

LAW OFFICES OF ANDREW P. PUGNO

andrew@pugnowlaw.com

VIA OVERNIGHT MAIL

May 31, 2006

Office of the General Counsel
Enforcement Division
Federal Election Commission
999 E St NW
Washington DC 20463-0001

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2006 JUN -1 A 10:01

Re: Response to Complaints

MUR 5725 and 5727
V. Eric Roach
Eric Roach for Congress
David Bauer, Treasurer

Dear Office of the General Counsel:

The undersigned represents Mr. V. Eric Roach, Eric Roach for Congress (a principal campaign committee), and its treasurer, Mr. David Bauer (collectively, "Respondents"). Attached please find Statements of Designation of Counsel executed by both Mr. Roach (Exh. 1) and Mr. Bauer (Exh. 2).

Pursuant to 2 U.S.C. § 437g(a)(1), this letter is a joint response to the two complaints filed by Jess Durfee ("Complainant") and designated by the Commission as MUR 5725 and MUR 5727. This response is filed timely within the extension of time granted by the Commission to June 1, 2006.

Respondents acknowledge that the requisite written disclaimers for each of the two subject communications were inadvertently omitted. However, Respondents request that no action be taken by the Commission and, instead, both matters be closed. An investigation does not warrant the use of the Commission's limited resources in these cases because, among other reasons: the disclaimer omissions were totally inadvertent and isolated occurrences, immediate corrective action was taken in each case upon discovery of the omission, and under the particular circumstances the omissions were not prejudicial or likely to mislead the voters in any material respect.

It is also worth noting that Mr. Roach did not prevail in the April 13, 2006 Special Election for California's 50th Congressional District, and is not actively campaigning for the Republican nomination in the regular Primary Election taking place June 6, 2006 (although his name remains on the ballot along with over 14 other candidates who filed their candidacies prior to the Special Election in April).

27190272567

MUR 5727**(Written Television Disclaimer)****I. Summary of Complaint**

There is no dispute that Respondents fully complied with the "stand by your ad" requirements that television advertisements include a large image of the candidate and his personally-spoken statement identifying himself and stating that he approved the communication. (11 C.F.R. § 110.11(c)(3)(ii).) The only omission complained of is that Respondents did not also include a "similar statement" in writing at the end of the communication as required by 11 C.F.R. § 110.11(c)(3)(iii). (MUR 5727 Complaint, ¶ 2.)

II. Response

Respondents acknowledge the inadvertent omission of the written "similar statement." However, Respondents request that the matter be closed without further action in light of the following mitigating circumstances.

² Please note that the letter's statement that "Eric and I have been thoroughly dismayed at the way Congress has been acting of late" (Exh. 3, p. 2, ¶ 3) cannot be understood to attack any of the other candidates in the Special Election because there was no incumbent in the race. The congressional seat was vacated by former-congressman Randy "Duke" Cunningham, triggering the Special Election to fill the vacancy.

III. Mitigating Considerations

A. Inadvertent Nature of the Occurrence

The Respondents' omission in this matter was wholly inadvertent and unintentional. Prior to the present election cycle, the Commission's new regulation requiring a written statement "similar" to the candidate's spoken statement at the end of television advertisements (11 C.F.R. § 110.11(c)(3)(iii)) has only been in effect for the 2004 election cycle since recently taking effect on January 13, 2003. (See 67 Fed. Reg. 76962, 76966 (12/13/2002).) It appears from this case that political media consultants and broadcast television stations alike are still discovering the confines of the new regulation.

In this case, Respondents' media consultant did not prepare television ads for any federal candidates in the 2004 election cycle, and thus had not yet been fully exposed to the new 2003 regulations when preparing Respondents' television ads. Even so, before preparing the ads the media consultant solicited written guidelines for political ads from all network stations in the local market. The media consultant utilized those guidelines to prepare the ads, and submitted them all to the stations to be pre-screened for regulatory compliance. Neither the media consultant nor the television station screeners noticed the error. In fact, the ads ran for several weeks as originally submitted without anyone, including Complainant, noticing or mentioning the technical omission.

The omission was clearly inadvertent and somewhat understandable in light of the recent adoption of the new regulation as well as uncertainties related to the regulation's interpretation. In fact, it should be noted that the "safe harbor" examples that will satisfy the spoken statement requirement (set forth at 11 C.F.R. § 110.11(c)(3)(iv)) are "*not* mandatory and are *not* the only acceptable disclaimers." (67 Fed. Reg. 76967 (12/13/2002), emphasis added.) Rather, there is substantial leeway in the choice of spoken statement – and further, the *written* statement appearing at the end of the television communication need only be "similar" to the spoken statement. (11 C.F.R. § 110.11(c)(3)(iii).) Under the circumstances of the present case and in light of the similarity between the written statement used before the ads were revised ("Paid for by Eric Roach for Congress") and the corrected written statement that was later used ("Approved by Eric Roach"),³ Respondents' media consultant and the television stations alike could have reasonably thought that disclaimer requirements had been satisfied by the original television ads.

B. Corrective Action Taken

The error was not brought to Respondents' attention until Monday, April 3, 2006, when a television station representative mentioned to Respondents' media consultant that the station had received a complaint three days earlier on Friday, March 31, 2006, but that the station found the complaint to be mistaken and that there were "no problems" with the ad. Later that day, at about

³ Unfortunately, a video sample showing both the original and the revised television ads could not be obtained in time to file this response. A DVD showing the "before and after" versions of the ads will be submitted to the Commission separately by supplemental filing.

2:30 p.m., Respondents received a copy of the written Complaint (MUR 5727). Upon discovering the unintentional error, Respondents' media consultant immediately revised the ads and delivered them to all airing stations by early the following morning, April 4, 2006.

Thus, Respondents' corrected television ads were airing the very next day after receiving notice of the error. Respondents' significant efforts in remedying the omission immediately upon discovering it demonstrate both the inadvertent nature of the omission and the Respondents' good faith intentions to comply with the Act.⁴

C. Substantial Compliance

As noted above, Respondents fully complied with the requirements of a large image of the candidate and his personally-spoken statement approving the television ad. Thus, the ad substantially complied with the spirit and objectives of the "stand by your ad" legislation. Common sense dictates that the nearly full-screen image of the candidate and his or her own voice personally approving the advertisement are significantly more prominent and penetrating to voters in comparison to the rather minor requirement of a similar written statement covering just 4% of the vertical picture height.

In light of the combined impact of the candidate's image and personal spoken statement approving the advertisement message, in this case the voting public is not likely to have been misled or confused by the missing written statement alone as to whether Mr. Roach did or did not personally approve his own television ad. Thus, little or no prejudicial harm was caused because Respondents substantially complied with the "stand by your ad" regulation.

D. Lack of Prejudicial Harm

Also, just as with the omission in MUR 5725 above, the inadvertent omission of the written "similar statement" in this matter was very unlikely to be prejudicial specifically with regard to the governmental interests that the requirement was designed to advance. As discussed in Statement for the Record (4/7/2005), Closed MUR 5432 (Stephanie Summers-O'Neal for U.S. Congress), the "stand by your ad" provision of the Bipartisan Campaign Reform Act of 2002 was intended to "slow the corrosion of the political process" by holding candidates personally accountable for negative attacks on their opponents. (*Id.*, quoting Congressional Record, S2174 March 20, 2002.) Thus, by compelling candidates to personally convey their approval of negative advertisements, the "stand by your ad" provision was intended to "help clean up campaigns" and "make the politics and political discourse in this country more positive and more open." (*Ibid.*) The legislation's sponsors expressly referred to candidates who "attack their opponent." (*Ibid.*) The legislation was clearly intended to prevent candidates from engaging in negative attacks on their opponents without personal accountability.

⁴ Please note that only the advertisements intended for transmission through broadcast, cable, or satellite television under 11 C.F.R. § 110.11(c)(3) were revised. Respondents chose not to incur the cost of revising similar video clips available for viewing solely on the Committee's website because the "stand by your ad" regulatory requirements do not apply to website content.

In this case, however, the omission of a written statement did not result in Mr. Roach engaging in negative advertising without having to take personal responsibility. Most of the advertisement content being aired at the time of the complaint was only positive information about Mr. Roach, and did not refer to any other candidate by name.⁵ To the extent that the ads communicated any negative information about other candidates (by implication or otherwise), all of the messages were actually spoken by Mr. Roach himself, mostly while looking directly into the camera. Thus, the core objective of the "stand by your ad" legislation (to force candidates to take personal responsibility for negative advertising) was fully satisfied because the voters could watch Mr. Roach personally deliver his minimal statements regarding other candidates.

Because the inadvertent omission of a written statement of approval in this case did not result in the type of "unaccountable" negative advertising that the requirement was designed to prevent, the omission was not materially prejudicial and does not warrant further investigation.

Conclusion

If necessary, the Respondents can provide declarations and other supporting documentation to corroborate the facts and circumstances described above. However, under the circumstances, additional investigation or remedies do not appear to be warranted. Instead, to conserve administrative resources, the Commission should simply admonish the Respondents and take no further action instead of seeking a civil penalty, as it has done in similar prior cases.⁶

Thank you for your attention. Please feel free to contact me if you have any questions.

Very truly yours,



ANDREW P. PUGNO

Counsel for Respondents

- Exhibits:
1. Statement of Designation of Counsel (Mr. Roach)
 2. Statement of Designation of Counsel (Mr. Bauer)
 3. First letter signed by Mrs. Meg Roach, mailed to voters by Respondents
 4. Second letter signed by Mrs. Meg Roach, mailed to voters by Respondents

⁵ See Footnote 3, *supra*

⁶ See, e.g., MUR 4842 [matter dismissed in exercise of prosecutorial discretion where failure to include disclaimer on single mailing was inadvertent]; MUR 2692 [disclaimer omission on door-hanger was an unintentional and isolated oversight, and upon discovery of the error respondents affixed disclaimer to remainder of copies before distribution], MUR 5580 [omission of disclaimer on printed mailing was inadvertent and a one-time occurrence], MUR 5001 [disclaimer omitted on one campaign communication]; MUR 5133R [omission of disclaimer on printed mailing was inadvertent and a one-time occurrence]; MUR 5007 [only portion of copies of communication distributed without disclaimer, respondent took corrective action to affix disclaimer to remainder of copies before distribution, and violation unlikely to effect outcome of the election]; MUR 5130 [sole disclaimer violation was inadvertent and acknowledged by respondent]; MUR 5411 [disclaimer omitted on sole printed letter].