PROFESSOR RONALD D. ROTUNDA
COMMISSIONER, FPPC
THE DOY & DEE HENLEY CHAIR AND
DISTINGUISHED PROFESSOR OF JURISPRUDENCE
Chapman University*
One University Drive
Orange, CA 92866-1005
Phone: (714) 628-2698
Fax: (714) 628-2576
http://www1.chapman.edu/~rrotunda/
Email: rrotunda@chapman.edu

10 November 2011

RESPONSE OF COMMISSIONER RONALD D. ROTUNDA TO OPINION OF ZACHERY P. MORAZZINI, GENERAL COUNSEL OF FPPC

FIRST, the Morazzini Opinion Letter is factually incorrect when it states, in its first sentence, that "[t]he Commission has asked the Legal Division" for this Opinion.

Commission did not ask the Legal Division to analyze the legal issues regarding the application of campaign contribution limits for donors who gave their campaign funds to political treasurer Kindee Durkee & to Durkee & Associates. It was apparently, the Chair, *sua sponte*, on her own motion, made this request.

SECOND, the Morazzini Opinion Letter never discusses the FPPC's or the FEC's own precedent on this issue. The Morazzini Opinion Letter never discusses the way the Fair Political Practices Commission or the Federal Election Commission has handled this issue in the past. This problem has occurred before — there is nothing new under the Sun — yet **the FPPC General Counsel never issued any similar Opinion in the past**. I easily found two examples and I do not have access to the resources of the FPPC.

- For example, the Morazzini Opinion Letter does *not* mention that "About 14 years earlier, while auditing the campaigns of Republican Assemblymen Jan Goldsmith and Steve Baldwin, [FPPC Auditor Grant] Beauchamp discovered that their treasurer had failed to report payments to himself. That treasurer, Chris Miller, later admitted to stealing thousands of dollars and was sent to jail."[1]

---

* Affiliation and address for identification purposes only.

1 http://www.ocregister.com/articles/beauchamp-321957-durkee-horton.html

- For example, the Morazzini Opinion Letter does *not* mention that in June 2010, the FEC fined the National Republican Congressional Committee $10,000, after the committee's treasurer had transferred hundreds of thousands of dollars from the NRCC to other accounts for his personal use.[2] There was no FEC Opinion letter at that time allowing the NRCC to raise even more money because of this fraud.

Instead of excusing these political campaigns and allowing a do-over, the FPPC's precedent and the FEC precedent suggest that the FPPC should consider whether the FPPC should fine them for failing to exercise *ordinary business prudence*.

Further evidence that the political campaigns that appointed Durkee her agent failed to exercise the ordinary care is that they knew of her long-running problems with the FPPC.

- At the time of her arrest, Durkee controlled more than 400 bank accounts—including campaign committees and some non-profit groups--even though, according to the L.A. Times, **"she had a history of fines and investigation into how she used the funds of elected officials."**[3]
- FPPC Auditor Grant Beauchamp and others were "suspicious of her because **she failed in 2006 to report an employee accused of embezzling from a state senator." "Durkee had waited at least two years to report a $4,500 check from Horton's campaign to her Burbank-based company**, Durkee & Associates. For Beauchamp, that raised a red flag."[4]
- Stephen Kaufman, a lawyer who represents half a dozen of Durkee's former clients . . . said: "I have to say it's shocking to look at those bank records and to see what went on with those accounts."[5] The "victims" had plenty of warnings.

THIRD, the **Morazzini Opinion Letter never discusses whether the FPPC should change the law to help political campaigns and politicians whose failure to exercise**

---

[2] http://www.dailynews.com/news/ci_19132227?source=rss

[3] **http://www.nbclosangeles.com/blogs/prop-zero/Kinde-Durkee-Center-for-Governmental-Studies-Prop-9-Campaign-Finance-Reform-132324808.html**

[4] http://www.ocregister.com/articles/beauchamp-321957-durkee-horton.html

[5] Los Angeles Times – *L.A. Now*. Posted by John Hoeffel, October 13, 2011, 5:25 pm.

ordinary care and prudence led to further harm to people not before this Commission. [6] **These politicians became enablers. As enablers, their lack of ordinary prudence caused others to lose money.**

Let us turn to one example of a victim created because of these enablers, the Latino Diabetes Association (LDA):

> Officials with the Latino Diabetes Association on Tuesday accused political treasurer Kindee Durkee of wiping out their bank account. Durkee was arrested last month, but so far only has been charged with one federal count of mail fraud.[7] NB: The failure of the sophisticated campaign organizations to use ordinary prudence over Durkee created victims, such as the Latino Diabetes Association.
>
> "We found out last week that (Durkee & Associates) didn't do our taxes," Munoz [of the Latino Diabetes Association] said. "It's just been one blow after another blow after another blow." [NB: if my accountant falsifies my taxes, takes my money & does not pay the taxes, I am still responsible. There is no do-over][8]
>
> Munoz [of the Latino Diabetes Association] said he never suspected that anything illegal was going on. **"We thought we were in such good company with all these elected officials," he said.** [9]

FOURTH, the money Durkee collected was indeed put into the bank accounts & then paid to her:

E.g.:

- "The checks were coming to Durkee from political campaigns, even federal ones – **and Durkee was signing the checks herself.**

---

[6] Los Angeles Times – *L.A. Now*. Posted by John Hoeffel, October 13, 2011, 5:25 pm.

[7] Montebello diabetes group says finances wiped out in campaign finance scam, J.D. Velasco, Staff Writer, Whittier Daily News, Posted: 10/18/2011 07:12:41 PM PDT.

[8] Montebello diabetes group says finances wiped out in campaign finance scam, J.D. Velasco, Staff Writer, Whittier Daily News, Posted: 10/18/2011 07:12:41 PM PDT.

[9] Montebello diabetes group says finances wiped out in campaign finance scam, J.D. Velasco, Staff Writer, Whittier Daily News, Posted: 10/18/2011 07:12:41 PM PDT.

"We weren't expecting the (amounts) of what we saw," Beauchamp said. "It was very substantial."[10]

- Sen. Feinstein: "Feinstein's campaign estimated its losses toward the end of the 184-page report. **It noted $4.6 million in "unknown disbursements."** [from her campaign account]. It also noted a $100,000 **unauthorized disbursement** on Aug. 31, just a couple of days before Durkee's arrest."[11]

The Morazzini Opinion simply asserts, "It has been reported that Durkee misappropriated contributions prior to depositing them into her clients' accounts."[12] Notice the passive voice: we are not told where it has been reported; or claimed this. This information is not found in any Durkee indictment. This assertion has no citation connected with it.

FIFTH, <u>there is no doubt that Durkee was the "agent" of the various political campaigns. It was because she was an agent that she had the authority to write checks & deposit checks & keep records</u>.

Mr. Morazzini's Opinion is sophistry when he says that she is not an "agent" because she was "acting with intent to defraud."[13] The law of Agency has never said that the agent — with both actual and apparent authority — loses the powers of an "agent" because she acted with a secret fraudulent intent. It is because an agent is a fiduciary that her fraudulent actions are particularly wrong.

The case law has dealt with the law of agency for hundreds of years, both under the common law in an era of statutes. Yet, the Morazzini Opinion cannot cite one case to support its novel invention.

The Morazzini Opinion asserts that because of her secret intent, "these contributions were never accepted for purposes of the Act's contribution limits."[14] How

---

[10] http://www.ocregister.com/articles/beauchamp-321957-durkee-horton.html

[11] **http://www.sacbee.com/2011/10/14/3981037/feinstein-estimates-embezzlement.html**

[12] Morazzini Opinion, at p. 2, 3rd full ¶.

[13] E.g., Morazzini Opinion, at p. 1, & passim.

[14] E.g., Morazzini Opinion, at p. 1.

do we know that? Does this Opinion cite any legislative history, any past rulings of this Commission? Nothing. Nada. Niente. This Opinion mistakes a conclusion for a reason.

All Morazzini Opinion does purport to cite is case that has nothing to do with the present situation. It relies heavily on a quotation taken out of content in *Vaughan v. People's Mortg. Co*., 130 Cal.App. 632, 20 P.2d 335 (Cal.App.1.Dist. March 29, 1933).

Leaving aside the fact that *Vaughan* is hardly a modern case, it is also clearly not on point.[15] The appellant in *Vaughan* argued that a "corporation, as a matter of law, must be held to have knowledge of all the facts" known by its agent. That would mean that the agent could bind the principal to criminal conduct. Well, those facts have nothing to do with what is happening here.

Vaughan then said that the principal is not liable for the agent's "usurious transaction" because the principal did not know and did not ratify.[16] No one is

---

[15] The issue in *Vaughan* was whether the corporation should be held to know what its agent knew when the agent made a loan. The court simply said that the corporation can refute the presumption of its knowledge.

This was an action to restrain a sale of real property under deeds of trust involving, among other things, the question of the validity of some of the deeds of trust depending upon whether the loans made by several corporations and secured by said trust deeds were or were not usurious, where an officer of the corporation, holder of the first deed of trust, was the sole representative and vice-president of the corporation in its negotiations with one of the plaintiffs concerning the loan. The corporation was presumed to have had knowledge of all the facts and circumstances surrounding the negotiations for the loan, but this presumption, was a disputable one.

In such action, the loan by the corporation, holder of the first deed of trust, was not rendered usurious by reason of the fact that its officer and representative took a usurious bonus or commission, where he took the same for his own personal benefit, and the corporation received no part of the usurious bonus or commission, and did not ratify the illegal transaction.

What does *Vaughan* have to do with Durkee? I have no idea, which is probably why the Morazzini Opinion does not describe the issue before the court and why it quotes from the case in a selective, and, frankly, misleading way.

[16] Looking at the full quotation makes it quite obvious that this case does not say what the Morazzini Opinion claims its says:

"In the case of a usurious contract the parties thereto are, or should be, fully aware of the terms of the contract; each of the parties knows or is presumed

contending that the politicians and their political campaigns are liable for Durkee's fraud. *Vaughan* agrees and that is all it said.

> **Indeed, if the Morazzini Opinion is really serious and it really thinks that Durkee is not an agent because she has a secret intent at the time she accepted the check on behalf of the campaign, *then the bank should be liable to reimburse the political campaign, because it dealt with someone who was not an agent but still accepted her signature on the checks*. If the Opinion is really serious, there is a simple solution: the campaigns can recoup their stolen funds from the banks, which treated the non-agent as an agent, accepted her signature, and allowed her access to the accounts.**

Durkee stole the money and had access to the money *because she was the agent*: she did not get that money by mugging someone on the street.

Frankly, no one on this side of the looking glass can read the quotation from *Vaughn* at p. 5 of the Morazzini Opinion and conclude that *Vaughn* has anything to do with this case.[17]

> to know that the contract is in violation of the law. They know, or are presumed to know, that an agency can be created only for the performance of lawful acts; that ' ... an officer of a corporation can have no authority to use the corporate property for his own benefit, and such use is notice of lack of authority. (Civ. Code, secs. 2230, 2234, 2306, 2322.)' (Palo Alto etc. Assn. v. First Nat. Bank, supra, at p. 221; 1 Cal. Jur. 695.)
>
> "The reason for the rule is apparent. In the absence of ratification of a usurious transaction or participating in the usurious profit therefrom, to hold a corporation liable for the illegal acts of its officers will result in either opening the door to a wholesale fraud upon stockholders or offering an undue reward by way of treble interest to those who participate in or who may promote illegal transactions." 130 Cal.App. 632, 644.

[17] We can imagine a case where the Post Office fails deliver contribution because the mail delivered to old address no longer accessible to the campaign. That is not this case: here, the authorized agent of the committee received a contribution and ultimately misused it. But the contributor gave the money, which is no longer in his bank account. And, he gave it to the campaign's authorized agent.

The candidates or campaign committees — i.e., the "principals" of any of the political campaigns — could have chosen to bond their agent. But they did not do that although they knew she had access to millions and had had previous problems with the FPPC. One cannot simply sweep that under the rug by announcing, like the Caliph of Bagdad, that she is not "for these purposes" an agent.

Regulation 18421.1(c) says that contributions are received by "a person *acting as an agent of* a candidate," and she was certainly acting as an agent — a crooked agent is still an agent. That is what the FPPC has said in the past,[18] but the Morazzini Opinion does not discuss those precedents.

Consider this example**:** Purchaser pays a store clerk (Clerk) $500 for an LCD television. While Purchaser is waiting for delivery, the Store and Purchaser learn that the Clerk absconded with the funds and intended to steal the funds from the very beginning. If the Clerk is not really an agent because of her secret intent to steal — as the Morazzini Opinion concludes — then Store should be able to demand that Purchaser turn over another $500 before Store delivers the LCD. Does anyone really think that the Purchaser has to do that when all the Purchaser did is rely on the actual and apparent authority of the Store's Agent?

SIXTH, the Morazzini Opinion simply announces that the campaigns can use legal defense funds to file cross-<u>complaints</u> in the interpleader action. Why? It describes what has happened and then says, "Under such circumstances, *we believe . . . .*"[19]

The Morazzini Opinion offers **no** legal analysis. The Morazzini Opinion does quote from the statute and regulations, which are very detailed, comprehensive, and lengthy. The law states, very carefully, exactly what the funds can be used for and, oddly enough, the law *never* says that *defense* funds can be used to file *complaints* or counterclaims or cross complaints.

The Morazzini Opinion also announces, like an *ipse dixit*, that defense funds can be used in federal criminal actions in which the political campaign or politician is *not* a party! Why? Because, "We believe that,"[20] followed by the conclusory statement that political campaigns and politicians can do this.

---

[18] See discussion of prior examples at pp. 1-2, supra.

[19] Morazzini Opinion, at p. 9 (emphasis added).

[20] Morazzini Opinion, at p. 10.

To be sure, there is a federal law that gives certain rights for crime victims, e.g., the right not to be excluded from public court proceedings.[21] But that law says nothing about overriding state law dealing with political campaigns. It says nothing about who will pay for any costs associated with a proceeding in which the politicians and political campaigns are clearly not *defendants*. Interested observers and victims are not defendants; we are left in the dark as to the reasoning of the Morazzini Opinion that announces that victims (and enablers, see p. 3, *supra*) are also "defendants" in a case to which they are not a party.

SEVENTH, the Morazzini Opinion never concludes that it is "highly confident" or even "confident" that its view would prevail. It does not say how confident it is that a court would embrace the novel assertion that agents who (because they are authorized agents) receive money on behalf of a political campaign and then steal that money, suddenly are no longer "agents" if they had a secret intent at the time they accepted the money.

The failure to reach this conclusion — which is often common in opinion letters — is particularly significant because any regulated person or public interest group or voter may sue to test the novel assertion of the Morazzini Opinion.

The Morazzini Opinion never discusses *Federal Election Commission v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998). The Federal Election Campaign Act of 1971 ("FECA"), like the analogous California statute, imposes extensive record keeping and disclosure requirements on "political committees," defined in the statute as "any committee" or "other group of persons" receiving more than $1000 in contributions or making more than $1000 in expenditures in a given year "for the purpose of influencing any election for Federal office." The respondents in this case were voters whose views often opposed to those of the American Israel Public Affairs Committee ("AIPAC"). The respondents petitioned the Federal Election Commission ("FEC") to treat the AIPAC as a "political committee." *Federal Election Commission v. Akins* held that the Respondent-voters had standing to challenge the FEC's decision not to bring an enforcement action against the AIPAC.

The courts can "redress" that injury, even though the FEC might then exercise its discretionary powers to reach the same result (i.e., nonenforcement) for a different reason. Although an agency's decision not to undertake an enforcement action is usually not subject to judicial review, the Court was dealing with a statute whose wording indicated the contrary. One would think that an Opinion Letter would discuss this case and seek to determine if the language of the California statute is so clear that no one aggrieved by the Opinion Letter could sue to determine if it is correct.

---

[21] 18 U.S.C.A. § 3771.

CONCLUSION.

What is going on here is underground regulation — "regulation" because it is changing the rules *retroactively*, and "underground" because it avoids all the proper procedure that accompany rule-making. The General Counsel is changing the law and doing so in a way that allows no input by the Commissioners. The General Counsel and the staff exist to enforce the regulations of the Commissioners; instead, everything is upside down: we have a situation where the Commissioners and its regulations are irrelevant.

Instead, the Morazzini Opinion authorizes the General Counsel and staff to exercise unreviewable discretion, on a "case by case basis." The Morazzini Opinion candidly concedes that "Staff would consider" various facts "on a case by case basis" to determine if it will give the politician a pass, a waiver, a do-over.[22] Granted, at one point the Morazzini Opinion buries this important fact in a footnote, but that does not change the result.

The newspapers report that **State Sen. Lou Correa, D-Santa Ana** – who had to dip into personal funds after his Durkee-managed campaign account was frozen – isn't sure he'd support waiving the contribution limits. "I think it's going to be an uphill battle," Correa said. "Generally, legislators tend to look really carefully at things like that."[23]

The *Morazzini Opinion avoids securing legislative approval* by the simple expedient of announcing that "make" does not necessarily mean "make," and "agent" is not necessarily an "agent," and "defense" includes counterclaims and cross-complaints. But we have a democracy because the people, though their representatives, are supposed to make these decisions. The idea that the staff can change the law by announcing new definitions of key words is a blatant work-around the legislature.

The *Morazzini Opinion avoids securing Commission approval* by the simple expedient of announcing that "make" does not necessarily mean "make," and "agent" is not necessarily an "agent," and "defense" includes counterclaims and cross-complaints. The Commissioners, like the legislators, are agents of the people. The General Counsel and the staff are supposed to be agents of the Commissioners. Instead, if the Commission allows this to procedure, the far-reaching effect of the Morazzini Opinion is that the General Counsel and staff will be able to work-around all the pesky procedures that limit what the Commissioners can do.

---

[22] *E.g.*, Morazzini Opinion, at p. 6, n4; and p. 2 (carryover ¶).

[23] **http://californiawatch.org/dailyreport/donation-limits-could-be-waived-those-hit-fraudscandal-13374**

Nowhere does the Morazzini Opinion ever explain how allowing a contributor to give beyond the limits in instances where the staff determines it can be done "on a case-by-case basis," further the purposes of the Political Reform Act.

The Act actually looks to limit the advantages of incumbency and the advantages of special access to incumbents by large donors. The Morazzini Opinion never articulates how allowing another round of contributions for certain politicians can further the Act. Where is the statutory authority for the Commission or the Commission staff to unilaterally make this determination?

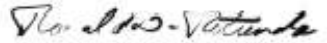
The Morazzini Opinion is not only wrong; it creates a very bad precedent by allowing the staff to use an Opinion Letter to substitute for a regulation. This is an underground regulation and, if its theory is valid, it should be adopted as a regulation by the Commission. Instead, this most significant Opinion is tucked in tab 26 and listed as a "discussion item." It is not even scheduled for a vote of the Commission.

I object. The Commission should vote on any proposed regulation, not simply hear an announcement from the staff of what the new regulation is.

These issues, and the precedent that the Morazzini Opinion will create, are too important to be treated this way. The legislature should consider these issues and decide whether it should enact a law to apply retroactively (and in the future) to such situations.

We do not want the public to think that the FPPC can allow campaigns to circumvent the voter-approved contribution limits by redefining terms. We are faced with the unfortunate circumstances. The legislature should decide this issue and that principle should not waver because of the scope of theft nor the political power of those affected. If the legislature wants to address this issue, then let them head on, but the staff and this Commission should not provide the whitewash.

Respectively submitted,



Ronald D. Rotunda
Commissioner, Fair Political Practices Commission
Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence
Chapman University