



FLORIDA DEPARTMENT *of* STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

October 5, 2016

Mr. Wesley Davis
P.O. Box 2432
Vero Beach, Florida 32962

Re: DE 16-12 Advertising – Political
Disclaimers; Meaning of “Expressly
Advocates”; Electioneering
Communications; §§ 106.011, 106.143,
106.1439, Florida Statutes

Dear Mr. Davis:

As a candidate for county office, you have requested an advisory opinion regarding whether certain political mailers will require disclaimers. Because you are a candidate proposing to take certain actions with respect to the Florida Election Code, the Division of Elections is authorized to issue an opinion pursuant to section 106.23(2), Florida Statutes.

FACTS

You state in your request that as a candidate for Indian River County Property Appraiser, you are contemplating entering into an agreement with a company that will disburse political mailers. The mailers will include your political flyers and a “sample ballot”¹ that will list all the candidates’ names in each of their respective races but that will also highlight your name “in bold red with an arrow.” No other candidates who are running for property appraiser will have their names highlighted. You ask whether, if you pay this company to highlight your name on the “sample ballot,” you need to include any disclaimers on the “sample ballot.”

¹ Throughout this opinion, the Division uses quotation marks to refer to the “sample ballot” you reference because it is not actually a true *sample ballot* as contemplated by the Election Code. A true sample ballot is a document in the form of the official ballot which lists the names of all qualified candidates, and which is published by the supervisor of elections. See § 101.20, Fla. Stat.

ANALYSIS

Chapter 106 of the Florida Statutes contains the definitions and requirements for various types of disseminated messages. If a particular message is regulated under chapter 106, then it must meet the requirements for such regulated communications. *See, e.g.*, § 106.011(15), Fla. Stat. (political advertisement definition); § 106.011(8), Fla. Stat. (electioneering communication definition).

To be a “political advertisement,” a communication must “expressly advocate” the election or defeat of a candidate or the approval or rejection of an issue. *See* § 106.011(12), (15), Fla. Stat. The term “express advocacy” is not defined in the Election Code. However, the Division has repeatedly drawn on the meaning given to that term by the United States Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), where it was noted that certain “magic words”—such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” and “reject”—constitute “express advocacy.” *See id.* at 44 n.52; *cf. Div. of Elections Op. 16-03* (Apr. 22, 2016); *Div. of Elections Op. 14-03* (June 25, 2014); *Div. of Elections Op. 12-05* (May 24, 2012); *Div. of Elections Op. 05-06* (Sept. 21, 2005). Whether a particular communication contains “express advocacy” is a matter that must be evaluated on a case-by-case basis. *See Div. of Elections Op. 14-03*.

Here, there is no indication from the facts you present that any “magic words” or language similar to the “magic words” will be present on the “sample ballot,” so that it is unlikely that the language on the “sample ballot” will contain express advocacy. In turn, the language will likely not be a “political advertisement” and will not need the political advertisement disclaimers referenced in section 106.143, Florida Statutes.

The next issue is whether the language of the proposed “sample ballot” could be considered an “electioneering communication.” To be an “electioneering communication,” a communication must meet several requirements, as follows:

(8)(a) “Electioneering communication” means communication that is publicly distributed by a television station, radio station, cable television system, satellite system, newspaper, magazine, direct mail, or telephone and that:

1. Refers to or depicts a clearly identified candidate for office without expressly advocating the election or defeat of a candidate but that is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate;
2. Is made within 30 days before a primary or special primary election or 60 days before any other election for the office sought by the candidate; and
3. Is targeted to the relevant electorate in the geographic area the candidate would represent if elected.

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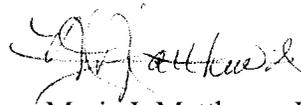
§ 106.011(8)(a), Fla. Stat.

Based on your description of the “sample ballot” as a listing of candidate names that will highlight your name and point to your name with an arrow, it appears this will meet the first prong of the definition of “electioneering communication.” Therefore, if the other two prongs of the “electioneering communication” definition are met, the “sample ballot” should be accompanied by the disclaimer language for electioneering communications as required by section 106.1439, Florida Statutes.

SUMMARY

A “sample ballot” which meets the definition of an electioneering communication must include the electioneering communication disclaimer language required by section 106.1439, Florida Statutes.

Respectfully,

A handwritten signature in black ink, appearing to read "Maria I. Matthews". The signature is written in a cursive style with a large initial "M".

Maria I. Matthews, Esq.
Director, Division of Elections