Opinion Withdrawn – Wisconsin Ethics Commission – 12/06/2016

Summary:

Non-registrants, including corporations, may communicate to the general public their views about issues and/or about a clearly identified candidate, without subjecting themselves to a registration requirement, if the communication does not expressly advocate the election or defeat of a clearly identified candidate; expenditures which are "coordinated" with a candidate or candidate's agent will be treated as a contribution to that candidate; intra-association communications that are restricted to "a candidate endorsement, a position on a referendum or an explanation of the association's views and interests" distributed to the association's members, shareholders and subscribers to the exclusion of all others, are exempt from ch. 11, Stats., regulation; and a non-partisan, candidate-non-specific voter registration or voter participation drive is not subject to the registration and reporting requirements of ch.11, Stats.

This opinion was reviewed by the Government Accountability Board pursuant to 2007 Wisconsin Act 1 and was reaffirmed on March 26, 2008.

Opinion:

You have requested that the State Elections Board issue a formal opinion establishing guidelines for voluntary associations and other non-registrants who wish to spend money for the purpose of publishing and distributing the following types of communications: communications that raise voter awareness about candidates and campaign issues; communications that promote voter registration or voter participation; and communications that are limited to members, shareholders and subscribers.

Your requests are as follows:

Metropolitan Milwaukee Association of Commerce

> In the past, if a get-out-the-vote effort did not advocate a specific candidate, they were exempt from state election laws §11.04, Stats.
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> A November 26, 1999 decision (No. 99-2574, Court of Appeals, District IV) says the Elections Board can investigate get-out-the-vote efforts carried out under §11.04, Stats., even if they do not advocate on behalf of any candidate. Based on this recent court decision, if a candidate or campaign is aware or encourages such a non-advocacy effort, the cost of the effort is a reportable contribution that must be fully disclosed.
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> To our knowledge, the Elections Board has never articulated this standard. As Wisconsin's Supreme Court said in its ruling last year in the WMC case:
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> "Because we assume that [persons are] free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he [or she] may act accordingly." Given

the short time frame prior to the upcoming spring elections, it is imperative for the Elections Board to provide fair warning and guidance to the many organizations conducting get-out-the-vote efforts.

WISCONSIN RIGHT TO LIFE

I have enclosed copies of some publications, a phone script and a radio ad that we have used in past elections. We would like clarification of how the Board would view these activities in light of the Appeals Court decision and Clearinghouse Rule 99-150.

Specifically, we would like to know: 1) which of these activities would the Board consider to fall under Clearinghouse Rule 99-150 and, thus, be subject to state election law? 2) if any of these activities were carried out in consultation with a candidate or a candidate's committee, which ones would the Board consider to be a contribution to a candidate's campaign and thus, subject to state election law? 3) if the Board considers any of these materials to be subject to state election law, would they be exempt if they were received only by members of Wisconsin Right to Life?

The Elections Board prefaces its commentary on the specifics of a response to your requests with the caveat that three of the areas -- "issue" advocacy, "coordinated" expenditures, and intra-association communications -- in which you have requested the Board's opinion are so fact intensive that the Board's opinion is virtually limited to the facts upon which the opinion is predicated. Slight changes in the wording of an issue advocacy communication or minimal increases in the amount or extent of contacts by a campaign agent regarding an expenditure of an independent committee, or expanding an intra-association communication beyond the strict limits of "endorsements of candidates, positions on a referendum or explanation of its views and interests," can completely change the regulatory outcome.

I. WRL Request

WRL is requesting the Board's opinion with respect to the association's activities in its non-registrant capacity, not with respect to its sponsored PAC's activity. Consequently, what WRL is asking the Board is which of the described communications or described circumstances will impose a registration and reporting requirement on the association -- a requirement that the association is not able to meet because of its corporate non-MCFL status. (MCFL status refers to the holding of the U.S. Supreme Court in Massachusetts Citizens for Life v. Federal Election Commission, 479 U.S. 238 (1986) that certain non-profit, ideological corporations may not be prohibited from making expenditures for express advocacy purposes. Whether or not WRL would or could qualify for that status is not in issue in this opinion and, therefore, WRL will be treated as a non-registrant for purposes of this discussion.)

WRL has raised three issues for the Board's consideration and discussion: 1) whether a given communication would cross the line from unregulated issue advocacy to regulated express advocacy; 2) with respect to a communication that would otherwise be unregulated, what kind of "contacts" between officers or agents of WRL and officers or agents of the campaign that "benefits" from the communication would constitute "coordination" between the two entities causing the communication (and the expenditures for it) to be subject to campaign finance

regulation; 3) if the text of a communication would cause it to be subject to regulation under the express advocacy test, would that communication nevertheless be free from regulation, under §11.29(1), Stats., if the association limited distribution of the communication to members, shareholders and subscribers of the association, to the exclusion of all others.

DISCUSSION

A. Express Advocacy vs. Issue Advocacy

The term "express advocacy," in the context of campaign finance regulation, was established in the U.S. Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1 (1976), in the Court's review of the Federal Election Campaign Act's expenditure limitations, (§608(e)(1) of the federal act):

> We agree that in order to preserve the provision against invalidation on vagueness grounds, s.608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office. (at p.702)

One concludes from the court's discussion that money that is spent, (by an otherwise non-registrant), for a communication which expressly advocates the election or defeat of a clearly identified candidate is subject to campaign finance regulation. Conversely, money that is spent (by an otherwise non-registrant) for a communication that does not expressly advocate the election or defeat of a clearly identified candidate is not subject to campaign finance regulation (absent other circumstances: see the discussion on "coordination"). In applying Buckley, the courts have said that the express advocacy standard establishes a three-prong test for determining whether a communication, and the expenditure for it, is subject to regulation (i.e., contains express advocacy):

> 1. The communication must clearly identify a candidate. Whether by name, description, picture or other depiction, the identity of the candidate(s) discussed in the communication must be unmistakable.
>
> 2. The communication must advocate the candidate's election or defeat.
>
> 3. The advocacy must be express, not implied.

Requirements (2) and (3) almost have to be read together such that a message which criticizes a specific candidate but calls for his/her election or defeat only impliedly, not expressly, is not subject to regulation. And a communication expressly advocating some action other than electing or defeating a candidate is also not subject to regulation. To clarify, or provide examples of, these joint requirements, the Buckley Court added (to the above quoted language on p.702), **Footnote 52** to spell out words or terms that expressly advocate election or defeat. Those terms, (commonly referred to as the "magic words"), are:

> 1. “Vote for;”
> 2. “Elect;”

3. “Support;”
4. “Cast your ballot for;”
5. “Smith for Assembly;”
6. “Vote against;”
7. “Defeat;”
8. “Reject.”

The Buckley decision and, particularly, its express advocacy test have been the subject of numerous federal court decisions. Broadly generalized, those decisions go in two different directions. One direction reflected in decisions in the First, Second and Fourth Circuits of the United States Courts of Appeals (and in various district court decisions) takes a strict-construction approach to the Buckley express advocacy test, requiring use of the "magic words," or an equivalent of those words, to subject a communication to regulation. More significantly, this direction limits the determination of express advocacy to the text of the message and virtually excludes examination of the context in which the message is uttered. This approach considers the Buckley Court to have intended the express advocacy test to be a "bright line" demarcation between what may be regulated and what may not. The other direction is reflected in the U.S. Court of Appeals Ninth Circuit's decision in FEC v. Furgatch, 807 F. 2d 857 (9th Cir. 1987), which rejected a strict "magic words" approach and added a context-based determination of express advocacy in the form of "limited reference to external events."

> We begin with the proposition that "express advocacy" is not strictly limited to communications using certain key phrases. The short list of words included in the Supreme Court's opinion in Buckley does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate. A test requiring the magic words "elect," "support," etc., or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act. "Independent" campaign spenders working on behalf of candidates could remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate. (at p.863)
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> We conclude that context is relevant to a determination of express advocacy. A consideration of the context in which speech is uttered may clarify ideas that are not perfectly articulated, or supply necessary premises that are unexpressed but widely understood by readers or viewers. We should not ignore external factors that contribute to a complete understanding of speech, especially when they are factors that the audience must consider in evaluating the words before it. However, context cannot supply a meaning that is incompatible with, or simply related to, the clear import of the words. (at pp.863-864)
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> With these principles in mind, we propose a standard for "express advocacy" that will preserve the efficacy of the Act without treading upon the freedom of political expression. We conclude that speech need not include any of the words listed in Buckley to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an

> exhortation to vote for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.
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> We emphasize that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements. This is necessary and sufficient to prevent a chill on forms of speech other than the campaign advertising regulated by the Act. At the same time, however, the court is not forced under this standard to ignore the plain meaning of campaign-related speech in a search for certain fixed indicators of "express advocacy." (at p.864)

A careful analysis of what the Furgatch court is really saying raises the question whether the court is saying something different from Buckley or saying the same thing differently. The answer to that question seems to depend on the analyst's perspective. What the court did say was that Buckley did not establish a "bright line." Also, the three-prong Buckley test becomes a four-prong test:

> 1. Speech is <u>"express"</u> for present purposes if its message is <u>unmistakable and unambiguous, suggestive of only one plausible meaning.</u>
>
> 2. Second, speech may only be termed "<u>advocacy</u>" if it presents a <u>clear plea for action</u>, and thus speech that is merely informative is not covered by the Act.
>
> 3. Finally, it <u>must be clear what action is advocated</u>. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.
> (emphasis supplied throughout)
>
> 4. (Although the court didn't spell the 4th one out: the speech must identify clearly the subject candidate. That is a given under Buckley.)

Thus, express advocacy is speech that is <u>unmistakable and unambiguous, suggestive of only one plausible meaning</u>, containing a <u>clear plea for action</u> and it <u>must be clear what action is advocated:</u> vote for or against a [clearly identified] candidate. That sounds a lot like the functional equivalent of the "magic words." But, at least, the Ninth Circuit opened the door to consideration of context in express advocacy determinations. Other federal courts, however, have not chosen to walk through that door.

Wisconsin codified the express advocacy test in §§11.01(6), (7) and (16), Stats., which provide that both "contributions" and "disbursements" must be made for "political purposes" and that "political purposes" includes (but, by the statute's own language, is not to be limited to) "The making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate or a particular vote at a referendum." To further clarify which disbursements are subject to campaign finance regulation, the Elections Board adopted Wis. Adm. Code ElBd Rule 1.28(2)(c), which provides:

> (2) Individuals other than candidates and committees other than political committees are subject to the applicable disclosure-related and record-keeping-related requirements of ch.11 Stats., **only** when they:
>
> (c) Make expenditures for the purpose of expressly advocating the election or defeat of a clearly identified candidate.

Note that the rule did not include, or make reference to, the "magic words" test.

The Board's application of the express advocacy test became the subject of litigation in 1996, when several non-registrants spent money to comment (positively or negatively) on the views, positions or voting records of specific candidates. In WMC v. State Elections Board, 227 Wis.2d 650 (1999), the State Elections Board made a determination that the defendant, WMC, a non-registrant, had paid for communications that contained express advocacy, notwithstanding that the text of those communications did not contain any of the eight terms of Footnote 52 (or even any equivalent of the terms in Footnote 52). When WMC failed to comply with registration and reporting under ch.11, Stats., as ordered by the Elections Board, the Board sought to enforce its order in circuit court.

After the Dane County Circuit Court dismissed the Elections Board's complaint on, essentially, due process grounds, the Wisconsin Supreme Court upheld the trial court's dismissal on the ground that the Board was attempting to do retroactive rulemaking by making a determination of express advocacy based on context. The Wisconsin Supreme Court said that the Board may not make a determination of express advocacy, (and thereby impose campaign finance regulation), based on the context in which speech is uttered or a communication is made -- unless before making that determination the legislature enacts a statute or the Elections Board adopts a rule spelling out that context-based test.

The Court added its opinion that the legislature or the Board may be able to craft a context-oriented express advocacy rule that may be able to pass constitutional muster, but that that rule may only be applied prospectively:

> We stress that this holding places no restraints on the ability of the legislature and the Board to define further a constitutional standard of express advocacy to be prospectively applied. We encourage them to do so, as we are well aware of the types of compelling state interests which may justify some very limited restrictions on First and Fourteenth Amendment rights. (at p.32)

But the Court also qualified any attempt to define "express advocacy" with the proviso that any communication that meets that definition must contain "explicit words of advocacy of election or defeat of a candidate":

> Consistent with this opinion, we note that any definition of express advocacy must comport with the requirements of Buckley and MCFL and may encompass more than the specific list of "magic words" in Buckley footnote 52, but must, however, be "limited to communications that include explicit words of advocacy of election or defeat of a candidate." (at p.33) (Emphasis supplied)

The Elections Board did attempt, in Clearinghouse Rule 99-150, to promulgate a rule clarifying determinations of express advocacy, but the rule was not context-based. That rule adopted the eight terms of Footnote 52 as examples of express advocacy and added that the term "express advocacy" also included the functional equivalent of any of those eight terms. The standing committees of the Wisconsin Legislature objected to the Board's rule and the rule was referred to the Legislature's Joint Committee for Review of Administrative Rules (JCRAR). JCRAR also objected to the rule and introduced a bill amending §11.06(2) and creating §§11.01(13) and (20) and 11.01(16)(a), Stats., requiring reporting of certain "issue advocacy" disbursements made during the last 60 days before an election.

Unless (and until) the legislature enacts the legislation recommended by JCRAR, however, the standard applicable in Wisconsin is the one that was applicable before the WMC case: expenditures are subject to regulation on the basis of the message they purchase only if the message expressly advocates the election or defeat of a clearly identified candidate. The Board believes that that standard means that, even without a rule, a message that does not include some form of the "magic words," or their equivalents, is not subject to campaign finance regulation.

Looking at the materials included with WRL's opinion request, Items (1), (3), (4), (6), (7), and (8) do not include any of the "magic words" or any equivalent of them. Even under the Furgatch test, these items contain no "plea to action" whatsoever, let alone a "clear plea". That means that not only do they not urge the reader or listener or viewer to vote one way or another, they do not urge the reader or listener or viewer to do anything. Consequently, to paraphrase the Court in WMC, they do not "include explicit words of advocacy of election or defeat of a candidate," and are not subject to campaign finance regulation (based on their text alone).

Items (2) and (5) of the WRL opinion request include the following language that suggests a call to action, but may stop short of express advocacy:

> **Item (2)**
> The November 3 election offers a clear choice between candidates running in your area.
> ….
> You can truly make a difference for the women harmed by abortion and for the unborn children whose beating hearts must not be silenced.
> BE INFORMED.
> MAKE A COMPASSIONATE CHOICE.

This language asks that the reader/voter make a compassionate choice on November 3: and suggests that the compassionate choice is to vote pro-life. The plea to action is clear; the course of action is not.

> **Item (5)**
> Now he wants to be re-elected to the State Assembly. Can unborn children, parents and taxpayers afford two more years of Virgil Roberts?

This language is similar to the "Don't let him do it" in Furgatch, except it is in rhetorical form rather than in the imperative. The only way to avoid two more years of Virgil Roberts is to vote him out on November 3, but that conclusion is implied not expressed.

Whether either one of these communications "includes explicit words of advocacy of election or defeat of a candidate may depend on the political orientation of the reader, but they are closer than the other five.

B. Coordination of Expenditures vs. Independent Expenditures

In striking down limits on independent expenditures -- because of the absence of the potential quid pro quo that justified restrictions on contributions -- the Buckley Court recognized an exception to that approach for money spent on communications that are "coordinated" with a candidate or his campaign or agents. In this tension between permissible contribution limits and impermissible independent expenditure limits, the court recognized the necessity of regulating expenditures that were so "coordinated" with a campaign that they ceased to be independent and were enough like contributions to be treated as such:

> The parties defending [the cap on expenditures by individuals] contend that [the cap] is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities … Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act. Section 608(b)'s contribution ceilings rather than s.608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. By contrast, s.608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign. (Buckley at pp.46-47, emphasis supplied)

The Court did not, however, provide a definition of, or standard for, "prearranged or coordinated expenditures amounting to disguised contributions." Furthermore, the Buckley court did not distinguish coordinated express advocacy from coordinated issue advocacy or even speak to the question whether one is distinguishable from the other with respect to government's authority to regulate.

The federal courts have begun to look at the issue of "coordinated" issue advocacy. In 1997, the United States Court of Appeals First Circuit, in Clifton v. Federal Election Commission 114 F. 3d 1309, held that the FEC's regulations restricting corporate contacts with candidates (or the

candidate's agents) with respect to certain forms of issue advocacy, (voter guides and voting records), were beyond the FEC's authority under the Federal Election Campaign Act (FECA). "The regulation on voter guides provided that either a corporation or union publishing a guide must have no contact at all with any candidate or political committee regarding the preparation, contents and distribution of the voter guide or, if there is such contact, (1) it must be only through written questions and written responses, (2) each candidate must be given the same prominence and space in the guide, and (3) there must be no "electioneering" message conveyed by any scoring or rating system used, or otherwise." (at p.1311)

> Starting with the FEC rule requiring substantially equal space and prominence, we begin with the proposition that where public issues are involved, government agencies are not normally empowered to impose and police requirements as to what private citizens may say or write. Commercial labeling aside, the Supreme Court has long treated compelled speech as abhorrent to the First Amendment whether the compulsion is directed against individuals or corporations. (at p.1313)
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> It seems to us no less obnoxious for the FEC to tell the Maine Committee how much space it must devote in its voter guides to the views of particular committees. We assume a legitimate FEC interest in preventing disguised contributions; … The point is that the interest cannot normally be secured by compelling a private entity to express particular views or by requiring it to provide "balance" or equal space or an opportunity to appear. (at pp.1313-1314)
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> The other rule principally at issue is the limitation on oral contact with candidates. We think that this is patently offensive to the First Amendment in a different aspect: it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office. As we have explained, the regulations bar non-written contact regarding the **contents**, not merely the preparation and distribution of voter guides and voting records; thus inquiries to candidates and incumbents about their positions on issues like abortion are a precise target of the FEC's rules as applied here. (at p.1314)
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> It is hard to find direct precedent only because efforts to restrict this right to communicate freely are so rare. But we think that it is beyond reasonable belief that to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues. The only difference between such an outright ban and the FEC rule is that the FEC permits discussion so long as both sides limit themselves to writing. Both principle and practicality make this an inadequate distinction. (at p.1314)
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> It is no business of executive branch agencies to dictate the form in which free citizens can confer with their legislative representatives. Further, the restriction is a real handicap on intercourse: the nuances of positions and votes can often be discerned only through oral discussion; as any courtroom lawyer knows, stilted written interrogatories and answers are no substitute for cross-examination. A ban on oral communication, solely for prophylactic reasons, is not readily defensible. (at p.1314)

The First Circuit was not saying that issue advocacy could be coordinated and it was not even saying that the FEC could not promulgate a rule prohibiting coordination of issue advocacy. What the court was saying was that the FEC could not attempt to prevent coordination with a prophylactic rule against all oral contact between candidates and committees who make expenditures after that contact. In other words, the FEC may promulgate a rule proscribing illicit coordination, but the rule before the court was not that rule. The further implication of this decision is that the outright ban on any "consultation, cooperation or action in concert" such as appears in the Wisconsin Statute, s.11.06(7), Stats., (and which is identical to the language of the federal statute), may be unenforceable. Some level of contact between a candidate and a committee making expenditures is permissible.

> The Supreme Court has said, in discussing related statutory provisions, that expenditures Valeo….; but "coordination" in this context implied some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue. … (at p.1311)

What constitutes "coordination," however, remained for other courts and other decisions. Recently, in Federal Election Commission v. The Christian Coalition, 52 F. Supp. 2d 45, (August, 1999), the United States District Court for the District of Columbia addressed the question of coordinated expenditures, generally, and coordinated "issue advocacy" in particular. The court found that coordinated issue advocacy was subject to campaign finance regulation, but that "the standard for coordination must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which coordination is extensive enough to make the potential for corruption through legislative quid pro quo palpable without chilling protected contact between candidates and corporations and unions." (at p.91) The court tried to strike a balance between the position of the Coalition that only coordinated expenditures for the purpose of express advocacy could be subject to regulation and the position of the FEC that any "consultation between a potential spender and a federal candidate's campaign organization about the candidate's plans, projects, or needs renders any subsequent expenditures made for the purpose of influencing the election "coordinated" contributions." (at p.92)

> While the FEC's approach would certainly address the potential for corruption in the above-described scenario, it would do so only by heavily burdening the common, probably necessary, communications between candidates and constituencies during an election campaign. (at p.96)
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> I take from Buckley and its progeny the directive to tread carefully, acknowledging that considerable coordination will convert an expressive expenditure into a contribution but that the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate. (at p.97)
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> A narrowly tailored definition of expressive coordinated expenditures must focus on those expenditures that are of the type that would be made to circumvent the contribution limitations. (at pp.97-98)

> That portion of the FEC's approach which would treat as contributions expressive coordinated expenditures made at the request or suggestion of the candidate or an authorized agent is narrowly tailored. The fact that the candidate has requested or suggested that a spender engage in certain speech indicates that the speech is valuable to the candidate, giving such expenditures sufficient contribution-like qualities to fall within the Act's prohibition on contributions. (at p.98)
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> In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and the spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners. . (at pp.98-99)

At about the same time, (November, 1999), the Wisconsin Court of Appeals, in Wisconsin Coalition for Voter Participation et al. v. State Elections Board (No.99-2574), was asked to review a similar issue: whether the State Elections Board could investigate the alleged "coordination" of a communication, (and the expenditures for it), between a candidate's campaign and a committee called Wisconsin Coalition for Voter Participation, notwithstanding that the communication did not (concededly) expressly advocate the election or defeat of a clearly identified candidate.

The Court of Appeals agreed with the Dane County Circuit Court, (from whose decision the appeal was being taken), that "express advocacy is not an issue in this case." (at p.6) The Court of Appeals found that while (under Buckley) "independent expenditures that do not constitute express advocacy of a candidate are not subject to regulation, … contributions to a candidate's campaign must be reported whether or not they constitute express advocacy."(at p.7)

> Contrary to plaintiff's assertions, then, the term "political purposes" is not restricted by the cases, the statutes or the code, to acts of express advocacy. It encompasses many acts undertaken to influence a candidate's election -- including making contributions to an election campaign. …(at p.8)
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> Under Wis. Adm. Code s.ElBd 1.42(2), a voluntary committee such as the coalition is prohibited from making expenditures in support of, or opposition to, a candidate if those expenditures are made "in cooperation or consultation with any candidate or … committee of a candidate … and in concert with, or at the request or suggestion of, any candidate or … committee …" and are not reported as a contribution to the candidate. These provisions are consistent with the federal campaign finance laws approved by the Supreme Court in Buckley -- laws which, like our own, treat expenditures that are "coordinated" with, or made "in cooperation with or with the consent of a candidate … or an authorized committee" as campaign contributions. (at pp.8-9)

> There is little doubt that had the coalition given 354,000 blank paid postcards to the Wilcox campaign committee, allowing it to put whatever message it wished on them, this would have been a reportable contribution. …. If there was consultation or coordination with the Wilcox campaign, it makes no difference that the chosen message was printed by the Coalition rather than by the campaign itself. As we have noted above, we think the Board was correct in observing (in one of its briefs to the circuit court) that "[i]f the mailing and the message were done in consultation with or coordinated with the Justice Wilcox campaign, the [content of the message] is immaterial." (at pp.9-10)

In finding that "if the mailing and the message were done in consultation with or coordinated with the Justice Wilcox campaign, the [content of the message] is immaterial," the court did not determine any standard for "coordination" other than to recite the Wisconsin Statutory standard set forth in the oath for independent disbursements, (s.11.06 (7), Stats.). That standard is that the committee or individual making the disbursements does not act in cooperation or consultation with, or act in concert with, or at the request or suggestion of, any candidate or agent or authorized committee of a candidate who is supported by the disbursements.

The conclusion that appears to follow from these cases is that speech which does not expressly advocate the election or defeat of a clearly identified candidate may, nevertheless, be subject to campaign finance regulation if the following two elements are present: (1) the speech is made for the purpose of influencing voting at a specific candidate's election; and (2) the speech (and or the expenditure for it?) is coordinated with the candidate or his/her campaign. The Courts seemed to be willing to merge express advocacy with issue advocacy if "coordination" between the spender and the campaign is sufficient that the potential for a quid pro quo is immediate and apparent and, therefore, that the expenditure ought to be treated as a contribution.

The Wisconsin Court of Appeals did not need to establish a standard for "coordination" because the proceeding before it was not one to determine whether "coordination" occurred, but a proceeding to determine whether the Elections Board could investigate whether "coordination" had occurred. But putting the standard established in Christian Coalition together with Wisconsin's statutory language one derives a standard as follows: coordination is sufficient to treat a communication (or the expenditure for it) as a contribution if:

> The communication is made at the request or suggestion of the campaign (i.e., the candidate or agents of the candidate); or, in the absence of a request or suggestion from the campaign, if the cooperation, consultation or coordination between the two is such that the candidate or his/her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and the spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.

Turning to the eight items WRL has included, all eight would appear to be made for the purpose of influencing voting at a specific candidate's election (if one concedes that the purpose of informing voters of a candidate's position on an issue or issues is to influence their voting). Consequently, under the above standard, with respect to such communications, WRL would have to refrain from "discussion or negotiation with the campaign over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots) such that the candidate and the spender (WRL) emerge as partners or joint venturers in the expressive expenditure, albeit not equal partners." And, of course, WRL could not act at the request or suggestion of the candidate or the candidate's agents.

Another approach to the same subject matter is to divide it into two categories: contacts between a campaign and an independent committee in which 1) the campaign is the speaker and 2) the committee is the speaker. Each of those two categories would be divided into two sub-categories: 1) discourse on philosophy, views and interests, and positions on issues and 2) discourse on campaign strategy.

In all of the cases discussed above, including Buckley, protection of a candidate's right to meet and discuss, with any person (including corporate persons), **his or her** philosophy, views and interests, and positions on issues (including voting record), is absolute. As the First Circuit said in Clifton:

> … [as to] the limitation on oral contact with candidates. We think that this is patently offensive to the First Amendment in a different aspect: it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office. (p.1314)

A candidate's (or campaign's) right to discuss campaign strategy, however, is not so absolute. It is the slippery slope and the best advice is to avoid (or, at the very least, minimize) it. The closer that such discussion comes to providing details that will facilitate or optimize the independent committee's expenditures, the more that discussion "dissolves in practical application" into coordination. Providing a committee with campaign literature or an 8 x 10 glossy picture is one thing, but providing a committee with an itinerary of media purchases and appearances, including text, is another.

Similarly, an independent committee's right to meet and discuss its philosophy, views and interests, and positions on issues, is probably equally absolute to that of the candidate. But the right of the committee to discuss <u>its</u> strategy for the campaign probably doesn't exist if the committee wishes to remain independent. A campaign has no need to know that information other than for the purpose of coordination.

C. Communications to Restricted Class (Members, Shareholders and Subscribers)

Under §11.29(1), Stats., a voluntary association, like WRL, may communicate a candidate endorsement, a position on a referendum or an explanation of the association's views and

interests with its members to the exclusion of all others without subjecting that communication to campaign finance regulation. In El. Bd. Op. 88-4, the Elections Board issued a formal opinion that says that the statute will be construed strictly. That means the communication's distribution must be limited to the association's members, shareholders and subscribers to the exclusion of all others. A distribution pattern that appears to go beyond the restricted class may render the protection of §11.29(1), Stats., inapplicable. According to that Opinion, if the communication's message goes beyond a candidate endorsement, a position on a referendum or an explanation of the association's views and interests, the protection of §11.29(1), Stats., may not apply:

> Wisconsin law prohibits corporations and cooperatives and unregistered organizations from engaging in political activity. §11.38(2), Stats. The exclusions of §11.29(1), Stats., provide an exemption from those requirements. (p.1)
>
> Wisconsin law clearly permits any organization to make communications to its membership. Communications of a political nature which consist of endorsements of candidates, positions on a referendum or an explanation of the organization's views or interests are not subject to the registration and reporting requirements of Chapter 11, Stats. This is provided that the communications are funded solely by the organization and the communications are limited to the members of the organization to the exclusion of all others. §11.29(1), Stats. (p.1)
>
> The exclusion from disclosure of communications with respect to endorsements and an explanation of the organization's views or interests is designed to permit otherwise political communications by an organization because it does not reach out to the general public. Although the communications may be designed to influence voting, or even expressly advocate the election or defeat of a clearly identified candidate, the communications are not subject to disclosure because the audience and activity are restricted. (p.2)
>
> If a candidate requests the organization to communicate to its membership, the organization may inform its membership of candidate endorsements and an explanation of its views or interests. The views and interests of the candidate do not qualify for the exclusion from disclosure except to the extent that the organization utilizes them in its explanation of its views and interests. To the extent that communication of the candidate's views and interests go beyond the statutory exclusion they are subject to disclosure and limitation under the applicable provisions of Chapter 11, Stats. (p.2)
>
> Communications of a political nature which go beyond the scope articulated in §11.29(1), Stats., would be subject to the registration and reporting requirements of Chapter 11. If the political communications are done in cooperation or consultation with, in concert with, or at the request or suggestion of a candidate, the communications will be subject to the contribution limits of Chapter 11. (p.1)

To be on the safe side, if an organization confines itself to communicating "a candidate endorsement, a position on a referendum or an explanation of the association's views and interests with its members to the exclusion of all others," pays for the communication with its

own funds, and does not distribute any candidate literature with the communication, the organization's communications will not be subject to ch.11, Stats.

Turning to the specific items included in WRL's letter: all eight of the pieces communicate a candidate's views, position or voting record on abortion issues but would probably qualify as either or both a candidate endorsement or an explanation of the views and interests of the association. While it is true that §11.29(1), Stats., exempts communication of the association's views and interests, not a candidate's, because the material originated with the association, the candidate's views or position set forth therein reflect the association's opinion of those views. Generally, associations have broad latitude when communicating material originating with the association. Associations may not, however, use this privilege to act as a conduit for campaign literature or campaign solicitations.

II. MMAC Request

Guidelines Relative to Non-advocacy Voter Registration and Voter Participation Efforts

MMAC is also requesting the Board's opinion with respect to the association's activities in its non-registrant capacity, not with respect to its sponsored PAC's activity. What MMAC is asking the Board, in addition to the issues raised and discussed above, is: to what extent may an unregistered association or other non-registrant conduct voter registration or voter participation drives without being subject to a registration requirement or subject to other compliance requirements of ch.11, Stats.

The initial response to the opinion request from MMAC is to note that the law has not changed: a non-partisan, candidate-non-specific voter registration or voter participation drive is not subject to the registration and reporting requirements of ch.11, Stats. The governing statute is s.11.04, Stats., which has not changed in many years and is quite clear in its command:

> **11.04 Registration and voting drives**. Except as provided in s.11.25(2)(b), ss.11.05 to 11.23 and 11.26 do not apply to nonpartisan campaigns to increase voter registration or participation at any election that are not directed at supporting or opposing any specific candidate, political party, or referendum.

What that language is saying is that a committee of persons who engage in an effort to "raise voter turnout" or voter registration, and who do so on a nonpartisan basis without directing their effort at "supporting or opposing any specific candidate, political party or referendum" are not required to comply with §§11.05 to 11.23, Stats., (which are the registration and reporting provisions of ch.11, Stats.), or §11.26, Stats. (ch.11's limit on contributions). As long as an organization confines itself to the specific language of §11.04, Stats., the organization would appear to have a safe harbor. Concededly, however, some issues have arisen about the interpretation of some of the language in §11.04, Stats.

The litigation to which MMACs letter refers raised a controversial issue about the meaning of the term "nonpartisan" in the statutory phrase: "nonpartisan campaigns to increase voter registration or participation." Neither §11.01, Stats., nor §5.02, Stats., (the two statutory sections

defining terms for election and campaign finance purposes), defines the term "nonpartisan." The American Heritage Dictionary defines "partisan" as follows:

> Partisan - n. 1. A militant supporter of a party, cause, faction, person or idea; adj. 2. Devoted to or biased in support of a single party or cause.

The Board believes that, at the very least, the legislature intended that an organization's message urging citizens to register and to vote could not, within the exemption of §11.04, Stats., exhort or suggest that they vote to support one party or another or exhort the voter to participate in a designated party's partisan primary. This meaning is sometimes referred to as "Partisan" with a capital "P". The legislature could also have intended that a voter registration or participation drive, seeking to qualify for the exclusion of §11.04, Stats., could not be partial towards any "cause, faction, person or idea." This is sometimes referred to as "partisan" with a lower case "p". Either interpretation of the term "partisan" or "nonpartisan" incorporates a certain amount of redundancy into §11.04, Stats., because of the subsequent phrase in the statute: "that are not directed at supporting or opposing any specific candidate, political party, or referendum."

The best way to avoid this issue is to refrain from mentioning any "party, cause, faction, person or idea" in the text of the message communicated to the public. Instead, by confining the message to registration and going to the polls, the meaning of the statute, and the meaning of the message, do not require interpretation.

Finally, with respect to the "coordination" issue alluded to in your letter, suffice it to say that the decision to conduct a voter drive and the particulars of that drive, including the funding of it, are best not discussed with a candidate or any agent of a candidate. That does not mean that an organization may not discuss with a candidate his or her views on issues important to the organization, but the organization is well advised not to include in that discussion the organization's consideration of a voter drive or the particulars of that drive.