

RECEIVED
FEDERAL ELECTION
COMMISSION

2009 AUG -6 AM 11:56

OFFICE OF GENERAL
COUNSEL

Perkins
Cole

607 Fourteenth Street N.W.
Washington, D.C. 20005-2003

PHONE: 202.628.6600

FAX: 202.434.1690

www.perkinscole.com

Marc Erik Elias

PHONE

FAX (202) 634-9126

EMAIL

August 5, 2009

Jeff S. Jordan
Federal Election Commission
General Counsel's Office
999 E Street, NW
Washington, DC 20463

Re: MUR 6196

Dear Mr. Jordan:

On behalf of Christopher G. Kennedy, this letter is submitted in response to the Complaint filed by Brian P. Daley, dated June 5, 2009. The Complaint claims that Mr. Kennedy should have filed Statement of Candidacy and Registration based solely on a report that Mr. Kennedy had commissioned a poll and had "already shot his first TV commercial." The Complaint is based on false information and, in any event, fails to allege any facts that, if true, would have triggered any registration obligation. The Commission should find no reason to believe that the County Party violated the Federal Election Campaign Act of 1971 (the "Act"), as amended, and it should dismiss the matter immediately.

I. Facts

Christopher G. Kennedy is a resident of the state of Illinois. In April 2009, Mr. Kennedy commissioned a public opinion poll to assess his name recognition and the potential public reaction if he were to run for the United States Senate. Mr. Kennedy intends to pay for the cost of the poll with personal or other federally permissible funds. See Dooley Affidavit at ¶ 2.

In addition, between April 2009 and July 2009, Mr. Kennedy participated in several talks and meetings with Larry Grisolano and John Kupper, partners with AKPD Message and Media ("AKPD"), a political consulting firm. During these interactions, Mr. Kennedy and several personal advisors spoke with Grisolano and Kupper about the logistics of becoming a candidate and running a campaign, the viability of Mr. Kennedy's candidacy, and potential public relations strategies he could employ if he were to choose to run. Mr. Kennedy has not paid or agreed to pay AKPD any consulting fees in connection with these meetings. See *id.* at ¶¶ 3-4.

71722-0001/LEGAL16639330.1

ANCHORAGE • BEIJING • BELLEVUE • BOISE • CHICAGO • DENVER • LOS ANGELES • MENLO PARK
OLYMPIA • PHOENIX • PORTLAND • SAN FRANCISCO • SEATTLE • SHANGHAI • WASHINGTON, D.C.

Perkins Cole LLP and Affiliates

Mr. Kennedy commissioned the poll and spoke with the consultants solely to help him decide whether or not to run for the United States Senate and there is no indication that would suggest otherwise. To this date, Mr. Kennedy has not made any public announcement indicating an intention to run for the United States Senate. Nor has Mr. Kennedy established a depository or collected any contributions for a federal campaign. *See id.* at ¶¶ 6-7.

On June 5, 2009, complainant Brian P. Daley filed the present Complaint against Mr. Kennedy, asserting that Mr. Kennedy should have filed Statements of Candidacy and Registration with the Commission. To support this contention, the Complaint points to a single column in the *Chicago Sun Times* stating that (1) Mr. Kennedy had commissioned a poll in April and (2) that Mr. Kennedy had hired AKPD and "has already shot his first TV campaign commercial." Complaint at 1-2. However, contrary to the report, Mr. Kennedy has not hired AKPD, and AKPD did not produce a TV commercial for Mr. Kennedy. *See Dooley Affidavit* at ¶¶ 4-5.

II. Legal Analysis

A. Legal Background

Under the Act, an individual becomes a candidate when the individual has received or made contributions or expenditures in excess of \$5,000, 2 U.S.C. § 431(2), at which point he or she has fifteen days to file a Statement of Candidacy with the Commission, *id.* § 432(e)(1). However, an individual who has not decided to run as a federal candidate may "test the waters" before declaring candidacy. 11 C.F.R. §§ 100.72, 100.131. Under this exception, an individual may raise and spend funds in order to determine whether he or she should become a candidate, such as conducting a poll. *Id.* The purpose of this exception is to permit individuals to determine whether candidacy for Federal office is feasible, without being discouraged by the burden of the Act's reporting requirements. FEC Adv. Op. 1981-82.

The testing the waters regulations seek to draw a distinction between activities directed to an evaluation of the feasibility of one's candidacy and conduct signifying that a private decision to become a candidate has been made. FEC Adv. Op. 1981-82. In addition to polling, the Commission has also found that the following activities qualify under the exception, as long as the candidate is truly deliberating candidacy:

- Hiring political consultants to provide advice on the potential and mechanics of constructing a campaign organization;
- Hiring a public relations consultant for the purpose of arranging and coordinating speaking engagements, disseminating copies of speeches, and arranging for the publication of articles by the individual; and

29044254179

- Preparing and printing biographical brochures and photographs to be used in connection with speaking appearances, as long as the candidate is truly deliberating candidacy.

FEC Adv. Op. 1981-82.

Under Commission regulations, certain activities may indicate that the individual is no longer testing the waters and, instead, has decided to become a candidate for a particular office. These include "general public political advertising to publicize his or her intention to campaign for Federal office"; raising funds in excess of what could reasonably be expected to be used for exploratory activities; making or authorizing statements that refer to him or her as a candidate for a particular office; conducting activities in close proximity to the election or over a protracted period of time; and taking action to qualify for the ballot under state law. *Id.*

B. Mr. Kennedy Has Not Made Any Expenditures Under the Act

For the Commission to find reason to believe that a violation occurred, a complaint must set forth sufficient specific facts which, if proven true, would actually constitute a violation. *See* 11 C.F.R. § 111.4; Commissioners Mason, McDonald, Sandstrom, Smith, Thomas and Wold, Statement of Reasons, MUR 5141; Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons, MUR 4960. "Unwarranted legal conclusions from asserted facts . . . or mere speculation, . . . will not be accepted as true." Statement of Reasons, MUR 5141; *see also* Commissioners Wold, Mason and Thomas, Statement of Reasons, MUR 4850 ("A mere conclusory accusation without any supporting evidence does not shift the burden of proof to respondents."). Because the Complaint does not meet this standard, and because the Complaint is based on false information, it must be dismissed.

The Complaint alleges that Mr. Kennedy was obligated to file with the Commission based on activities described in the *Sun Times* column. But it fails to allege that Mr. Kennedy made expenditures or received contributions in excess of \$5,000. To the contrary, Mr. Kennedy's activity falls squarely within the ambit of the testing the waters exception.

Mr. Kennedy commissioned a poll to assess his name recognition and viability as a candidate. This is classic testing the waters activity and thus does not qualify as an expenditure under Commission rules. *See* 11 C.F.R. § 100.131.

In addition, Mr. Kennedy spoke with Grisolano and Kupper about the logistics of becoming a candidate and running a campaign, the viability of his candidacy, and potential strategy should he choose to run for office. He did not pay or agree to pay AKPD. But, even if he had made payments to AKPD, they would not qualify as expenditures under Commission regulations, as the discussions were conducted solely to help Mr. Kennedy determine whether he would run for the Senate. *See id.* § 100.131; FEC Adv. Op. 1981-82.

29044254180

Jeff S. Jordan
August 5, 2009
Page 4

29044254181

The *Sun Times* report cited in the Complaint states that Mr. Kennedy had hired AKPD and "has already shot his first TV campaign commercial." It is not clear what the purported basis for these claims is, but they are simply false: Mr. Kennedy has not hired AKPD, nor has AKPD produced a television advertisement for Mr. Kennedy. Further, while the report predicts that Kennedy would announce his candidacy "next week," this claim is only a prediction, and an incorrect one at that: to date, Kennedy has not announced any decision to run for the Senate. In any event, speculative and unsupported hearsay cannot support a reason to believe finding. See Statement of Reasons, MUR 5141.

In sum, Mr. Kennedy's activities merely reflect the fact that he was evaluating whether or not to run for the Senate. The Complaint fails to allege, and Mr. Kennedy did not engage in, any activities that indicate that he decided to become a candidate. He did not disseminate any general public political advertising indicating an intention to campaign for federal office; he did not establish a campaign depository or collect funds; he made no attempts to qualify for the ballot under Illinois law; his activities occurred well before the election; and he has not made any public statements in which he has referred to himself as a candidate or indicated that he has decided to become one. Mr. Kennedy's activities fall squarely within the testing the waters exceptions of 11 C.F.R. §§ 100.72 and 100.131.

III. Conclusion

For the reasons set forth above, Mr. Kennedy respectfully requests that the Commission find no reason to believe that he violated the Act, and dismiss this matter.

Very truly yours,



Marc Erik Elias
Christopher B. Wilson
Counsel to Christopher Kennedy

Enclosure (Affidavit of Craig Dooley)