February 12, 2014
AO-14-02

Cheryl Cronin, Esq.
Cronin & Leonard
24 Federal Street, 12th Floor
Boston, MA 02110

Re: Coordinated Communications

Dear Ms. Cronin:

This letter is in response to your request for an opinion regarding OCPF Interpretive Bulletin IB-06-01. Your questions concern consultants who may wish to provide services for both a candidate committee and an independent expenditure PAC or other entity disclosing independent expenditures. 1 In IB-06-01, the office stated that if there is “coordination” between a candidate or candidate committee and an independent expenditure entity, an expenditure by the entity relating to that candidate or committee is not independent but instead is an in-kind contribution subject to the limits and prohibitions of the campaign finance law.

As discussed in more detail below, one way for there to be coordination is if a common vendor shares information obtained from the candidate or committee with the entity paying for a communication. Specifically, if a common vendor uses or conveys information about the campaign plans, projects, activities or needs of a candidate (other than information that is publicly available), there is coordination.

QUESTIONS

You state that there are a limited number of individuals and firms in Massachusetts with the experience to provide consulting services for political campaigns. This limited group often consults with both candidates and independent expenditure entities. You have asked for an opinion regarding whether a consultant’s contracting with both a candidate committee and an independent expenditure entity would mean that resulting expenditures by the independent expenditure entity would necessarily be considered “coordinated” with the candidate committee. There are three categories of vendors that you are particularly interested in – researchers, compliance consultants and attorneys.

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1 Such independent expenditure PACs and entities are collectively referred to in this opinion as “independent expenditure entities.” Consultants who provide services to both candidate committees and independent expenditure entities are referred to as “common vendors.”
1. Experienced vendors accumulate a substantial amount of information and political knowledge, such as information about campaign tools and political dynamics, in the course of their political work. Please confirm that the term “information” covered by the test is only information related to the particular campaign’s plans, projects, activities and needs.

Response: Yes. Further, responding to your the specific example, general information about campaign tools and political dynamics would not appear to be information related to a particular campaign’s plans, projects, activities or needs.

2. Please confirm that publicly available information can always be shared or utilized by a common vendor for any purpose.

Response: Yes, such information may be shared or utilized by a common vendor for any purpose.

3. Assuming that a common vendor retained by both a candidate’s committee and an independent expenditure entity is contractually prohibited from sharing information relating to campaign plans, projects, and activities or needs, may the common vendor engage in any type of work on behalf of each client?

Response: Yes, and we strongly suggest that vendors use such contract provisions to ensure compliance. It is crucial that the common vendor be very careful to not share relevant campaign information. As with other mechanisms which are implemented in the campaign finance area to ensure compliance with the law, such as a firewall within an organization, it is very important that all individuals involved comply with the safeguards which have been established.

4. May a common vendor work for both sides of a firewalled organization – the side coordinating with a candidate and the side making independent expenditures, provided that the common vendor is contractually prohibited from sharing campaign plans, projects, activities or needs, with each side?

Response: Yes, and we strongly suggest that vendors use such contract provisions to ensure compliance. It is crucial that the common vendor be very careful to not share the relevant campaign information. It is very important that all individuals involved comply with the safeguards which have been established.

**DISCUSSION**

The Massachusetts campaign finance law, M.G.L. c. 55, does not define the terms “coordination,” “coordinated expenditure,” or even “independent expenditure PAC.” IB-06-01, however, provides guidance and describes a three-part test for determining coordination. One part
of the test (the "conduct prong")\(^2\) is satisfied, i.e., it indicates coordination, if a communication is created, produced or distributed by an independent expenditure entity at the request or suggestion of the candidate, the candidate's committee, or an agent of the committee.\(^3\) Coordination may also occur if the candidate, the candidate's committee, or an agent of the committee is materially involved in decisions made by an independent expenditure entity regarding the content, intended audience, method of communication, specific media outlet used, or the timing, frequency, size or prominence of a public communication. A third way for the conduct prong to be satisfied is if there are substantial discussions about the communication between the person or entity paying for the communication or the employees or agents of that person or entity and the candidate or committee.

Alternatively, the conduct prong may indicate coordination if the person or entity paying for the communication uses a common vendor or retains an employee or independent contractor who has previously worked for the candidate or committee. The common vendor or employee standard may be satisfied, i.e., there may be coordination, when a vendor who has worked for a candidate within the previous 90 days also works for an independent expenditure entity, if the vendor uses or conveys information about the campaign plans, projects, activities or needs of the candidate obtained from the candidate or committee to the entity paying for the communication.

The test for determining coordination is based on regulations issued by the Federal Election Commission, which state that, within the scope of the federal campaign finance law, the use of a common vendor is not, in and of itself, sufficient to meet the conduct prong of the coordination test. See 11 CFR 109.21(d)(4) and (5). The federal regulations state that for there to be coordination, the common vendor must use or convey non-public information to the independent expenditure entity about the plans or needs of the candidate, or information previously used by the vendor in serving the candidate, and that information must be material to the creation, production or distribution of the communication. See also FEC booklet “Coordinated Communications and Independent Expenditures” published June 2007 (updated January 2013) (www.fec.gov/pages/brochures/indexp.shtml) and 68 FR 421, 435-437.

We find this approach to coordination to be persuasive. The fact that an entity that plans to make an independent expenditure uses the same vendor as a candidate who will benefit from the independent expenditure does not, by itself, constitute coordination and therefore an in-kind contribution by the entity to the candidate.

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\(^2\) See Federal Election Commission regulation 11 CFR 109.21. The other parts of the test are called the “payment” and “content” prongs. The “payment” part of the test is reached if a communication is paid for by someone other than the candidate named in the communication or the candidate’s committee, or an agent of the candidate or committee. The “content” part of the test is reached if a communication expressly advocates the election or defeat of a clearly identified candidate, contains an electioneering communication or republishes campaign materials prepared by a candidate or the candidate’s committee. See pages 7-8 of OCPF 1B-06-01. Although the office generally follows the federal standard for determining coordination, it should be noted that not all aspects of the federal test will necessarily be applied in Massachusetts state campaigns.

\(^3\) A person is an “agent” of a committee, for purposes of determining whether an entity made coordinated communications, if the person is given actual authority by the candidate or committee to perform certain actions related to the creation, production, or distribution of communications by the entity. See 11 CFR 109.3. For example, if a consultant working for a candidate is asked by a candidate to help an entity create a campaign mailing, the consultant is an “agent” of the committee for purposes of the mailing.
Whether there is coordination is a fact question, i.e., it depends on the specific facts involved in the relationship between the vendor and the candidate, the nature of the work done by the vendor for the candidate and entity, and any and all communications between the vendor, the candidate, and the entity.

In conclusion, a political researcher, compliance consultant or attorney may work for a candidate’s committee and also for an independent expenditure entity if information obtained by the vendor from the committee relating to the campaign’s plans, projects, activities or needs is not conveyed or used when the vendor provides services to the independent expenditure entity. If OCPF were to receive some evidence that the common vendor shared information related to the candidate’s plans, projects, activities or needs, we would of course closely review such activities to ensure compliance. Any vendor may use information that is available from public sources, e.g. media stories or the candidate’s website, in independent expenditure communications.

This opinion is issued within the context of the Massachusetts campaign finance law and is provided solely on the basis of representations in your letter and conversations with OCPF staff. The emerging issue of coordination presents difficult challenges for regulators and practitioners. OCPF will strive to provide timely and accurate advice in a proactive manner through advisory opinions and interpretive bulletins. In addition, the office will continue to closely observe, and, if necessary, review the actual activity and contract provisions of campaigns and independent entities that utilize common vendors.

Please contact us if you have further questions regarding this opinion or any other campaign finance issue.

Sincerely,

Michael J. Sullivan
Director

MJS/gb