



## MEMORANDUM

**TO:** David Hallman, President  
Florida Association of County Attorneys

**FROM:** Leonard Berger, Chair  
General Government Committee

**SUBJECT:** SB 216

**DATE:** January 25, 2010

A handwritten signature in black ink, appearing to be "L. Berger", is written over the "FROM" line of the memorandum.

Denise M. Nieman  
**County Attorney**

P.O. Box 1989  
West Palm Beach, FL 33402-1989  
(561) 355-2225  
Suncom: (561) 273-2225  
FAX: (561) 355-4398  
www.pbcgov.com

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The General Government Committee was asked by the FACA Board of Directors to review Senate Bill 216 and its impact on local government's ability to advocate for or against a particular ballot issue. This new law prohibits local governments from expending public funds to pay for a "political advertisement" or an "electioneering communication." But shortly before this law took effect, all other laws regarding "electioneering communication" were declared unconstitutional in *Broward Coalition of Condo Homeowners, et al. v. Browning, et al.*, 2009 WL 1457972 (N.D. Fla. 2009). Thus, while the language in SB 216 remains intact, the court declared all other references to electioneering communication to be unconstitutional, including the definition of the term.<sup>1</sup>

For all practical purposes, what remains of this law is a prohibition against expending public funds for a political advertisement concerning a ballot issue. The term "political advertisement" consists of two elements.<sup>2</sup> The first element concerns the nature of the message: expressly advocating for or against a particular candidate or ballot issue. Express advocacy employs very explicit terms such as "vote for," "vote against," "accept," "reject," and the like. The second element concerns the means of distributing the message. In order for the message to be considered a "political advertisement," money must be spent in placing the message in various communications media listed in Chapter 106, Florida Statutes, such as television, newspaper, direct mail, or radio.<sup>3</sup>

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When a public official or governing body communicates a position on a particular ballot issue, *both* elements must be present in order for the communication to be a political advertisement under the law. As such, a resolution adopted by a governing body that expressly advocates a position on a ballot issue is not a political advertisement because no public funds have been expended in publishing this position in any communications medium. An advertisement paid for with public funds that provides the pros and cons of a ballot issue is not a political advertisement either, because the message advertised does not expressly advocate for or against the ballot issue.

In sum, unless and until the Legislature amends what is left of SB 216, a government can violate the law *only* when it expressly advocates for or against a particular issue *and* spends public money to publish that position.

LB/jg

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<sup>1</sup> Not surprisingly, on September 24, 2009, the Florida Elections Commission rejected a complaint filed against the Mayor of Coconut Creek and the publisher of *Coconut Creek Life Magazine*. While recognizing that SB 216 took effect after the *Broward Coalition* decision, the Executive Director opined that the Commission lacked jurisdiction to enforce the law to the extent it pertained to electioneering communications.

<sup>2</sup> The complete statutory definition of political advertisement: (17) "Political advertisement" means a paid expression in any communications media prescribed in subsection (13), whether radio, television, newspaper, magazine, periodical, campaign literature, direct mail, or display or by means other than the spoken word in direct conversation, which expressly advocates the election or defeat of a candidate or the approval or rejection of an issue. However, political advertisement does not include:

(a) A statement by an organization, in existence prior to the time during which a candidate qualifies or an issue is placed on the ballot for that election, in support of or opposition to a candidate or issue, in that organization's newsletter, which newsletter is distributed only to the members of that organization.

(b) Editorial endorsements by any newspaper, radio or television station, or other recognized news medium. Section 106.011(17), Florida Statutes.

<sup>3</sup> The complete statutory definition of communications media: (13) "Communications media" means broadcasting stations, newspapers, magazines, outdoor advertising facilities, printers, direct mail, advertising agencies, the Internet, and telephone companies; but with respect to telephones, an expenditure shall be deemed to be an expenditure for the use of communications media only if made for the costs of telephones, paid telephonists, or automatic telephone equipment to be used by a candidate or a political committee to communicate with potential voters but excluding any costs of telephones incurred by a volunteer for use of telephones by such volunteer; however, with respect to the Internet, an expenditure shall be deemed an expenditure for use of communications media only if made for the cost of creating or disseminating a message on a computer information system accessible by more than one person but excluding internal communications of a campaign or of any group. Section 106.011(13), Florida Statutes.