

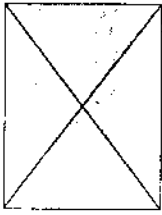


Tom Josefiak - Legal <tomj@rnchq.org> on 05/30/2003 07:52:09 PM

To: enfpro@fec.gov
cc: Charles Spies - Legal <CSpies@rnchq.org>
Subject: RNC Comment on Enforcement Procedures



- Enforcement Procedures RNC Comment.doc



Republican
National
Committee

Counsel's Office

May 30, 2003

Ms. Susan L. Lebeaux
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

VIA E-MAIL: enfpro@fec.gov

Dear Ms. Lebeaux:

We appreciate the opportunity to comment on the Federal Election Commission's ("the Commission") enforcement process based upon the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* as amended ("FECA" or "the Act") as well as the implementing regulations adopted by the Commission. We commend the Commission for its willingness to examine and call for comments on its enforcement process as expressed in its Notice of Public Hearing and Request for Public Comment ("Notice" or "Request"). We request an opportunity to testify before the Commission at its hearing on this subject and will be pleased to clarify and expand upon any of our responses at that time. Our comments are based upon personal experience, observations and dealings with various party organizations and candidates over the years and do not represent any particular entity's views.

Among attorneys who practice before the Commission, there is a long-held belief that, even if their client is ultimately exonerated, the process of dealing with the Commission's enforcement process is burdensome. Although over the past few years the Commission, and specifically the General Counsel's Office, has become more approachable, we encourage the Commission to take this opportunity to reexamine its enforcement processes. The fact that the Commission is aware of the perceived or actual inequities that certain of its enforcement policies perpetrate, as evidenced by the twelve specific areas of questions asked in this Notice, is a positive first step forward. This Commission has the opportunity to modify many of these policies, even if they are long-standing, with the ultimate goal of enforcing the Commission's statutory obligations while at the same time enacting policies that encourage, rather than deter, citizens from participating in the American political process.

I. Designating Respondents in a Complaint

The Commission has a record of expansively naming as respondents to complaints anyone who was even remotely referenced in the complaint. This has caused needless cost and anxiety for organizations and individuals named that must then hire attorneys and file a response. Just as a complaint must meet certain facial requirements to be accepted by the Commission, 2 U.S.C. § 437g(a), for a respondent to be named there must be an allegation in the complaint of a violation of the Act by a particular respondent. Off-hand references to individuals do not constitute credible allegations. If in doubt, Commission staff should err on the side of limiting the number of initial respondents named, and then naming additional respondents only if necessary based upon timely information gleaned during the investigation.

II. Confidentiality Advisement

Commission staff has in past instances issued warnings regarding confidentiality to witnesses in such a manner that led the witnesses to believe that they were not permitted to then speak with counsel representing the respondents. The Commission should clarify its confidentiality advisement in such a way as to make clear that witnesses are not, in fact, prohibited from speaking with respondents' counsels in the course of preparing their defense. The Commission should, if asked, reveal to the witness who the respondents to the matter are, and strive to avoid any tactics that serve to prevent respondents from preparing a fully informed defense.

III. Motions Before the Commission

Although, as the Commission notes, the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* does not *require* that agencies such as the FEC consider motions such as to dismiss and/or reconsider during the course of nonadjudicative proceedings, that begs the question of whether the Commission *should* consider such motions. In limited circumstances, we believe it is necessary for the Commission to afford respondents due process by entertaining such motions. One example of an appropriate circumstance to

entertain such motions would be when genuinely new material has come to light that respondents could not have previously presented. Instead, these (along with whether there should be a tolling of the statute of limitations while the motion is considered) should be case by case determinations to be made by the Commission itself, rather than the General Counsel's office rigidly applying one-sided rules in the context of an adversarial process.

IV. Deposition and Document Production Practices

The Commission practice that is most shocking to seasoned litigators and administrative law practitioners alike is the policy of not allowing deponents to have a copy of their own deposition, even for the purposes of careful review. A recent example entailed a deponent who needed to review his own deposition to ensure its factual accuracy prior to signing it. The General Counsel's office refused to allow that individual to remove a copy of the deposition from the building, notwithstanding the deponent's counsel's (an officer of the court) willingness to sign a sworn affidavit stating that the deposition would not be copied. This policy is offensive (it presumes that attorneys practicing before the Commission can not be trusted), unusual (attorneys in billion dollar lawsuits in federal court are trusted to maintain secrecy of documents, yet somehow the Commission believes it cannot follow such a policy), and inconvenient (unnecessarily forcing witnesses to go to the Commission to review depositions). In contrast to, for example, the Federal Rules of Civil Procedure, this policy seriously hinders the ability of defense counsel to review and prepare responses to both fully defend the respondent and better assist the Commission in coming to a just resolution. We have yet to hear a rational reason why the Commission, and the basically the Commission alone among administrative agencies, has this requirement.

This Request advances the proposition that section 6b of the APA, 5 U.S.C. § 555(c) grants the Commission the right to deny for "good cause" requests for transcripts by witnesses. We agree that upon showing of good cause the Commission should be able to withhold transcripts, but that presumes that the transcript is ordinarily available. The Commission's current practice is contrary to that assumption. We agree that, instead, the Commission's policy should be to have the General Counsel's Office as a policy allow deponent-respondents to procure a copy of their own transcript immediately. If, on a limited case-by-case basis, the General Counsel concludes that it is necessary to withhold the transcript until completion of the investigation, then he should make his case to the Commission, and a majority vote of the Commission should be required before the transcript may be withheld.

V. Appearance Before the Commission

Current Commission practice is to have just one side of the enforcement process, namely the General Counsel's Office, filter all information before it reaches the Commission, both by providing the General Counsel's "interpretation" in a cover memorandum attached to respondents' documents, and also by only allowing the General

Counsel's office to appear before it to, as the Request characterizes it, "answer questions of law and fact" for the Commission. Of course, there are almost always disputes about what constitutes "the law" and/or "facts," so the respondents side is operating at a serious disadvantage. While we understand concerns about dragging out the process – and the Commission should definitely *not* draw an adverse inference if respondent declines to argue before it because cost and resources may prevent many from doing so – basic fairness demands that respondents, upon request, have the ability to appear before the Commission.

VI. Prioritization

In the past enormous amounts of time and resources have been spent by the Commission to pursue legal theories that were at best tenuous, and at worst could not be made in good faith. *See FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997). The Commission has, in contrast, a very good track record on enforcing the core disclosure and non-controversial provisions of the Act. It follows, therefore, that the Commission would be best served in utilizing its resources (and having public credibility) by giving the highest priority for resource utilization to cases where there is solid consensus about the application of the law.

VII. Dealing with 3-3 Votes at the "Reason to Believe" Stage

Simply stated, if there is no Commission majority (4 votes) to proceed, the investigation terminates.

We look forward to answering questions and expanding upon these and other issues that the Commission deems relevant at the upcoming hearing.

Respectfully Submitted,

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