CITY OF PHILADELPHIA

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Philadelphia Board of Ethics
Response to Request for Reconsideration of
Non-Public Board Opinion No. 2022-003

June 3, 2022

Re: Request for Reconsideration of Non-Public Board Opinion No. 2022-003

Dear Requestor:

On May 19, 2022, you asked us to reconsider Non-Public Board Opinion No. 2022-003, which we issued on March 16, 2022.

Pursuant to Board Regulation No. 4, a requestor of a previously issued Advisory Opinion may seek reconsideration of the Opinion if the requestor can demonstrate that: (1) a material error of law has been made; (2) a material error of fact has been made; or (3) a change in materially relevant facts or law has occurred since the requestor made the request for an Advisory Opinion. Board Reg. 4 ¶ 4.23.

The Board may respond to a request for reconsideration by denying the request or by issuing an amended Advisory Opinion that modifies the original Opinion. Board Reg. 4 ¶ 4.26. A request for reconsideration does not suspend or stay the original Opinion that the Board issued to the requestor. *See* Board Reg. 4 ¶ 4.27.

I. Background

Earlier this year, your client, a candidate political committee (the "Committee"), asked us for an Advisory Opinion addressing the extent to which the City's campaign contribution limits apply to money it raises to pay off debt incurred prior to the General Election to defend itself against a lawsuit filed by an opposing candidate in the Primary Election. Your client also asked whether the limits apply to fees and costs incurred after the General Election and in the future.

In response, on March 16, 2022, we issued Non-Public Advisory Opinion No. 2022-003 (the "Opinion") in which we advised that the contribution limits apply to any money received by the Committee to pay fees and costs associated with the opposing candidate's lawsuit, regardless of whether such fees and costs were incurred before or after the General Election.

On May 19, 2022, you sent a letter requesting that we reconsider Opinion 2022-003. You contend that "the Board's ruling under Paragraph 1.1(h)(iii) of Board Regulation No. 1 requires reconsideration because the Board erred in its analysis of the facts and the law, and ignored the serious due process and fairness implications of its decision." Request for Reconsideration, pg. 2.

II. Discussion

You present your argument in favor of reconsideration in four bullet points on pages 3 and 4 of your letter. In the first three bullets, you argue, essentially, that we erred because we improperly accepted the opposing candidate's allegations as true. In the fourth bullet, you argue that we erred because we misread Paragraph 1.1(h)(iii) of Regulation No. 1.

Contrary to the argument you make in the three bullet points on page 3 of your letter, we did not accept as true the allegations made by the opposing candidate. Indeed, on page 5 of the Opinion, we specifically state: "We do not, of course, make any finding as to the validity of [the opposing candidate's] claims." Rather, we found that, based on the totality of the circumstances of the opposing candidate's suit, including the basis for the allegations he makes and facts already known to the Board this particular action did arise directly out of the conduct of the former candidate's campaign.[1] Indeed, the alleged improper acts that are the basis for the opposing candidate's action were made specifically because the opposing candidate was the former candidate's opponent in the campaign for elected office.

That is not to say that we base our findings solely on a plaintiff's allegations. A case may arise where the allegations are so untethered from reality that we would find them incapable of supporting a conclusion that the matter in question arose from the conduct of the defendant candidate's campaign. Instead, we consider the entire context and the totality of the circumstances. In this case, as explained in the Opinion, the totality of the circumstances compels a finding that the lawsuit in question arose from the conduct of the former candidate's campaign.

With regard to the argument you make in the bullet point on page 4 of your letter, we found that the plain language of Paragraph 1.1(h)(iii) of Regulation No. 1 compels the conclusion that it covers the type of action brought by the opposing candidate.

Paragraph 1.1(h)(iii) refers to "any civil, criminal, or administrative proceeding arising directly out of the conduct of the candidate's campaign or with respect to a covered election, such as a nomination petition challenge, a recount proceeding, or a Board investigation."

[1] A candidate who is defending against a lawsuit brought by an opponent will often contend that some or all of the allegations are untrue. If we were to hold that a lawsuit did not arise from the conduct of a defendant candidate's campaign simply because the allegations of that lawsuit are disputed by the defendant, it would render Paragraph 1.1(h)(iii) of Regulation 1 meaningless.

You argue that the type of lawsuit brought by the opposing candidate is "fundamentally different" from a nomination petition challenge, a recount proceeding, or a Board investigation and therefore outside the scope of Paragraph 1.1(h)(iii). You state that a principle of statutory construction is that associated words bear on one another's meaning and cite to a U.S. Supreme Court case, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 577-78 (1995). In *Gustafson*, the Court discussed the doctrine of *noscitur a sociis*, which is typically translated as "a word is known by the company it keeps." *See* 513 U.S. at 575. It is a "canon of construction holding that the meaning of an unclear word or phrase, esp. one in a list, should be determined by the words immediately surrounding it." Black's Law Dictionary (11th ed. 2019).[2]

We see no need to apply the doctrine of *noscitur a sociis* in this case as the meaning of the term at issue – "any civil…proceeding" – is clear. It means: *any* civil proceeding, which includes the opposing candidate's civil action. Even if we were to apply the doctrine, however, the company the relevant phrase keeps – "any civil, criminal, or administrative proceeding" – leaves no doubt as to the intended breadth of the term.[3] Moreover, as demonstrated by the introductory phrase "such as," the three subsequent examples – "a nomination petition challenge, a recount proceeding, or a Board investigation" – are just that, examples, and are plainly not meant to be exhaustive, exclusive, or limiting. Because the opposing candidate's civil action is a typical civil proceeding, we have no difficulty in concluding that it is covered by Paragraph 1.1(h)(iii).

We note that, aside from asserting that we made an error of law, you contend that, as a matter of policy, we should reach a different result because otherwise our Opinion will "significantly [limit] [the Committee's] ability to continue its vigorous defense of [the opposing candidate's lawsuit]." You also assert that the Committee will not be able to "easily fundraise" to cover the costs of the litigation and that the law firm (the "Defense Firm") cannot provide the representation *pro bono* as that "will be deemed to be an in-kind contribution."

We agree that it would be easier for the former candidate to fundraise if they were permitted to accept unlimited contributions from a small number of donors, or even a single donor. As we stated in the Opinion, we appreciate the challenge this type of litigation poses for candidates. But we are bound to interpret the law as written by the legislature; we cannot rewrite it. And, in our view, the law as written does not permit the interpretation that you urge on us.

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[2] The Third Circuit has noted that when the phrase under examination uses the conjunction "or," as in this case, the doctrine of *noscitur a sociis* "often 'is of little help.'" *Pellegrino v. U. S. Transp. Sec. Admin., Div. of Dep't of Homeland Sec.*, 937 F.3d 164, 174-75 (3d Cir. 2019), citing *In re Continental Airlines, Inc.*, 932 F.2d 282, 288 (3d Cir. 1991).

[3] In *Gustafson*, the Supreme Court observed that it relied upon the doctrine *noscitur a sociis* "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." 513 U.S. at 575. In this case, the use of the word "any" and the inclusion of all three legal forums available in our legal system indicates that breadth of coverage is precisely what is intended in this case. In that context, the type of lawsuit brought by the opposing candidate is not "inconsistent" with the terms "a nomination petition challenge, a recount proceeding, or a Board investigation."

City Council, however, has recognized the burden that such litigation can impose on a candidate and amended the Campaign Finance Law in 2010 to permit candidates to establish litigation defense committees to engage in additional fundraising. *See* Bill No. 100124 (approved June 16, 2010). As we note in the Opinion, if the former candidate sets up a litigation defense committee, he may accept maximum contributions from a single donor to both the Committee and the litigation defense committee. This means that a single political committee could give a total of $25,200 and a single individual could give a total of $6,200 and all such funds could be used to either pay down the existing litigation debt or to pay for future litigation costs.

Lastly, you are correct that if the Defense Firm were to forgive debt already incurred, such forgiveness would be an in-kind contribution subject to the campaign finance limits. But that does not mean that the firm cannot agree to provide any future services on a *pro bono* basis. If the firm chose to, it may provide future representation on a *pro bono* basis.

III. Conclusion

As explained in more detail above, after reviewing your request, the Board finds that it did not make an error of law or an error of fact in Board Opinion No. 2022-003. As such, your request is denied and the advice provided remains in effect.

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Since you requested a non-public opinion, neither the original Opinion nor the original of this Response to your Request for Reconsideration will be made public. As required by the Ethics Code, versions of the Opinion and this Response that have been redacted to conceal facts that are reasonably likely to identify the requestor are being made public. If you have any questions, please contact General Counsel staff.

BY THE PHILADELPHIA BOARD OF ETHICS

/s/*Michael H. Reed*

Michael H. Reed, Esq., Chair
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Encl.