

POLITICAL CONSULTANTS WHO WORK FOR BOTH CANDIDATES AND INDEPENDENT SPENDERS

Political consultants¹ must be aware of potential campaign finance violations that may arise for them and their clients when they choose to work for both candidates and independent spenders simultaneously.

Doing work for both types of clients can lead to violations of the Act and Rules by candidates, independent spenders, and consultants. The guidance below provides information to consultants on when their work may cause issues for their clients and themselves.



REMINDER

Candidates and independent spenders should also review this guidance and confirm that any consultants they hire have taken the necessary steps to avoid campaign finance violations resulting from non-independent activity.

Why is working for both types of clients an issue?

New York City has specific rules that govern independent expenditures. In order for an expenditure to be truly independent of a candidate’s campaign, the candidate and independent spender cannot coordinate their activities. When a consultant operates on behalf of both a candidate and an independent spender, the spender’s activities may be considered non-independent and any costs would be attributed to the candidate as in-kind contributions. In these instances, the consultant’s dual role creates the coordination. Unreported coordination can result in penalties for improper reporting and/or misrepresentation, and can lead to a campaign exceeding the spending limit. If the consultant is deemed an agent of the campaign or independent spender, the Board may find it liable for all or part of these penalties.

What does the rule say?

Specific to this guidance, Rules 6-04(a)(vii) through (xi) state that the CFB may consider the following factors in determining whether an expenditure is independent:

(vii) the candidate, or any public or private office held or entity controlled by the candidate, including any governmental agency, division, or office, has retained the professional services of the person making the expenditure or a principal member of the entity making the expenditure, or an individual or entity who has been previously compensated, reimbursed, or retained as a consultant; political, media, or fundraising advisor; employee; vendor; or contractor by the entity making the expenditure, during the same election cycle in which the expenditure is made;

(viii) the candidate serves or has served as a principal member or professional or managerial employee of the entity making the expenditure, or as a professional or managerial employee of the person making the expenditure, during the same election cycle in which the expenditure is made;

¹ For purposes of this guidance, a “consultant” includes a person or entity that establishes, maintains, or controls a consulting organization, and every entity established, maintained, or controlled by that person or entity.

(ix) the candidate and the person or entity making the expenditure have each consulted or otherwise been in communication with the same third party or parties, if the candidate knew or should have known that the candidate's communication or relationship to the third party or parties would inform or result in expenditures to benefit the candidate;

(x) the candidate, or an individual or entity who has been previously compensated, reimbursed, or retained by the candidate as a consultant; political, media, or fundraising advisor; employee; vendor; or contractor, has conveyed strategic information not obtained from a publicly available source to the person or entity making the expenditure or its agent, during the same election cycle in which the expenditure is made, provided that, for purposes of this subdivision, information shall be deemed strategic if it relates to the candidate's or an opponent's electoral campaign plans, projects, or activities;

(xi) the person or entity making the expenditure has utilized strategic information or data that either (A) is not from a publicly available source or otherwise available by subscription, or (B) has been made publicly available by the candidate, or an individual or entity who has been previously compensated, reimbursed, or retained by the candidate as a consultant; political, media, or fundraising advisor; employee; vendor; or contractor, in a manner which the candidate or such individual or entity knew or should have known would facilitate such utilization.

What situations will almost always result in a determination of non-independence?

The following situations will almost always result in a determination of non-independence, regardless of any firewalls or other safeguards put in place by consultants:

1. **Individual consultants**—Because an individual consultant is necessarily influenced by the work he/she does for an independent spender when also working for a candidate, all expenditures made by an individual consultant's independent spender clients on behalf of one of his/her candidate clients or in opposition to one of his/her candidate client's opponents are considered non-independent.
2. **Organizations with a primary electoral objective**—When a consultant works for both a candidate and an independent spender, one of whose primary objectives is to advance the nomination or election of that candidate and/or to defeat the nomination or election of one or more of that candidate's opponents, the independent spender's expenditures will be considered non-independent. This includes multi-candidate political committees.
3. **Dual agents**—When the CFB determines a consultant to be an agent of both a candidate and independent spender, there will also be a determination of non-independence. This includes:
 - * Most general and strategic consultant relationships, as well as when 50 percent or more of a candidate or independent spender's total spending is allocated to a consultant.
 - * When the consultant acts on a client's behalf, such as by helping to conduct business transactions or negotiations, on a regular basis.

Assuming the above situations do not apply, how can consultants safeguard their operations and clients against illegal coordination?

Consultants who work for both types of clients should establish a firewall by hiring or separating their employees into two distinct groups: (1) employees who perform work solely on candidate-related matters (“candidate-assigned”); and (2) employees who perform work solely on the activities of independent spenders (“IE-assigned”).

No employee of a consultant should work on the accounts of both types of clients within the one-year period preceding a primary or general election or within the three-month period preceding a special election.

How should a consultant separate the staff working on candidates vs. independent spender accounts?

Consultants should create a policy that prohibits communication between candidate-assigned and IE-assigned employees regarding any of their clients’ plans, strategies, projects, activities, needs, resources, or other information about a client that is not available to the general public.

NOTE: An individual employee who is also a supervisor may neither work on nor supervise both candidate and IE accounts.



COMPLIANCE ALERT

If a consulting firm or organization is **owned, controlled, or managed by a single individual**, that individual should choose to supervise either only work performed by candidate-assigned employees, or only work performed by IE-assigned employees, within the one-year period preceding a primary or general election or the three-month period preceding a special election.

What additional safeguards should exist?

The written policy should state that the following types of employees should work only on candidate accounts:

1. Immediate family members of a candidate who is a client.
2. Employees who were employed or supervised during the current election cycle by a candidate who is a client.
3. Employees who, in the current election cycle, provided professional services to, or served in a senior position or advisory capacity on, the campaign of a candidate who is a client .

The following types of employees should work only on independent spender accounts:

1. Immediate family members of either an individual independent spender or an individual who owns/controls an independent spender that is a client.
2. Employees who were employed or supervised during the current election cycle by an independent spender that is a client.
3. Employees who, in the current election cycle, provided professional services to, or served in a senior position or advisory capacity for, an independent spender that is a client.

As stated in [CFB Advisory Opinion 2009-7](#), “the determination of whether a particular expenditure is independent or non-independent is necessarily fact-specific.” The CFB will review the context of the activity and the specific circumstances to make a final determination and all consultants, candidates, and independent spenders are advised to consult directly with the CFB regarding any questions.



CONTACT US

Candidates may contact the Candidate Services Unit at (212) 409-1800 or CandidateServices@nyccfb.info.

Consultants or Independent Spenders may contact the Special Compliance Unit at (212) 409-1800 or IEmail@nyccfb.info.