September 9, 2014

Flowers-Barney Advisory Opinion 2014-02

You have each requested, on behalf of the Delaware GOP (the "Republican Party") and the Barney for Delaware campaign committee (the "Barney Committee"), respectively, an Advisory Opinion, pursuant to my authority set forth in 15 *Del. C.* § 8041(2), on the impact of Chipman Flowers' withdrawal from the race for State Treasurer. The recitations of relevant facts that you provided are not contradictory and, as supplemented by the public records of my office, are accepted as the operative set of facts for purposes of this Advisory Opinion.

On March 5, 2014, Mr. Flowers filed for reelection as a Democratic candidate for State Treasurer. On February 18, 2014, Sean Barney challenged Mr. Flowers by filing as a second Democratic candidate. The Barney Committee was created on January 24, 2014. From January 24, 2014, until Mr. Flowers' withdrawal from the race on August 28, 2014, the Barney Committee actively campaigned in contemplation of a primary election against Mr. Flowers to be held on September 9, 2014. As of the date of the September 9, 2014 primary election, the Barney Committee will have spent approximately ninety-five percent (95%) of the two hundred and twenty eight (228) days the committee has existed running a primary election campaign.

With this background, the requestors ask for an Advisory Opinion on the treatment of the contributions that the Barney Campaign received from its January 24, 2014 formation date through the August 28, 2014 effective date of Mr. Flowers' withdrawal. Specifically, the requestors ask whether the contributions received during that time period are reportable during the primary election period or the general election period. While the requestors advocate for different conclusions in this Advisory Opinion, they agree that the relevant statutes governing this issue are set forth in Chapter 80, Title 15 of the Delaware Code.

Fifteen 15 *Del. C.* § 8010(a) reads, in pertinent part:

> No person (other than a political party) shall make, and no candidate, treasurer or anyone acting on behalf of a candidate or candidate committee shall accept, any contribution which will cause the total amount of such person's contributions to or in support of such candidate to exceed, with

respect to a statewide election, $1,200 during an *election period*.. . .(emphasis added).

"Election period" is a defined term. Fifteen *Del. C.* § 8002(11)(a) reads, in pertinent part:

(11) "Election period" means:

a. For a candidate committee:

4. Notwithstanding the foregoing, for purposes of the limitations under § 8010 of this title on contributions from persons other than political parties and political action committees, *for a candidate in a general election who was nominated for such office in a primary election, the election period shall end on the day of the primary* and the next election period shall begin on the day after the primary. (emphasis added).

This is an issue of first impression in Delaware and so I must align my Advisory Opinion with my understanding of how a Delaware court would rule on this issue, applying relevant principles of statutory interpretation and examining the legislative intent of the statutory scheme.

The Delaware Supreme Court has recently opined on the purpose and scope of Delaware's election laws. In *Sussex County Dept. of Elections v. Sussex County Republican Committee*[1], the Election Commissioner advocated for a narrow reading of the term "incapacity" under 15 *Del. C.* § 3306 to exclude the candidate nominated to replace an incapacitated candidate. Rejecting that narrow interpretation, the Delaware Supreme Court, citing 15 *Del. C.* § 101A, wrote:

> The General Assembly has announced the purposes underlying our election laws. Our election statutes are intended to "assure the people's right to free and equal elections" and to establish a system "[f]or the orderly and fair selection of party nominees ... and for the filling of vacancies among such nominees."[2]

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[1] *Sussex County Dept. of Elections v. Sussex County Republican Committee*, 58 A.3d 418, 423 (Del. 2013). *See also LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 933 (Del. 2007) ("An ambiguous statute should be construed 'in a way that will promote its apparent purpose and harmonize it with other statutes' within the statutory scheme. A statute is ambiguous if 'it is reasonably susceptible of different conclusions or interpretations' or 'if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature') (internal citations omitted); *CML V, LLC v. Bax*, 28 A.3d 1037, 1040 (Del. 2011) ("If the statute is ambiguous, then we consider it as a whole and we read each section in light of all the others to produce a harmonious whole. We also ascribe a purpose to the General Assembly's use of particular statutory language and construe it against surplusage if reasonably possible." (Citations omitted).

[2] *Id.* at 423 (citations omitted).

The court cited to rules of statutory construction that militate against an interpretation that thwarts the legislative intent underlying a statute. The court wrote:

> When construing a statute, we attempt to ascertain and give effect to the General Assembly's intent. First, we must determine whether the relevant statute is ambiguous. A statute is ambiguous when it can reasonably be interpreted in two or more different ways "or if a literal reading of its terms 'would lead to an unreasonable or absurd result not contemplated by the legislature.' " If we determine that a statute is unambiguous, we give the statutory language its plain meaning. If we determine that a statute is ambiguous, 'we consider the statute as a whole, rather than in parts, and we read each section in light of all others to produce a harmonious whole.' We presume that the General Assembly purposefully chose particular language and therefore construe statutes to avoid surplusage if reasonably possible.[3]

The Republican Party contends that, based on the express language of Section 8002 (11)(a)(4), Mr. Barney is not a candidate nominated for office in a primary election and Section 8002(11)(a)(4) is inapplicable. Accordingly, Section 8002(11)(a)(3)[4] applies, and all contributions that Mr. Barney receives, both before and after the primary election, are reportable in the general election period. The Barney Committee contends that the express language of Section 8002(11)(a)(4) cannot be reconciled with the language of Section 8010(a), as neither statute appears to contemplate the possibility the late withdrawal of a primary election candidate. I believe that both positions may be reasonable interpretations of the statute. In addition, I conclude that a court reviewing the application of Section 8002(11)(a) to the set of facts provided to me would lead to an unreasonable result not contemplated by the General Assembly. For these reasons, I conclude that Section 8002 is ambiguous when it is applied to this set of facts. I do not believe that the General Assembly intended to deny a primary election period to a candidate campaigning in good faith to win a primary race simply because the candidate's opponent unilaterally withdrew from the race less than two weeks before the primary election. The inequity of this situation is particularly evident where, as here, the Barney Committee spent at least 176 days in a primary campaign from the date Mr. Flowers filed his candidacy (March 5, 2014) to the date of withdrawal, while Republican candidate Ken Simpler spent only 51 days in a primary campaign due to his opponent's late filing of her notice of candidacy (July 8, 2014).

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[3] *Id.* at 422 (internal citations omitted).

[4] 15 *Del. C.* § 8002(11)(3) reads:

"Election period" means:

a. For a candidate committee:

3. For a candidate for election to an office which the candidate does not hold, the period beginning on the day on which the candidate first receives any contribution from any person (other than from the candidate or from the candidate's spouse) in support of that candidate's candidacy for the office, and ending on the December 31 immediately after the general election at which the candidate seeks election to the office.

In addition, I am mindful of applicable constitutional principles embodied by the Equal Protection clause of the United State Constitution. I am aware of a recent Tenth Circuit Court of Appeals decision that, in an as-applied challenge, struck down different contribution limits for write-in candidates and major party candidates who were not running in a primary election as violative of the Equal Protection clause.[5] Primary election expenses are separate from, and in addition to, general election expenses. To require that the Barney Committee forego its right to a primary election period under this set of facts may raise Equal Protection issues. Here, the Barney Committee acted in good faith, relying on the filing of Mr. Flowers to run for State Treasurer, to raise and spend money to win a primary election. The Flowers-Barney primary election was cancelled solely due to action by Mr. Flowers – withdrawal from the race – fewer than two weeks before the primary election. I believe that a Delaware court would interpret Sections 8002 and 8010 as advocated by the Barney campaign to preserve its constitutionality.[6]

Although I believe that this Advisory Opinion is consistent with a ruling that would be made by a Delaware court, this Advisory Opinion is based exclusively on the set of facts provided by the Republican Party and the Barney Committee. I urge the General Assembly to examine whether an amendment to clarify the meaning of Section 8010 would be instructive or appropriate.

[5] *See Riddle v. Hickenlooper*, 742 F.3d 922, 930 (10th Cir. 2014).

[6] *Moore v. Wilmington Hous. Auth.*, 619 A.2d 1166, 1173 (Del. 1993) ("A court has a duty to read statutory language so as to avoid constitutional questionability and patent absurdity and to give language its reasonable and suitable meaning.").