

Tuesday, February 2, 2010

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Campaign Finance Developments

By Mark R. Bolton, Janna B. Day, Laura A. Lo Bianco and Kendis K. Muscheid

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The U.S. Supreme Court and an Arizona District Court both recently issued rulings in two campaign finance cases that that will have enormous implications for the upcoming state and federal election cycle.

Arizona Clean Elections Matching Funds

First, the U.S. District for the District of Arizona struck down the matching funds provision of Arizona's Clean Elections System. Under the Clean Elections system, candidates who qualify to receive public funding receive a lump sum amount at the outset of the primary and general election periods. The amount the participating candidates receive depends on the office they seek. Participating candidates also receive public funds beyond the primary and general election lump sums when facing a non-participating opponent whose spending exceeds the initial lump sum amounts. Should it hold up on appeal, the court's ruling will prohibit candidates participating in the Clean Elections System from receiving those matching funds. While the district court opinion enjoined the state from issuing matching funds for the 2010 election cycle, the opinion was stayed pending appeal to the U.S. Court of Appeals for the 9th Circuit. The 9th Circuit will likely extend the stay pending its decision. Therefore, the question of whether the state can issue matching funds during the 2010 election cycle will remain unresolved until the 9th Circuit issues its decision, which should occur within the next month.

The potential outcomes at the 9th Circuit are: 1) an immediate injunction on the distribution of matching funds for the 2010 election cycle; 2) a continued stay that would allow matching funds to be issued during the 2010 election cycle; 3) a complete reversal of the District Court opinion; or 4) severance of certain portions of the matching funds law. Under the last scenario, matching funds would continue to be issued except when non-participating candidates exceed the primary or general election lump sum spending limits by making personal contributions to their own campaign.

There are currently 90 Arizona candidates who have indicated their intent to run under Clean Elections. However, the likely impact of the uncertainty in the matching funds is that at least some candidates will switch to traditional financing. The impact will be felt the most in the statewide races where, for example, one candidate for Governor has already contributed \$2 million to his campaign; without matching funds, those candidates running under Clean Elections will be at a significant disadvantage.

Corporate and Labor Union Expenditures for Advocacy Activities

Second, in a 5-4 decision, in *Citizens United v. Federal Election Commission*, the United States Supreme Court invalidated decades-old federal prohibitions on corporations and labor unions making Independent Expenditures to expressly advocate the election or defeat of federal candidates. The Supreme Court ruling means that corporations and labor unions will now be able to spend unlimited general

Phoenix
3003 N. Central Ave.
Suite 2600
Phoenix, AZ 85012
(602) 916-5000

Tucson
One S. Church Ave.
Suite 1000
Tucson, AZ 85701
(520) 879-6800

Nogales
420 W. Mariposa Rd.
Suite 200
Nogales, AZ 85621
(520) 281-3480

Las Vegas
300 S. Fourth St.
Suite 1400
Las Vegas, NV 89101
(702) 692-8000

Denver
1700 Lincoln
Suite 2900
Denver, CO 80203
(303) 291-3200

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treasury funds to advocate for or against candidates, but must do so without any level of coordination with the candidate. Corporations and labor unions are still prohibited from contributing directly to candidates' campaigns. Corporations and labor unions conducting advocacy activities must be careful to act independently from the candidates they support. An inappropriate level of coordination with a candidate would constitute an illegal campaign contribution. The question of whether an advocacy activity is coordinated requires a fact based analysis.

The court's ruling also applies equally to state campaign finance laws, meaning a corporation or labor union will now be able to fund advertisements that advocate the election or defeat of state or local candidates as long as there is no coordination with the candidate.

The ruling did not change IRS regulations regarding obtaining and maintaining non-profit status or the treatment of political activities. As many for-profit corporations may be understandably hesitant to make direct expenditures, it is likely that non-profit corporations such as 501(c)(6) trade associations, and 501(c)(4) social welfare organizations will be involved in express advocacy activities.

Critics of the ruling are crying out for a Congressional response, but, until then, look for a much more diverse set of advertisements in the weeks and months to come.

Mark R. Bolton focuses his practice in the areas of government relations, administrative law and government procurement. He earned his B.A. (2003) from the University of Arizona and his J.D. (2008) from University of New Mexico School of Law.

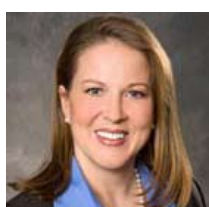
Janna B. Day practices in the area of government relations, with an emphasis on representing corporate and trade association clients on state legislative issues. In her fourteen years of lobbying the Arizona legislature and the executive branch, Janna has effectively represented her clients both by drafting and ensuring passage of complex legislation, as well as by stopping or satisfactorily modifying legislation contrary to her clients' interests. Ms. Day concentrates on the areas of taxation, health care, public record access, mining issues and business issues, as well as covering a variety of general legislative issues. Ms. Day also represents clients on procurement efforts before state agencies and municipalities. Janna is one of the state's foremost experts in the areas of campaign finance and lobbyist regulation and regularly advises candidates, contributors and political committees on reporting compliance issues. She earned her B.A. (1991) and her J.D. (1995) from Brigham Young University.

Laura A. Lo Bianco focuses her practice on corporate law and transactional matters. Her general corporate experience includes business counseling, formation of organizations, including non-profit, tax-exempt organizations and limited liability companies; corporate governance and maintenance of requisite organizational records. She advises various tax-exempt entities, such as private foundations, support organizations, public charities and other entities that are tax-exempt under the Internal Revenue Code. She also has experience with mergers and acquisitions; purchase, sale and lease of real property; and negotiation of contracts. She earned her B.S. (1993) from Arizona State University and her J.D. (1996) from Santa Clara University, School of Law.

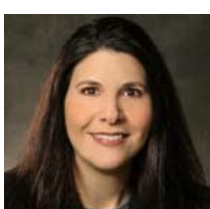
Kendis K. Muscheid practices primarily in the areas of nonprofit and tax-exempt organizations, charitable trusts, and state and local taxation. Ms. Muscheid advises a wide variety of tax-exempt Section 501(c)(3) organizations, varying in size and charitable purposes. She also advises entities that are tax-exempt under a number of other Internal Revenue Code sections, including social welfare organizations, trade associations, title-holding organizations, and social clubs. She is also a frequent speaker on topics relating to tax-exempt entities. Ms. Muscheid represents non-profit organizations in a wide assortment of matters such as qualification for tax exemption, conversions of entities to and from tax-exempt status, obtaining and maintaining favorable tax-treatment, reporting and government filings, the creation and operation of supporting organizations, private foundations and public charities, unrelated business income tax, advocacy issues, charitable solicitations, endowment management, tax-exempt bond financing, mergers, governance issues, compensation matters, and intermediate sanctions issues. She earned her B.B.A. (1986) from Texas Tech University and her J.D. (1991) from University of the Pacific, McGeorge School of Law.



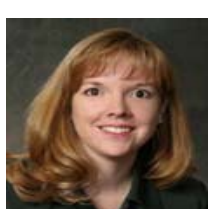
Mark R. Bolton
Associate
602.916.5495
mbolton@fclaw.com



Janna B. Day
Director
602.916.5476
jday@fclaw.com



Laura A. Lo Bianco
Director
602.916.5345
llobianco@fclaw.com



Kendis K. Muscheid
Director
602.916.5354
kmuscheid@fclaw.com

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