

Opinion Withdrawn – Wisconsin Ethics Commission – 12/06/2016

Summary:

The filing, with the State Elections Board, of a challenge to a candidate's nomination, is an act for political purposes and the spending of more than \$25 in the submitting of that challenge requires that the person challenging file a registration statement with the Board. The spending by an individual of more than \$100 of his or her own money to submit a challenge to a candidate's nomination precludes the individual from exempt status and requires the individual to file a campaign finance report. Whether or not nomination challenge expenditures are an in-kind contribution or an independent expenditure, or are neither, they are permissible political expenditures and should be reported. (Issued to Don M. Millis, March 28, 2003)

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 on the following question:

I am writing to request that the Elections Board issue a formal opinion clarifying that an effort to remove a candidate from the ballot via a complaint constitutes an act for a political purpose and, therefore, if such an effort involves disbursements or incurred obligations in excess of \$25, then the registration and reporting requirements of chapter 11 apply.

The Elections Board finds that the filing, with the applicable filing officer, of a challenge to a candidate's nomination, is an act for political purposes and the spending of more than \$25 in the submitting of that challenge requires that the person challenging file a registration statement with the filing officer.

I. A person who spends more than \$25 to file a challenge to the nomination papers of a candidate for state or local office is subject to a registration requirement under ch.11, Stats.

Registration of political committees, groups and individuals, for campaign finance purposes, is set forth in §11.05, Stats., reading as follows:

11.05 Registration of political committees, groups and individuals.

(1) Committees and groups. Except as provided in [s. 9.10 \(2\) \(d\)](#), every committee other than a personal campaign committee, and every political group subject to registration under [s. 11.23](#) which makes or accepts contributions, incurs obligations or makes disbursements in a calendar year in an aggregate amount in excess of \$25 shall file

a statement with the appropriate filing officer giving the information required by [sub. \(3\)](#). In the case of any committee other than a personal campaign committee, the statement shall be filed by the treasurer. A personal campaign committee shall register under [sub. \(2g\)](#) or [\(2r\)](#).

(2) Individuals. Except as provided in [s. 9.10 \(2\) \(d\)](#), every individual, other than a candidate or agent of a candidate, who accepts contributions, incurs obligations, or makes disbursements in a calendar year in an aggregate amount in excess of \$25 shall file a statement with the appropriate filing officer giving the information required by [sub. \(3\)](#). An individual who guarantees a loan on which an individual, committee or group subject to a registration requirement defaults is not subject to registration under this subsection solely as a result of such default.

Clearly, the statutes require that an individual who “accepts contributions, incurs obligations, or makes disbursements in a calendar year in an aggregate amount in excess of \$25,” is required to file a registration statement with the appropriate filing officer. The terms “contribution,” “incurred obligation,” and “disbursement” are all defined terms under ch.11, Stats., Wisconsin’s campaign finance chapter of the statutes. The abbreviated statutory definition of those terms is as follows:

11.01 Definitions. As used in this chapter:

(6)(a) "Contribution" means:

1. A gift, subscription, loan, advance, or deposit of money or anything of value, except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business, made for political purposes. In this subdivision "anything of value" means a thing of merchantable value.
2. A transfer of personalty, including but not limited to campaign materials and supplies, valued at the replacement cost at the time of transfer.
3. A contract, promise or agreement, if legally enforceable, to make a gift, subscription, loan, advance, or deposit of money or anything of value, except a loan of money by a commercial lending institution in accordance with applicable laws and regulations in the ordinary course of business, for a political purpose.

(7)(a) "Disbursement" means:

1. A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business, made for political purposes. In this subdivision, "anything of value" means a thing of merchantable value
2. A transfer of personalty, including but not limited to campaign materials and supplies, valued at the replacement cost at the time of transfer.
3. A contract, promise, or agreement, if legally enforceable, to make a purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, except a loan of

money by a commercial lending institution in accordance with applicable laws and regulations in the ordinary course of business, for a political purpose.

(11) "Incurred obligation" means every express obligation to make any contribution or disbursement including every loan, guarantee of a loan or other obligation or payment for any goods, or for any services which have been performed or are to be performed in the future, incurred by a candidate, committee, individual or group for political purposes.

The foregoing statutes define "Contributions," "Disbursements," and "Incurred obligations" in terms of having been made for "political purposes." Thus, a person who receives something of merchantable value, makes an expenditure, or incurs an obligation, for political purposes, in excess of \$25 in a calendar year is required to register with the appropriate filing officer. The term "political purposes" is also defined by the statutes, in §11.01(16), Stats., as follows:

(16) An act is for "political purposes" when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, for the purpose of payment of expenses incurred as a result of a recount at an election, or for the purpose of influencing a particular vote at a referendum. In the case of a candidate, or a committee or group which is organized primarily for the purpose of influencing the election or nomination for election of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, or for the purpose of influencing a particular vote at a referendum, all administrative and overhead expenses for the maintenance of an office or staff which are used principally for any such purpose are deemed to be for a political purpose.

(a) Acts which are for "political purposes" include but are not limited to:

1. 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.
2. The conduct of or attempting to influence an endorsement or nomination to be made at a convention of political party members or supporters concerning, in whole or in part, any campaign for state or local office

For campaign finance purposes, the critical language in the definition is: "An act is for "political purposes" when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office,..." Given that wording, a challenge to the nomination of a candidate to elective office through the medium of a challenge to the candidate's nomination papers clearly is an "act ... done for the purpose of influencing the ... nomination for election of any individual to state or local office ..."

The term "political purposes" as described by §11.01(16)(a), Stats., is a term commonly used synonymously with the term "express advocacy." "Express advocacy" is defined in EIBd 1.28 of the Wisconsin Administrative Code as:

ElBd 1.28 Scope of regulated activity; election of candidates.

(1) Definitions. As used in this rule:

(a) "Political committee" means every committee which is formed primarily to influence elections or which is under the control of a candidate.

(b) "Contributions for political purposes" means contributions made to 1) a candidate, or 2) a political committee or 3) an individual who makes contributions to a candidate or political committee or incurs obligations or makes disbursements for the purpose of expressly advocating the election or defeat of an identified candidate.

(2) Individuals other than candidates and committees other than political committees are subject to the applicable disclosure-related and recordkeeping-related requirements of [ch. 11, Stats.](#), only when they:

(a) Make contributions for political purposes, or

(b) Make contributions to any person at the request or with the authorization of a candidate or political committee, or

(c) Make a communication containing terms such as the following or their functional equivalents with reference to a clearly identified candidate that expressly advocates the election or defeat of that candidate and that unambiguously relates to the campaign of that candidate:

1. "Vote for;"
2. "Elect;"
3. "Support;"
4. "Cast your ballot for;"
5. "Smith for Assembly;"
6. "Vote against;"
7. "Defeat;"
8. "Reject."

(3) Consistent with s. [11.05 \(2\)](#), Stats., nothing in [sub. \(1\)](#) or [\(2\)](#) should be construed as requiring registration and reporting, under ss. [11.05](#) and [11.06](#), Stats., of an individual

whose only activity is the making of contributions.

The Board also notes that the language of §11.01(16)(a)1., Stats., further provides that "Acts which are for "political purposes" include but are not limited to:

1. 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.

The underscored language shows that the legislature recognized that the term "political purpose" is not limited to express advocacy, notwithstanding common usage of the term, "political purpose." Consequently, the statutory definition of "political purpose" is not limited to express advocacy and, by its own terms, includes spending for the purpose of influencing voting at an election even though the spending is not for the purpose of express advocacy.¹ While the Wisconsin Attorney General, (at 65 Atty. Gen. 145), and almost every court have recognized that, as a direct result of the decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), regulation of political **speech** is limited to express advocacy, that is not the same as holding that regulation of political **activity** that goes beyond speech to influence a clearly identified candidate's election, defeat or nomination is limited to express advocacy.

Therefore, the filing, with the State Elections Board, or the applicable filing officer, of challenges to a candidate's nomination, is an act for political purposes under §11.01(16), Stats., and the spending of more than \$25 in the submitting of that challenge requires that the person challenging file, pursuant to §11.05(2), Stats., a registration statement with the Board.

Currently, most nomination challenges will entail the expenditure of more than \$25, just from the charges for photocopying and delivery required by administrative rules. See EIBd 2.07, Wis. Adm. Code. Therefore, most nomination challengers are currently subject to the registration requirements of the statutes.

II. The requirement to file campaign finance reports as the result of filing a challenge to nomination papers is a separate determination from the requirement to file a registration statement. Every registrant² who exceeds either the \$100 or \$1,000 exemption threshold is required to file campaign finance reports.

Whether or not an individual who or a committee which is required to file a registration statement is also required to file campaign finance reports, disclosing their contributions,

¹ The Wisconsin Court of Appeals, District IV specifically recognized this principle in *Coalition for Voter Participation v. Elections Board*, 231 Wis.2d 670, at page 680, where the court said: "And while, as plaintiffs point out, 'express advocacy' on behalf of a candidate is one part of the statutory definition of 'political purpose' it is not the only part. Under s.11.01(16), Stats., for example, an act is also done for a political purpose if it is undertaken 'for the purpose of influencing the election . . . of any individual . . .' Contrary to plaintiffs' 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. And political contributions may be made 'in kind' as well as in cash." The court footnoted its discussion with the very statutory language referred to above: "We note in this regard that the 'express advocacy' language in the statute appears immediately below the following admonition: 'Acts which are for 'political purposes' include but are not limited to . . .'" (Emphasis added)

² Except a candidate who makes self contributions exceeding \$100, but who does not exceed the \$1,000 aggregate financial activity limit.

disbursements and incurred obligations, depends on whether the individual or committee is, or is not, exempt from filing campaign reports under s.11.06(2r), Stats. That statute reads as follows:

11.06 Financial report information; application; funding procedure.

(2r) General reporting exemptions. Any person, committee or group, other than a committee or individual required to file an oath under [s. 11.06 \(7\)](#), who or which does not anticipate accepting contributions, making disbursements or incurring obligations in an aggregate amount in excess of \$1,000 in a calendar year and does not anticipate accepting any contribution or contributions from a single source, other than contributions made by a candidate to his or her own campaign, exceeding \$100 in that year may indicate on its registration statement that the person, committee or group will not accept contributions, incur obligations or make disbursements in the aggregate in excess of \$1,000 in any calendar year and will not accept any contribution or contributions from a single source, other than contributions made by a candidate to his or her own campaign, exceeding \$100 in such year. Any registrant making such an indication is not subject to any filing requirement if the statement is true. The registrant need not file a termination report.

A registrant not making such an indication on a registration statement is subject to a filing requirement. The indication may be revoked and the registrant is then subject to a filing requirement as of the date of revocation, or the date that aggregate contributions, disbursements or obligations for the calendar year exceed \$1,000, or the date on which the registrant accepts any contribution or contributions exceeding \$100 from a single source, other than contributions made by a candidate to his or her own campaign, during that year, whichever is earlier. If the revocation is not timely, the registrant violates [s. 11.27 \(1\)](#).

If an individual's or committee's annual aggregate contributions accepted, disbursements made and obligations incurred does not exceed \$1,000 **and** if the individual or committee *will not accept any contribution or contributions from a single source, other than contributions made by a candidate to his or her own campaign, exceeding \$100 in such year*, then the individual or committee is exempt from filing campaign finance reports and will **not** have to disclose contributions, disbursements or incurred obligations. That means that if an individual who challenges a nomination does not exceed \$1,000 in aggregate contributions, disbursements or incurred obligations **and** the individual does not accept more than \$100 from a single source, the individual is not required to file campaign finance reports.

With respect to the question whether an individual, other than a candidate, may contribute more than \$100 to his or her registered committee without losing the committee's exempt status, the Board has always interpreted the statute, §11.06(2r), Stats., strictly and has read the statutory language, "*contributions from a single source, other than contributions made by a candidate to his or her own campaign,*" to apply only to candidates and not any other individuals (or committees). Consequently, if an individual filing a challenge to a candidate's nomination spends more than \$100 to bring that challenge, the individual does not qualify for exempt status and must file a campaign finance report – even if the money spent is entirely the individual's.

III. Challenge expenditures are not necessarily treated as either in-kind contributions or independent expenditures. Like other “political expenditures,” that do not involve contributions or independent expenditures, challenge expenditures may be unclassified.

Finally, you have also asked “how the expenditures for a challenge are classified for campaign finance purposes.” The Board believes that such expenditures may not neatly fit into any classification. In the event that an individual or a committee who challenges a nomination is required to register pursuant to §11.05, Stats., and is not exempt from campaign finance reporting under §11.05(2r), Stats., the manner in which the expenditures are reported depends on the facts and circumstances of each individual case. Challenge expenditures are contributions (in-kind) under §11.01(6), Stats., if they were made with the consent of (or in coordination with) the benefiting candidate. Challenge expenditures are independent expenditures under §11.06(7), Stats., if they were made for the purpose of expressly advocating the election or defeat of a clearly identified candidate and without coordination with a candidate or a candidate’s committee. Some challenge expenditures, however, may not fit under either of those two categories. The closest campaign finance analogy to this type of expenditure is an expenditure for “issue advocacy,” or an expenditure for administrative expenses under §11.01(16), Stats. The Board has previously expressed the view that a political party’s “issue advocacy” expenditures that did not involve either express advocacy or coordination with a candidate or the candidate’s campaign, were, nevertheless permissible political expenditures within the meaning of §11.25(2), Stats. As such, those expenditures are reported, generally, as disbursements under §11.06(1)(g), Stats., just as administrative expenses, like overhead, are reported.