



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

SENSITIVE

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
Deputy General Counsel - Law

Lorenzo Holloway *LH*
Assistant General Counsel
Compliance Advice

Danita C. Alberico *DCA*
Attorney

SUBJECT: Request for Consideration of a Legal Question
Colorado Republican Committee (LRA 961)

I. INTRODUCTION

On December 24, 2014, the Commission received a Request for Consideration of a Legal Question ("Request") from counsel on behalf of the Colorado Republican Committee ("Committee"), the state committee of the national Republican Party in Colorado, whom the Commission had voted to audit pursuant to 52 U.S.C. § 30111(b). See Attachment I (Request).

The Request addresses a proposed audit finding pertaining to the requirements in 52 U.S.C. § 30104(b)(8) and 11 C.F.R. § 104.3(d) that treasurers of political committees disclose the amount and nature of outstanding debts and obligations owed by or to the reporting committee.

During fieldwork, the Audit staff identified a trust account from which the Committee paid a debt of \$13,541.49 to its legal counsel on November 14, 2012. Prior to payment, the Committee had not disclosed the debt on its reports to the Commission. The auditors were unable to determine the source of the funds used to pay the debt or the date on which the Committee transferred the apparent retainer funds into the trust account to support the payment. The auditors requested that the Committee provide information regarding the source of the funds and the date the funds were transferred to the trust account to pay the previously undisclosed debt. In response, the Committee provided invoices related to all of the payments that it made to its legal counsel during the audit period. The auditors determined that the information provided did not address when the funds supporting the \$13,541.49 payment were transferred to the trust account and the source of those funds. In the absence of additional information, the auditors

concluded that the \$13,541.49 should be treated as an undisclosed debt because there was no indication that the obligation existed until the Committee paid the debt. Consequently, the Audit staff informed the Committee during the exit conference that absent additional documentation/information showing that the debt was not required to be reported, the Interim Audit Report would include a finding that the Committee failed to properly disclose debt totaling \$13,541.49 on Schedule D (Debts and Obligations).¹

The Committee, however, questions whether it is required to disclose debts and obligations that it owes to its legal counsel. Attachment 1. The Committee contends that such disclosures impinge upon attorney-client privilege, attorney work-product doctrine, and client confidentiality rights. *Id.* In particular, the Committee contends that the Commission does not have authority under either the Federal Election Campaign Act of 1971, as amended (the "Act"), or 11 C.F.R. § 104.3(d) to compel the Committee or its officers or authorized agents to waive its rights or privileges and disclose any debts and obligations that it may owe to legal counsel. *Id.* The Committee contends that it is required to disclose legal services only after it makes expenditures for the services. *Id.*

We have considered the arguments that the Committee raises in its Request, and we recommend that the Commission conclude that the Committee is required to disclose all debts and obligations owed to its legal counsel.

II. THE COMMITTEE MUST DISCLOSE ALL DEBTS AND OBLIGATIONS OWED TO LEGAL COUNSEL

The Act and Commission regulations require the treasurer of a political committee to disclose the amount and nature of outstanding debts and obligations owed by or to such committee. 52 U.S.C. § 30104(b)(8) and 11 C.F.R. § 104.3(d). State law, however, governs the attorney-client privilege, work-product doctrine, and client confidentiality rights. These doctrines are separate and distinct and, in Colorado, they are established in part by Rule 1.6 of the Colorado Rules of Professional Conduct and Rule 26(b)(3) of the Colorado Rules of Civil Procedure, and are codified at Colo. Rev. Stat. Ann. § 13-90-107(1)(b).

The attorney-client privilege is intended to promote early access to legal advice, and facilitate open communications between the parties in privilege. *Gordon v. Boyles*, 9 P.3d 1106, 1123 (Colo. 2000). The attorney-client privilege covers "matters communicated by or to the client in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations." *Id.* "[T]he privilege applies only to statements made in circumstances giving rise to a reasonable expectation that the statements will be treated as confidential." *Lanari v. People*, 827 P.2d 495, 499 (Colo. 1992) (citations omitted).

Generally, the attorney-client privilege protects communications between the attorney and the client, and the promotion of such confidences is said to exist for

¹ The Audit Division advised this Office that it is possible that the \$13,541.49 payment could be recharacterized as an in-kind contribution at a later stage of the audit depending upon additional information the auditors may receive regarding the source of the funds and/or the nature of the trust account.

the benefit of the client. On the other hand, the work-product exemption generally applies to “documents and tangible things . . . prepared in anticipation of litigation or for trial,” [Colorado Rules of Civil Procedure] 26(b)(3), and its goal is to insure the privacy of the attorney from opposing parties and counsel.

Caldwell v. Dist. Court in & for City & County of Denver, 644 P.2d 26, 34 (Colo. 1982).

Client confidentiality is a doctrine that prohibits an attorney from revealing information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is otherwise permitted by Rule 1.6(b).² Colorado Rules of Professional Conduct Rule 1.6(a).

In addressing the attorney-client privilege and the work-product doctrine, Comment 3 to Rule 1.6(a) makes clear that “the attorney-client privilege and work-product doctrine *apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.*” C.R.P.C. Rule 1.6(a), Comment 3 (emphasis added). The Colorado Rules of Civil Procedure also make clear that the privileges associated with the work-product doctrine are only applicable in the context of judicial proceedings. Colo. R. Civ. P. 26(b)(3) (2008). Regarding confidentiality, Comment 2 to Rule 1.6(a) explains that “a fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, *the lawyer must not reveal* information relating to the relationship” C.R.P.C. Rule 1.6(a), Comment 2 (emphasis added).

The Committee’s counsel has not been called to testify or produce any documents or information regarding any aspect of the Commission’s audit of the Committee. Nor has the Committee’s counsel been asked to reveal any information regarding the attorney’s relationship with the Committee or the legal services provided. Rather, the Audit Division has only requested that the Committee disclose a debt that it owed to its legal counsel.³ The mere fact that the Committee retained counsel, and the amount owed to legal counsel, is not subject to any of the privileges invoked by the Committee, nor has the Committee cited any legal support for such a contention. *See Wesp v. Everson*, 33 P.3d 191, 199 n.15 (Colo. 2001) (citations omitted) (“[A]n attorney generally may not refuse to answer questions about the identity of a client and fee arrangements.”). Thus, we conclude that the Committee failed to show how the attorney-client privilege, work-product doctrine, and/or its rights to client-attorney confidentiality relieve the Committee of its obligation to disclose debt to its legal counsel totaling \$13,541.49.⁴ 52 U.S.C. § 30104(b)(8); 11 C.F.R. § 104.3(d).

² Rule 1.6(b), which focuses on protecting third parties, is not implicated by the issues raised here.

³ The Committee does not explain why disclosure prior to paying for legal services debts would violate its rights and privileges but disclosure after payment would not.

⁴ The Act and Commission regulations may preempt any provision of state law with respect to the reporting of debts and obligations even if Colorado’s attorney-client privilege, work-product doctrine, or client confidentiality rules were relevant to this audit or the Committee’s reporting obligations. 52 U.S.C. § 30143(a).

III. RECOMMENDATION

For the above reasons, we recommend that the Commission conclude that the Committee must disclose the amount and nature of outstanding debts and obligations owed by or to the Committee from its legal counsel under 52 U.S.C. § 30104(b)(8) and 11 C.F.R. § 104.3(d).

Attachment 1: Request for Legal Consideration from the Colorado Republican Committee, dated December 24, 2014.