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ELECTIONS: Provision against corporate contributions in support of or in opposition to ballot questions.

The provision in the Michigan Election Law prohibiting a corporation from contributing to the support or opposition of a ballot question is unenforceable.

Opinion No. 5123 September 30, 1976.

Hon. Dennis O. Cawthorne
State Representative
Capitol Building
Lansing, Michigan

Citing § 919 of the Election Laws, you have requested my opinion on the following question:

> "Would you please advise me whether or not the prohibition cited above, which prohibits corporate contributions of money to candidates or their political committees, would prevent similar contributions in support of, or in opposition to state ballot proposals?"

The Michigan Election Law, 1954 PA 116, § 919; MCLA 168.919; MSA 6.1919 provides:

> "No officer, director, stockholder, attorney, agent or any other person, acting for any corporation or joint stock company, whether incorporated under the laws of this or any other state or any foreign country, except corporations formed for political purposes, shall pay, give or lend, or authorize to be paid, given or lent, any money belonging to such corporation to any candidate or to any political committee for the payment of any election expenses whatever."

The fact that contributions in support or opposition of ballot questions were intended to be included within the purview of 1954 PA 116, § 919, *supra,* is well established. 1954 PA 116, *supra,* § 901 defines the term "political committee" as follows:

> " 'Political committee' or 'committee' shall apply to every combination of 2 or more persons who shall aid or promote the success or defeat of a candidate, or a political party or principle or measure; . . ."

In addition, in *People* v *Gansley,* 191 Mich 357; 158 NW 195 (1916), the Court held that it was illegal for a brewery company to contribute money to influence a local option campaign; the payment of money involved was a contribution by the director of a brewery company to a so-called "Personal Liberty League." In so doing, the Court upheld the constitutionality of a provision identical to 1954 PA 116, § 919, *supra.*

Relying *inter alia* on *People* v *Gansley, supra,* OAG, 1961-1962, No 3610, p 213 (November 8, 1961) held that the legislature intended to include a constitutional proposal as a "principle or measure" within the purview of the definition of "political committee." However, although 1954 PA 116, § 919, *supra,* does prohibit corporate contributions to support or oppose a

ballot question, recent judicial pronouncements have cast doubt on the continued viability of this proposal.

The constitutionality of outlawing corporate contributions to support or oppose ballot questions was directly addressed in *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2 - 10)*, 396 Mich 465; ... NW2d ... (1976). Specifically, the question before the Court was whether a prohibition against corporate contributions contained in 1975 PA 227, § 95[1] constituted a denial of equal protection of the law or infringed upon the right to freedom of expression and assembly guaranteed by Const 1963, art 1, §§ 1, 2, 3 and 5.

The Court first determined that 1975 PA 227, § 95, *supra*, although prohibiting only corporations from making campaign contributions, did not violate the equal protection of the law. The Court stated:

> "Corporations have been prohibited from contributing to electoral campaigns in Michigan since 1913, the year in which the corrupt practices act passed. The legislative intent in prohibiting financial involvement of corporations in the elective process was to prevent the use of corporate funds to impose undue influence upon elections. Large aggregations of capital controlled by a few persons could have a significant impact upon the nomination or election of a candidate. The possibility of misuse of corporate assets by persons acting on behalf of uninformed or unwilling shareholders and the attempts at influence or importunity which might be exerted upon a successfully elected

[1] Section 95 states:

"(1) Except with respect to the exceptions and conditions in subsections (2) and (3) and to loans made in the ordinary course of business, a corporation may not make a contribution or expenditure or provide volunteer personal services which services are excluded from the definition of a contribution pursuant to section 5(3)(a).

"(2) An officer, director, stockholder, attorney, agent, or any other person acting for a corporation or joint stock company, whether incorporated under the laws of this or any other state or foreign country, except corporations formed for political purposes, shall not make a contribution or expenditure or provide volunteer personal services which services are excluded from the definition of a contribution pursuant to section 5(3)(a). A corporation may make an expenditure solely for the establishment and administration of a separate segregated corporate political education fund to be utilized for the sole purpose of making contributions to and expenditures on behalf of candidate committees.

"(3) Contributions to and expenditures from a fund established under subsection (2) shall be limited to money or anything of ascertainable value obtained through the voluntary contribution of the employees of the corporation under which the fund was established. A corporation which is nonprofit may also obtain money or anything of ascertainable value received through the contributions of members, who are individuals, of that corporation. The fund may not make a contribution or expenditure by utilizing money or anything of ascertainable monetary value obtained by using or threatening to use job discrimination or financial reprisals, or obtained as condition of employment.

"(4) A person who knowingly violates this section is subject to section 176." MCLA 169.95; MSA 4.1701(95).

candidate by a contributing corporation represent abuses which the passage of the corrupt practices act sought to eliminate.

"The state's interest in preserving the integrity of the elective process must be balanced against the assumed right to free expression of an artificial entity (*i.e.*, a corporation) regarding the candidacy of persons seeking election to public office. Recognizing that the state must show a compelling interest to justify interference with the fundamental right of freedom of speech or press, it is our opinion that this test is met and that the Legislature can exercise its power to insure the integrity of the elective process by prohibiting any corporate contributions or expenditures made for the purpose of influencing either the nomination or election of a candidate. We need not discuss further those circumstances under which corporations may be afforded First Amendment protection.

"The prohibition against corporate contributions or expenditures for such purposes does not violate their right to equal protection under the law as guaranteed by art 1, § 2. The United States Supreme Court in *Buckley, supra,* recently restated the established principle that:

" '[A] "statute is not invalid under the Constitution because it might have gone further than it did," *Roschen* v *Ward,* 279 US 337, 339 [49 S Ct 336; 73 L Ed 722 (1929)], that a legislature need not "strike at all evils at the same time," *Semler v Dental Examiners,* 294 US 608, 610 [55 S Ct 570; 79 L Ed 1086 (1935)], and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson* v *Lee Optical Co,* 348 US 483, 489 [75 S Ct 461; 99 L Ed 563 (1955)].'

"It is our opinion that restricting the application of § 95 to corporations alone did not constitute a violation of equal protection of the law." 396 Mich 465, 491-493 (1976)

Next, the Court considered whether proscribing corporate contributions to ballot questions infringed upon the right to freedom of expression and assembly and stated:

"We believe a significant distinction exists between corporation contributions or expenditures made for the purpose of influencing the nomination or election of a candidate and, on the other hand, corporate contributions or expenditures made for the purpose of expressing a position or opinion concerning a public issue which may include the qualification, passage or defeat of a ballot question. Though *Buckley* did not address ballot-question campaigns, the Court determined that expenditures for communication of views and opinions about *public issues* are constitutionally protected. Political expression must be afforded the broadest protection in order 'to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' That our discussion involves corporations and not individuals does not render inapplicable our society's 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'

"Contributions or expenditures by corporations to communicate their positions or opinions concerning ballot questions serve to enlighten the public and encourage an informed decision-making process. Such contributions or expenditures create no danger of incurring obligations from an elected official to a major contributor. The right of the public to be informed is a paramount consideration in seeking to preserve the free exchange of ideas in the market place.

"A ballot question may affect the assets, the conduct, or, indeed, the very existence of a corporation. Especially in such cases, the corporation is deserving of a public forum to express its position or opinion, much the same as the public has a right to hear those same matters.

"It is our opinion that insofar as § 95 interferes with the right of the public to hear divergent views of public importance by prohibiting corporations from making contributions or expenditures for the purpose of communicating its opinion concerning ballot questions, it is violative of Const 1963, art 1, § 5. We make no judgment upon the extent to which art 1, § 5, protects the right of corporations to freely express their ideas in other contexts." 396 Mich 465, 493-495 (1976)

Although the advisory opinion clearly contradicts *People* v *Gansley, supra,* and, as a practical matter, vitiates 1954 PA 116, § 919, *supra,* it was noted in the opinion that "[a]n advisory opinion is not precedentially binding upon the Court and represents only the opinions of the parties signatory." 396 Mich 465, 477. Nevertheless, great weight must be given to the advisory opinion since the members of the Supreme Court who have expressed these views will also be called upon to apply the law if an actual controversy involving this issue is presented.

Further support for the conclusion reached by the Michigan Supreme Court may be found in *Schwartz* v *Romnes,* 495 F2d 844 (1974). *Schwartz* involved a shareholder's derivative suit in New York seeking to recover a $50,000 expenditure made by a corporation for the purpose of publicizing its views with respect to a proposed state public transportation bond issue to be submitted to referendum. The New York statute[2] contained language substantively similar to 1954 PA 116, § 919, *supra.* The Second Circuit United States Court of Appeals held that the phrase "for political purposes" or payments for "any political purpose whatever," may not be interpreted as applying to the public referendum that is essentially nonpartisan in nature. The Court recognized that, although corporate contributions to political candidates tend to obligate public officers to reciprocate and place the special interest of contributors above the will of the general public, this evil is not present where contributions are made to promote the success or obtain the defeat of a nonpartisan proposal. The Court stated:

". . . It is difficult to imagine a setting where a narrow interpretation would be more appropriate than when a criminal statute might otherwise impinge on First Amendment rights. See United States v. Robel, 389 U.S. 258, 262, 265, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967);

[2] § 460, New York Election Law, McKinney's Consol. Laws, c. 17.

United States v. Rumely, 345 U.S. 41, 45-47, 73 S.Ct. 543, 97 L.Ed. 770 (1953); United States v National Committee for Impeachment, 469 F.2d 1135, 1140-1141 (2d Cir. 1972). In adopting a narrow interpretation of § 460 we are but following the example set by the Supreme Court in its encounters with the Corrupt Practices Act, the federal analog of § 460. Concerned with the serious constitutional doubts that would afflict a broad interpretation of the federal statute's prohibition of contributions or expenditures in support of a political candidate, the court has consciously opted for a restrictive reading of the statute's words. There is even greater cause for constitutional concern in the present case, for the plaintiff's broad construction of § 460 would proscribe corporate contributions or expenditures for the purpose of communicating its expenditures for the purpose of communicating its views to the public with respect to an important issue to be decided by the voters and furnishing information that might be of assistance in arriving at that decision. 'Since corporations must usually expend moneys to communicate their views,' First Natl. Bank of Boston v. Attorney General, Mass., 290 N.E.2d 526, 534 (1972), the effect of the district court's interpretation would be to inhibit such expression." 495 F2d 844, 852

For the reasons set forth in the *Advisory Opinion on Constitutionality of 1975 PA 227, supra,* and the views expressed by the 2nd Circuit Court of Appeals in *Schwartz* v *Romnes, supra,* I conclude that any attempt to enforce 1954 PA 116, § 919, *supra,* where the sole basis of prosecution is a campaign contribution made in support of or in opposition to a ballot question, would violate the freedoms of expression and assembly guaranteed by Const 1963, art 1, §§ 1, 2, 3 and 5.

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