with a position on any ballot proposal" unless the expression of such position is "incidental" such as being included in a list of other positions of the candidate. The advisory opinion thereby prohibits a candidate from speaking out on the one political issue that may be of the greatest concern of and interest to the voters. Ultimately, the effect of the advisory opinion is to censor political debate of participating candidates based on the content of that debate. This, we believe, the Board cannot do.

We urge you, in the strongest possible terms to withdraw this advisory opinion and reformulate it so that candidates may appropriately use campaign funds, both public and private, to disseminate their positions on any issue that may present itself in the course of a campaign.

Very truly yours,

Henry T. Berger

Henry T. Berger

Lawrence A. Mandelker

Lawrence A. Mandelker



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Campaign Finance Board**

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July 29, 2003

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Re: Advisory Opinion No. 2003-2 (July 14, 2003)

Dear Messrs. Berger and Mandelker:

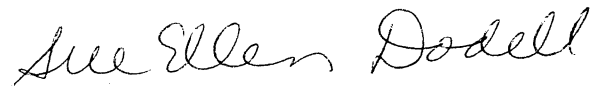
Chairman Schwarz has asked that I respond on behalf of the Board to your July 21, 2003 letter to him expressing your concern that "the effect of Advisory Opinion No. 2003-2 is to censor political debate".

The intent of the advisory opinion was to ensure that candidates use their campaign committees and their campaign funds to advance their election or nomination and not instead as a vehicle to promote a position on a ballot proposal. The example of a possibly acceptable context for referring to a ballot proposal that in the Board's view would not run afoul of the concern that a political committee was being used to promote a position on a proposal rather than a candidate's candidacy was "if support of or opposition to a ballot proposal is listed in campaign literature among other positions of the candidate" This was an example, and not an attempt to prescribe an exclusive manner in which a candidate's position on a ballot proposal might be expressed through the use of a campaign committee.

Thus, the example in your letter, of a candidate distributing “a piece of literature setting forth the candidate’s position on rent control or recycling or run[ning] a television ad about lead paint or benefits for gay partners,” could – with respect to setting forth a candidate’s position on a ballot proposal -- similarly be permissible under Advisory Opinion No. 2003-2, again, as long as this is done “in the context of and incidental to promoting the candidate’s candidacy.”

Of course, specific factual scenarios may present difficult challenges for candidates and for the Board, and it is not possible without a factual context to itemize all the possible ways in which candidates might promote their candidacy while referring to their position on a ballot proposal. It is certainly not the intent of the Board to attempt to stifle political debate, but rather to ensure that campaigns under its jurisdiction are not using the Campaign Finance Program and its public resources to promote or oppose a ballot proposal (or for any other purpose) rather than a campaign purpose. Please be assured that the Board, in its implementation of the Campaign Finance Act, will respect candidates’ need and right to express themselves on matters of concern to the voters.

Sincerely,

A handwritten signature in cursive script that reads "Sue Ellen Dodell". The signature is written in dark ink and is positioned above the printed name.

Sue Ellen Dodell