

ADVISORY 2009-12

October 1, 2009

To: All County Boards of Elections

Re: Effect of permanent federal injunction in *O'Brien v. Brunner* and enforcement of R.C. 3517.103

The purpose of this advisory is to inform Ohio boards of elections and affected candidates for state offices of the effect of the permanent injunction issued in *O'Brien v. Brunner* (S.D. Ohio No. 2:09-cv-733) by the federal district court of the Southern District of Ohio, Eastern Division. This decision changes how the Secretary of State and boards of elections must administer Ohio election law concerning enforcement of R.C. 3517.103, governing contributions of “personal funds” to a candidate’s campaign committee.

On August 20, 2009, Sandra O’Brien, a declared but not yet filed candidate for the political party nomination for the office of Secretary of State in the 2010 Republican primary election, filed a lawsuit challenging the constitutionality of provisions of R.C. 3517.103. In this lawsuit the federal district court declared R.C. 3517.103 unconstitutional, granting a permanent injunction prohibiting the Secretary of State and the Ohio Elections Commission from enforcing subsections (C), (D), (E), and (F) of R.C. 3517.103, and holding that those sections of the Ohio Revised Code were “indistinguishable” from a federal statute struck down by the United States Supreme Court in *Davis v. Federal Election Commission*, 128 S.Ct. 2759 (2008).

The law invalidated by the court and now prohibited from being enforced applies to candidates for statewide office¹ and candidates for the office of member of the General Assembly (i.e., member of the Ohio House of Representatives or Ohio Senate) and candidates for member of the state board of education. Since the law that the court struck down applies only to these candidates, no other candidates are affected by the court’s ruling.

Previous Enforcement of R.C. 3517.103 and Required Notices

Before August 26, 2009, a candidate who had filed the proper notice was permitted to make or receive unlimited contributions of “personal funds” and make unlimited expenditures of these funds to or from his or her campaign committee, so long as any contribution of personal funds aggregating more than \$500 was first deposited into the candidate’s campaign committee fund. R.C. 3517.103(B)(1). The law defines “personal funds” to include contributions from or loans guaranteed by the candidate or the candidate’s spouse, parents, children, sons-in-law, daughters-in-law, brothers, sisters, grandparents, mother-in-law, father-in-law, brothers-in-law, sisters-in-law, or grandparents by marriage. R.C. 3517.103(A)(1)(b). The reason for this

¹ For purposes of R.C. 3517.103, “statewide candidate” is defined as “the joint candidates for the offices of governor and lieutenant governor or a candidate for the office of secretary of state, auditor of state, treasurer of state, attorney general, or member of the state board of education.”

separate definition of “personal funds” is for the purposes of exempting them from contribution limits to state campaign committees.

Under the law before August 26, 2009, any statewide candidate that received or expended (or expected to expend) more than \$100,000 of personal funds in a primary election or \$150,000 of personal funds in a general election was required to file a “Notice of Use of Personal Funds” (Form 32-G), also known as a “Personal Funds Notice.” R.C. 3517.103(C)(1). Likewise, any candidate for the office of member of the General Assembly or state board of education that received or expended (or expected to expend) more than \$25,000 of personal funds in a primary election or a general election was required to file a Personal Funds Notice. R.C. 3517.103(C)(2). The Personal Funds Notice was required to be filed at a subjective period of time, and failure to file it could subject the candidate to forfeiture of the office. R.C. 3517.103(C)(3). When a candidate filed a Personal Funds Notice, his or her opponent could then file a “Declaration of No Limits” (Form 32-H), to permit the opponent to be free of the contribution limits and accept contributions in excess of those limits. (See, R.C. 3517.102 and R.C. 3517.103(D).) Filing a Personal Funds Notice or a Declaration of No Limits also subjected the candidate’s committee to certain statutory requirements regarding the disposal of excess funds at the end of a primary election or general election campaign. See R.C. 3517.1010.

Enforcement of R.C. 3517.103 After Federal Injunction

According to the District Court’s order, candidates for statewide office or the office of member of the General Assembly may no longer file, nor are they required to file a Personal Funds Notice. Elimination of the Personal Funds Notice means that only candidates, themselves, are exempt from the general individual campaign contribution limits contained in R.C. 3517.102(B). Contributions by all other individuals covered in the definition of “personal funds” – i.e., spouse, children, sons-in-law, daughters-in-law, brothers, sisters, grandparents, mother-in-law, father-in-law, brothers-in-law, sisters-in-law, or grandparents by marriage – remain subject to those general limits in all circumstances. This conclusion follows from an Advisory Opinion issued by the Ohio Elections Commission:

The contribution limits contained in R.C. 3517.102 are applied to “individuals” by the terms of division (B)(1) of 3517.102. Each of the persons included in the definition of “Personal Funds” in R.C. 3517.103(A)(1) is an individual for the purposes of the contribution limits of R.C. 3517.102(B). The contribution limits contained in R.C. 3517.102, therefore, continue to apply to all of the persons identified in R.C. 3517.103(A)(1), except the candidate, until such time as a Personal Funds Notice is filed.

Ohio Elections Comm. Adv. 2001ELC-02.

Because the District Court’s order prohibits filing of a Personal Funds Notice, the general limits apply to contributions from *all* individuals, including the named family members in the definition of “personal funds,” except the candidate, himself or herself. The requirement that any “personal funds” contributions of more than \$500 during an election period, whether from the candidate or a family member, must be deposited into the campaign committee’s funds before they may be spent by the committee is still in effect and remains unchanged by the order.

The District Court’s order also prohibits the filing of a “Declaration of No Limits” (Form 32-H) by any opponent of a candidate who has filed a Personal Funds Notice before August 26, 2009. Contributions to any opponent of a candidate who has filed a Personal Funds Notice before

August 26, 2009, continue to be governed by the general campaign contribution limits under R.C. 3517.102.

Impact on Candidates who Previously Filed Notices

Any candidate who has filed a Personal Funds Notice before August 26, 2009, and whose committee has received contributions of “personal funds” as defined in R.C. 3517.103(A)(1)(b) **before** the filing of a Personal Funds Notice, may retain those contributions. Any candidate who has filed a Personal Funds Notice before August 26, 2009, and whose committee has received contributions of “personal funds” as defined in R.C. 3517.103(A)(1)(b) **after** the filing of a Personal Funds Notice but **before** August 26, 2009, may retain any funds contributed by the candidate, but must disgorge any amount in excess of the limit and/or resulting from the aggregation of all contributions received from the family member who has contributed “personal funds” during the primary election period. The excess contributions must be disposed of in accordance with R.C. 3517.1010. In addition, all “personal funds” contributions from individuals other than the candidate received on or after August 26, 2009, are subject to the applicable contribution limits set forth in R.C. 3517.102(B), including their aggregation with funds received from the same individual before August 26, 2009 and during the primary election period, (with such limits being adjusted for inflation under R.C. 3517.104.) Any candidate who filed a Personal Funds Notice before August 26, 2009, is not required to file any of the reports required under subsections (C)-(F) of R.C. 3517.103 or required by those subsections to be filed under R.C. 3517.1010. However, if a candidate’s committee must disgorge contributions of personal funds from an individual other than the candidate, such disgorgement must be reported on the candidate’s campaign committee’s next regular report as one or more expenditure of funds with a notation that it is pursuant to this Advisory 2009-12.

Additional Information

Due to these changes in the law, the portions of pages 9 through 11 of Chapter 3 of the Campaign Finance Compliance & Disclosure Guide addressing “Personal Funds Used by Statewide and General Assembly Candidates” are no longer valid. In the near future, the Campaign Finance Division will be issuing a revised handbook outlining Ohio’s campaign finance laws that will reflect the effect of the District Court’s order. In the interim, a copy of this Advisory should be provided to any candidate that files a Designation of Treasurer (Form 30-D) for a statewide office, as defined under R.C. 3517.103(A), or for the office of member of the General Assembly or member of the state board of education.

Any questions regarding this Advisory may be directed to Curt Mayhew, Campaign Finance Administrator, or Kelly Neer, Assistant Campaign Finance Administrator, at 614-466-3111.

Sincerely,

Jennifer Brunner