TAB 8

AO 14-05-CD

Mallott Fundraising in Juneau During Legislative Session

Presented by: John Ptacin, Assistant Attorney General

THE STATE of ALASKA
GOVERNOR SEAN PARNELL

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March 4, 2014

VIA U.S. MAIL and EMAIL
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Re: Advisory Opinion Request AO 14-05-CD

Dear Mr. Botelho:

Please find the attached advisory opinion regarding your February 28, 2014 request for guidance related to fundraising during session. The conclusion of this opinion has not yet been submitted for approval by the Alaska Public Offices Commission. AS 15.13.374. Only the Commission has the authority to approve an advisory opinion under 2AAC 50.840. The Commission will rule on staff's proposed advice at its next regular meeting.

Sincerely,

ALASKA PUBLIC OFFICES COMMISSION

Paul Dauphinais
Executive Director

cc:
APOC Commission Members
John Ptacin, Assistant Attorney General
Senior Staff

Encl: Unapproved Advisory Opinion AO 14-05-CD

ADVISORY OPINION REQUEST

Number:	AO 14-05-CD
Requested By:	Bruce Botelho, Campaign Advisor – Alaskans For Mallott 2014
Prepared By:	Paul Dauphinais, Executive Director and John Ptacin, Assistant Attorney General
Date Issued	March 4, 2014
Subject:	Accepting and Soliciting Contributions During Legislative Session
Commission Decision:	

I. QUESTIONS PRESENTED

This advisory opinion request asks how gubernatorial candidates may fundraise during the legislative session in light of AS 15.13.072(g) which precludes gubernatorial candidates like Mr. Mallott from soliciting or accepting contributions in the capital city ("Juneau") during the legislative session.

Mr. Mallott and Alaskans For Mallott (the campaign) have sought advice on two matters: first whether the commission considers AS 15.13.072(g) a constitutional law; and second, how the law applies to their campaign which is headquartered in Juneau.[1] The campaign has raised the following questions:

- the campaign maintains an office in Juneau. May the campaign solicit or accept contributions by telephone from the Juneau office during session?
- the campaign maintains a website in Juneau. Can the campaign solicit or accept contributions from the Juneau website during session?
- the campaign wants to contact individuals in Juneau during session and advise them on how to make legal contributions during session. Is this prohibited?
- the campaign maintains both a Juneau bank account and a Juneau P.O. Box. May the campaign receive contributions to either during session?
- campaign treasurers hope to attend campaign events in Juneau during session and want to solicit or accept contributions at those events. Does AS 15.13.072(g) allow this?
- the campaign intends to pay for expenditures from its Juneau bank account during session. Is this permissible?

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[1] The capital of the state is Juneau (AS 44.06.010). Juneau is a unified borough, and as such, restrictions for the City and Borough of Juneau apply to each community of the borough, including Douglas and Auke Bay.

- Mr. Mallott resides in Juneau and wishes to make individual contributions to his campaign while he is in Juneau during session. Is this permissible?

- the campaign wishes to receive assistance from professional volunteers in Juneau during session. Is this allowed?

II. SHORT ANSWER

The commission does not conclude that AS 15.13.072(g) is per se unconstitutional. The campaign must take certain steps to insure that they neither solicit nor accept campaign contributions from individuals in Juneau during the legislative session as described below.

III. FACTS

Mr. Mallott is a candidate for Alaska Governor and a resident of Juneau. Mr. Mallott's campaign is run out of Juneau, the capital city, and his campaign's bank account is in Juneau. On February 28, 2014 the campaign explained that it wants to conduct the following activities in Juneau during session:

- Calls from Juneau to persons outside Juneau asking financial support;
- Calls from Juneau to persons inside Juneau asking financial support;
- Calls from Juneau to persons outside or inside Juneau asking for political support, silent about contributions;
- Maintaining a website either inside or outside Juneau that provides information about the candidate and includes information on how to make a contribution [websites don't actually have a physical location];
- Maintaining a website either inside or outside Juneau that provides information about the candidate and includes information on how to make a contribution and directs potential contributors to a post office box outside Juneau or to a web-based method for accepting electronic contributions;
- Maintaining a website either inside or outside Juneau that provides information about the candidate and includes information on how to make a contribution, but that cites the law and informs Juneau residents not to make contributions during the legislative session;
- Campaign staff in Juneau explaining to potential contributors what APOC says the law is and offering suggestions on how donors can contribute legally, including providing an Anchorage address for receipt of contributions;
- Calls by the candidate from his home in Juneau to potential contributors inside or outside of Juneau and asking [sic] contributions;
- Receipt by campaign staff in Juneau of contributions sent to a Juneau post office box, and then deposit of those funds in either a) a Juneau branch, or b) a non-Juneau branch, of a national bank that can be accessed anywhere;
- Attendance and speeches by the candidate or others on his behalf at campaign events in Juneau, at which contributions are mentioned;
- Attendance and speeches by the candidate or others on his behalf at campaign events outside Juneau at which the candidate speaks from his home in Juneau by phone or electronically, and contributions are mentioned;

- Campaign staff in Juneau adding to and removing sums in a campaign bank account that is in a national bank accessible from anywhere;
- The candidate making a loan to his own campaign by a bank transfer from his home in Juneau or from a bank branch in Juneau of a national bank ;
- The candidate accepting calls at his Juneau home from supporters, calling from either inside or outside Juneau;
- Professionals making in-kind contributions of professional services performed in Juneau, e.g., accounting or legal services;
- Composing solicitation materials in Juneau, to be sent to a statewide audience either from Juneau or from outside Juneau; and
- Accepting unsolicited donations sent to Juneau campaign office.

IV. LAW

a. The ban on contributions in Juneau during the legislative session.

In 1998, the legislature added a provision to campaign finance laws restricting gubernatorial candidates from soliciting or accepting contributions in Juneau while the legislature is in session.[2] The law limits when a person can make a contribution to a gubernatorial candidate. Such laws are commonly referred to as temporal bans on contributions.

Alaska Statute 15.13.072(g)—the temporal ban at issue—only applies to: incumbent and non-incumbent candidates for governor and lieutenant governor; in Juneau; during session.

b. Contribution restrictions raise First Amendment concerns.

Temporal restrictions on contributions to candidates raise serious constitutional questions. This is so because even temporal bans on contributions tend to burden expressive activity under the First Amendment. Legislation that has the effect of prohibiting a contributor from expressing support and affiliation with a candidate for a lengthy period constitutes a significant interference with the right of association.[3]

Alaska Courts have examined temporal bans in prior rulings. In 1999, The Alaska Supreme Court struck down a temporal ban.[4] The temporal ban at issue in that case was broader than the temporal ban in AS 15.13.072(g). The temporal ban in that case applied to all the candidates for the legislature.[5] The ban applied to all contributions in the state, not just Juneau.[6]

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2 § 4 ch 74 SLA 1998.

3 1996 Inf. Op. Atty. Gen. (June 22, 1999; 661-99-0513) pg. 8; *See also State v. Alaska Civil Liberties Union*, 978 P.2d 597, 630-31 (Alaska 1999)(held that a temporal ban on all campaign contributions during legislative session to all candidates running for office was unconstitutional).

4 *Id.*

5 *Id.*

6 *Id.*

IV. ANALYSIS

The campaign must follow AS 15.13.072(g).

a. Alaska Statute 15.13.072(g) is not patently unconstitutional.

The commission will not invalidate the application of AS 15.13.072(g) to the campaign on First Amendment grounds.

Temporal bans on campaign contributions—like AS 15.13.072(g)—are not per se unconstitutional.[7] Courts will uphold the application of a temporal ban if two conditions are met: (1) the state can demonstrate a sufficiently important interest in applying the temporal ban; and (2) the state employs means closely drawn to avoid unnecessary abridgment of associational freedoms and free speech concerns.[8]

There is only one recognized set of governmental interests that will justify a temporal ban. Courts will uphold temporal bans to contributions if the temporal ban prevents corruption and/or the appearance of corruption.[9] The commission finds that as an initial matter, limiting the ability of gubernatorial candidates from soliciting or accepting contributions in the shadow of the capital during session inherently prevents corruption or at the very least, the appearance of corruption.

Moreover, the commission believes that AS 15.13.072(g) could be considered narrowly tailored to prevent corruption or the appearance of corruption for three reasons. First, the temporal ban in AS 15.13.072(g) only applies to the candidates for the two highest offices in Alaska (governor and lieutenant governor) and not to all of the legislative candidates. Second, the ban only applies to soliciting or accepting contributions during the legislative session. Third, the ban does not apply statewide, only to Juneau. Given these distinctions from the law struck down in 1999, AS 15.13.072(g) could be viewed as narrowly tailored by the courts.

The commission will apply the law.

b. The campaign must avoid soliciting or accepting contributions from individuals in Juneau during the legislative session.

Alaska Statute 15.13.072(g) prohibits the solicitation or acceptance of campaign contributions by gubernatorial campaigns in the capital city during session. The prohibition

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7 *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714-16 (4th Cir. 1999)(upheld a ban on lobbyist contributions to both incumbent and non-incumbent candidates during legislative session).

8 *State v. Alaska Civil Liberties Union*, 978 P.2d at 627-28; *but see* Jessica A. Levinson, Timing is Everything: A New Model for Countering Corruption Without Silencing Speech in Elections, 55 St. Louis U. L.J. 853, 865 (2011)(noting that temporal bans are typically reviewed under strict scrutiny).

9 *Riddle v. Hickenlooper*, --- F.3d ----, 2014 WL 241983 * 8-9 (10th Cir. 2014).

applies to phone calls, websites (including Facebook pages and Twitter accounts), and in person solicitations. The commission takes each of the campaign's specific questions in turn.

1. Phone calls during session

The following rules apply to campaign phones calls during session under AS 15.13.072(g):

- phone call solicitations from Juneau, including calls by the candidate, to individuals outside Juneau, are permissible;
- solicitation phone calls, including calls by the candidate, to individuals inside Juneau, are prohibited;
- all calls that do not solicit a contribution are permissible. Mr. Mallott and his campaign are permitted to advocate for his candidacy in telephone calls to individuals in Juneau (calls either made or received), so long as the campaign does not solicit or accept campaign contributions as a result of the phone call; and
- the campaign may not instruct individuals in Juneau to mail contributions to a campaign treasurer outside of Juneau during session. Also, the campaign may not instruct an individual in Juneau to contribute to the campaign after session. Both activities constitute soliciting contributions during session in Juneau and are prohibited.

2. Websites

The following rules apply to websites:

- the campaign may solicit contributions—generally—through its website;
- the campaign cannot directly solicit individuals in Juneau on its website during session;
- individuals in Juneau during session can make unsolicited contributions in response to a campaign website so long as the contribution reaches the campaign outside Juneau during session;
- the campaign's website may not instruct individuals in Juneau to send contributions outside Juneau during session; and
- the campaign must return any unsolicited contributions that it receives during session from an individual in Juneau if it is received by the campaign's Juneau office.[10]

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10 *See* AO 14-01-CD, Fundraising during Legislative Session (determining how AS 15.13.072(g) applies to new technologies).

3. Receiving contributions

The campaign may accept contributions forwarded to the campaign's P.O. Box or Juneau bank account during session so long as the contribution originated outside of Juneau. If the contribution is made by an individual in Juneau during session, the campaign must return it to the contributor.

4. Candidate events in Juneau during the session

The campaign may not solicit or accept any contributions at any event in Juneau during session. If contributions are mentioned, the campaign should note that it can neither solicit nor accept contributions in the capital while the legislature is in session.

5. Use of the campaign's Juneau bank account during session

The campaign may remove money from its Juneau bank account to make campaign expenditures. The campaign may not make expenditures in furtherance of soliciting or accepting contributions in Juneau during session.

6. Candidate contribution to his own campaign

Mr. Mallott may contribute to his own campaign during session (in Juneau) for two reasons. First, application of this law to the candidate would be an overly technical reading of the statute. Candidates do not "solicit or accept" a contribution from themselves. Rather, candidates simply contribute to their own campaign without soliciting or accepting the contribution.

More importantly, application of AS 15.13.072(g) to candidate contributions would be unconstitutional. Courts will uphold the application of a temporal ban if the ban targets corruption and/or the appearance of corruption.[11] Limiting a candidate's contribution to their own campaign does not further that interest.[12] In short, a candidate cannot corrupt him or herself. Thus, AS 15.13.072(g) cannot apply to Mr. Mallott making contributions to his own campaign.

7. Professionals donating their time during session in Juneau

The campaign may accept professional services from volunteers without triggering the temporal ban. Alaska Statute 15.13.072(g) applies to soliciting or accepting "contributions" in Juneau during session. Our definition of "contribution" excludes "services provided without compensation by individuals volunteering a portion or all of their time on behalf of a...candidate."[13] Here, the campaign may generally accept the professional services of volunteers in Juneau during session because volunteerism is not generally considered a

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[11] *Riddle v. Hickenlooper*, 2014 WL 241983 at * 8-9.

[12] *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, —— U.S. ——, 131 S.Ct. 2806, 2826 (2011).

[13] AS 15.13.400(4)(B)(i).

contribution under Alaska's campaign finance law.[14] The campaign should seek further clarification from the APOC Staff if certain volunteers will provide tangible objects to the campaign as a result of their volunteerism.[15]

8. Solicitations to areas other than Juneau during session

The campaign may solicit and accept contributions outside Juneau during session. Materials for such solicitations may be composed in Juneau and sent from Juneau.

V. CONCLUSION

The campaign must take all necessary steps to insure that its staff are neither soliciting nor accepting campaign contributions from individuals in Juneau during the legislative session as described above. If the campaign receives a contribution in Juneau during session or as a result of a prohibited solicitation, the contribution must be returned.

VI. COMMISSION DECISION

Only the Commission has the authority to approve an advisory opinion. 2 AAC 50.840. The Commission will rule on staff's proposed advice at its next regular meeting. The Commission may approve, disapprove, or modify the proposed advice. An advisory opinion must be approved by an affirmative vote of at least four members or it will be considered disapproved. Both staff's proposed advice and the Commission's final advisory opinion apply only to the specific facts and activity for which advice was requested.

If you rely on staff's proposed advisory opinion in good faith and the Commission subsequently rejects the proposed advice, staff will take no enforcement action on your activities up to that point if you acted under the specific facts described. If you have any additional questions or would like to discuss this proposed advice, please contact me at (907) 276-4176.

CERTIFICATE OF SERVICE
I certify that on this date, I mailed by Certified Mail, Return Receipt Requested, a true and correct copy of the foregoing document to:

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T-MT Douglas 3-4-14
Tamara M Douglas Date
Paralegal II

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14 Alaskan Democratic Party, AO 10-11 CD pg. 5. http://aws.state.ak.us/ApocInterimFiles/AO%2010-11%20CD%20ADP%20professional%20services%20FINAL%20with%20decision.pdf

15 *Id.*

Statutes and Regulations

Alaska Statutes

AS 15.13.072(g) Restrictions on solicitation and acceptance of contributions

(g) A candidate or an individual who has filed with the commission the document necessary to permit that individual to incur election-related expenses under AS 15.13.100 for election or reelection to the office of governor or lieutenant governor may not solicit or accept a contribution in the capital city while the legislature is convened in a regular or special legislative session.

AS 15.13.400(4)(B)(i) Definitions

(4) "Contribution"

(B) does not include

(i) services proved without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question