



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>ERIC J. BISTROW*</p> <p>CHIEF DEPUTY ATTORNEY GENERAL</p> <p>August 21, 2013</p>	<p>No. I13-006 (R13-011)</p> <p>Re: Campaign Finance</p>
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To: Hon. Phil Lovas
Arizona House of Representatives

Questions Presented

You have asked the following questions regarding freedom of political association under Arizona's campaign finance laws:

1. May an incumbent Arizona Legislative candidate associate himself with an Arizona political committee (standing or super PAC) in support of or opposition to one or more candidates if the committee does not accept contributions for the candidate's own race and does not make expenditures in connection with the candidate's own race?

2. May an incumbent Arizona Legislative candidate associate himself with an Advocacy Organization (I.R.C. § 501(c)(4), (c)(5), or (c)(6)) if the Advocacy Organization does not make any expenditures to influence the candidate's own race and does not receive or make contributions or expenditures that would trigger registration as an Arizona political committee of any kind?

Summary Answers

1. Yes, with qualification. Arizona law permits a state legislative candidate to associate with a state political committee that supports or opposes one or more other candidates and that neither contributes nor expends funds toward the candidate's own race, provided that (a) the political committee is not the candidate's own campaign committee, (b) the candidate is not acting as an agent of his own campaign committee, and (c) the candidate follows all other state campaign finance rules.

2. This question requires a fact-driven analysis of which factors require registration as a political committee under A.R.S. § 16-901(19) and what types of conduct constitute an independent expenditure under A.R.S. § 16-901(14). Because the answer to this question may vary based on an infinite number of factual permutations, we decline to provide a formal opinion in response to this question. We recommend that you refer to the Handbook for Candidates & Political Committees and the Guide for Campaign Finance published by the Arizona Secretary of State when considering these issues.

Background

Courts have long recognized the social and personal importance of allowing individuals to associate with political organizations of their choice. In *Buckley v. Valeo*, the United States Supreme Court affirmed that the "freedom of political association . . . is 'a basic constitutional freedom'" that the First Amendment protects. 424 U.S. 1, 24-25 (1976) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)).

At the same time, courts have also identified compelling interests that justify some restrictions on this freedom. In particular, *Buckley* upheld parts of a restriction designed "to limit the actuality and appearance of corruption" in campaign finance. *Id.* at 26. The *Buckley* Court

recognized that some forms of political association could covertly “secure a political quid pro quo from current and potential office holders” whereby “the integrity of our system of representative democracy is undermined.” *Id.* at 26-27. Even if these corrupt quid pro quo arrangements do not actually arise, “the appearance of corruption” and the “public awareness of the opportunities” for such arrangements are of “almost equal concern.” *Id.* at 27.

This deep tension—between the need to protect freedom of political association and the need to deter real and apparent corruption—has prompted federal and state governments to develop increasingly complex campaign finance regulatory schemes. Your question implicates this long-recognized tension.

Analysis

In general, an Arizona Legislative candidate may associate with a state political committee that supports or opposes one or more other candidates and that does not influence the candidate’s own race.

Your first question is whether an Arizona Legislative candidate (“the Candidate”) may associate with a certain kind of political committee (“the Committee”). According to your explanation, the Candidate’s association with the Committee might “include fundraising for the . . . Committee, serving on the Board of Directors, and/or serving as Chairman.” Request at 1. The Committee would neither “receive contributions for the candidate’s own race” nor “make any expenditure in connection with the candidate’s own race.” Request at 1. The Committee might “make contributions to [other] Arizona Legislative candidates” and would “restrict its expenditures to those that influence only races other than the candidate’s.”¹ Request at 1-2.

Arizona law acknowledges that legislative candidates have a basic right to lend their personal support to other candidates of their choice. This acknowledgment has, for instance,

¹ Our analysis assumes—and therefore applies only to the extent—that the Committee would actually operate in the way that you have described (i.e., that it would neither receive contributions for the Candidate nor make expenditures in connection with the Candidate).

compelled this Office to deem an Arizona statute “patently unconstitutional to the extent that it prohibits a candidate from making a contribution to other campaigns with the candidate’s personal funds.” Ariz. Att’y Gen. Op. I87-039. In *Buckley*, the Supreme Court similarly declared that “[t]he candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election *and the election of other candidates.*” 424 U.S. at 52 (emphasis added). Since the Candidate’s association with the Committee would constitute an expression of the Candidate’s support for other candidates, Arizona law generally permits this kind of association.

Arizona law does not, however, permit this kind of association in all circumstances. In an effort to stem real and apparent corruption, the Arizona Revised Statutes have placed restrictions on the particular ways in which candidates may support one another via political association. We discuss these restrictions below.

1. The Committee must not be the Candidate’s own campaign committee.

Under A.R.S. § 16-905(F), a “candidate’s campaign committee . . . shall not transfer or contribute money to any other campaign . . . committee” Moreover, under A.R.S. § 16-903(D), a “political committee that supports . . . another candidate . . . may not be designated as a candidate’s campaign committee.” Hence, if the Committee were the Candidate’s campaign committee, the Committee’s contributions to other candidates would violate § 16-905(F) and § 16-903(D).

The Candidate could take steps to ensure that the Committee does not become his campaign committee. “Candidate’s campaign committee” means “a political committee designated and authorized by a candidate,” A.R.S. § 16-901(3), although a political committee might become a candidate’s de facto campaign committee even without the candidate’s formal

designation if it accepted earmarked contributions for that candidate, *see* A.R.S. § 16-907(B); *cf.* *Van Riper v. Threadgill*, 183 Ariz. 580, 583, 905 P.2d 589, 592 (Ct. App. 1995) (deeming an “informal ad hoc group[]” to be a political committee). Therefore, as long as the Candidate neither designates the Committee as his campaign committee nor accepts contributions from it, the Committee will not become his campaign committee.

Note that if the Committee becomes the campaign committee of any candidate, it cannot also be a standing political committee. A.R.S. § 16-907(D). To avoid this result, a concerned candidate should follow the steps outlined above.

2. The Candidate must not be acting as an agent of his own campaign committee.

Even if the Committee is not the Candidate’s campaign committee, the Candidate’s association with the Committee might still violate sections 16-905(F) and § 16-903(D) in at least one scenario. If in associating with the Committee, the Candidate acts as an agent of his own campaign committee, then this association might constitute a contribution from the Candidate’s campaign committee to another candidate, which sections 16-905(F) and 16-903(D) prohibit. An important question, then, is whether the Candidate is an agent of his own campaign committee by virtue of his association with the Committee.

Arizona Revised Statute § 16-903(E) provides as follows:

Any candidate who receives a contribution or any loan for use in connection with the campaign of that candidate for election or who makes a disbursement in connection with that campaign shall be deemed as having received the contribution or as having made the disbursement as an agent of the candidate’s campaign committee for purposes of this article.

This statute does not directly address the situation at hand; rather, it deals with a “candidate who receives a contribution” for “the campaign of *that* candidate” or “who makes a disbursement” for “*that* campaign” (emphasis added), i.e., a candidate who receives or spends money for his or her

own campaign. Because the Committee would limit its spending to races other than the Candidate's, section 16-903(E) does not render the Candidate an agent of his own campaign committee merely by virtue of associating with the Committee.

No Arizona statute deems a candidate who contributes to another campaign to be thereby acting as an agent of his own campaign committee absent additional facts. Any such judgment would make all such contributions illegal per § 16-905(F), whereas in reality these contributions are not only permitted but also protected. *See, e.g.,* Ariz. Att'y Gen. Op. I87-039; *Buckley*, 424 U.S. at 52. Thus, the Candidate would not be acting as an agent of his own campaign committee simply by virtue of his association with the Committee.

3. The Candidate must follow all other state campaign finance rules.

The Candidate who associates with the Committee but does not act as an agent of his campaign committee is acting personally. Various state campaign finance rules, such as personal contribution limits, therefore apply. *See* A.R.S. § 16-905(B). The applicability of these rules is beyond the scope of the questions presented.

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Conclusion

An Arizona Legislative candidate may associate with an Arizona political committee that supports or opposes one or more other candidates and that neither contributes nor expends toward the candidate's own race, provided that (a) the political committee is not the candidate's own campaign committee, (b) the candidate is not acting as an agent of his own campaign committee, and (c) the candidate follows all other state campaign finance rules.

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*Under the Attorney General's policy of avoiding conflicts of interest and the appearance of impropriety, Attorney General Thomas C. Horne has recused himself from any participation in formulating this Opinion. Eric J. Bistrow, Chief Deputy Attorney General, has been designated to serve as the acting Attorney General for purposes of this Opinion.