2018 ETH 03

CAMPAIGN FINANCE – APPLICATION OF 50-PIECE RULE TO AGENCY MATERIALS

You are the chief legal counsel for a state agency. You have asked for an advisory opinion confirming that the distribution of various materials produced by your agency pursuant to its official duties are not prohibited by WIS. STAT. § 11.1205 ("50-piece rule"). The request also asks the Commission to clarify how social media communications are counted under the 50-piece rule.

Summary:

It is the opinion of the Commission that your agency is not subject to the 50-piece rule as by its terms, the rule only applies to persons elected to state or local office who become a candidate for national, state, or local office. However, the members of your agency's governing board who are elected to state or local office and who are a candidate for national, state, or local office are subject to the 50-piece rule and any materials or distribution directed by those individuals must comply with requirements of the 50-piece rule.

It is also the opinion of the Commission that instances of communication via social media will be counted under the 50-piece rule by categorizing the communication as either active or passive as described below, with active messages being counted as one piece per recipient, while passive messages are counted as a single piece.

Analysis:

A. Application of the 50-Piece Rule to Agency Materials

Wisconsin law prohibits individuals elected to state or local office who become candidates for national, state, or local office from using public funds for the cost of materials or distribution of 50 or more pieces of substantially identical material distributed during a campaign period. WIS. STAT. § 11.1205. This prohibition is broad, but there are certain enumerated exceptions:

1. Answers to communications of constituents.
2. Actions taken by a state or local government administrative officer pursuant to a specific law, ordinance or resolution which authorizes or directs the actions to be taken.
3. Communications between members of the legislature regarding the legislative or deliberative process while the legislature is in session.
4. Communications not exceeding 500 pieces by members of the legislature relating solely to the subject matter of a special session or extraordinary session, made during the period between the date that the session is called or scheduled and 14 days after adjournment of the session.

The first question is whether this prohibition even applies to your agency. As stated in your request, it is the agency's position that the agency controls its communications, not any elected official, and therefore the 50-piece rule does not apply. The Commission agrees with this analysis with one reservation. An organization can only act through its agents. The agency's governing board includes current state elected officials. As some of those officials are seeking

re-election this fall, the 50-piece rule would still apply to them. Presumably the agency would still be able to act if these elective officials did not participate in the authorizations of materials during their respective campaign periods. However, if the officials wish to participate, their actions would need to meet one of the exceptions provided in WIS. STAT. § 11.1205(2).

On its face, the only exception that could possibly cover these activities is "actions taken by a state or local government administrative officer pursuant to a specific law, ordinance or resolution which authorizes or directs the actions to be taken." WIS. STAT. § 11.1205(2)(b). Your agency has both specific and general statutory authority for its programs. The sweeping nature of the statutory language would appear to authorize a wide variety of activities as long as they could be reasonably construed to be within your agency's duties.

This interpretation is consistent with prior guidance of the courts, the Attorney General, and opinions issued by the Elections Board and subsequently reaffirmed by the Government Accountability Board. In Elections Board Opinion 78-12, which was withdrawn by this Commission as it was under the old Chapter 11, the Elections Board held that the Secretary of State was permitted to send out a variety of notices required by law despite the fact that the law at that time contained no exception for actions authorized or directed by statute. However, the opinion also emphasized that despite this exception, the use of state resources for mailings with a primarily political purpose was forbidden at any time. This opinion was later cited by the Attorney General in an opinion provided to the Speaker of the Assembly that found that various administrative communications were not prohibited. 69 Op. Att'y Gen. 259. This opinion was also cited by the Court of Appeals in holding that a special message directed by Milwaukee's mayor and common council members to be included with city tax bills was not prohibited as it was not distributed for a political purpose. *Crawford v. Whittow*, 123 Wis. 2d. 174 (Wis. App. 1985). In the court's analysis, it noted that express advocacy was not required to find a political purpose and that a case-by-case analysis was necessary to determine if a message is distributed for political purposes. The court adopted the test developed by the Elections Board in Opinion 76-12 to determine if a message was sent for political purposes. However, the Legislature appears to have acted to reassert the need for a statutory exception when it added WIS. STAT. § 11.33(3) in 1985 Wisconsin Act 303, which specifically provided that lack of political purpose was not a defense unless paired with one of the exceptions of WIS. STAT. § 11.33(2).

The Legislature removed the political purpose language from the 50-piece rule when it was repealed and recreated as WIS. STAT. § 11.1205. As such, the intent of the sender is irrelevant to the analysis of whether the 50-piece rule is violated by a given communication. If the communication consists of 50 or more substantially identical pieces and is authorized by a covered official during the prohibited period, it must fit within one of the exceptions to rule. In this case, the materials described in the request all appear to fit within the exception provided for "actions taken by a state or local government administrative officer pursuant to a specific law, ordinance or resolution which authorizes or directs the actions to be taken." WIS. STAT. § 11.1205(2)(b). The Commission also reiterates the conclusion of our predecessor agencies and the courts that using public resources for private purposes is always forbidden as a violation of

the public purpose doctrine as articulated in *State ex rel. Thompson v. Giessel*, 265 Wis. 207 (1953) and subsequent cases.

B. Application of the 50-Piece Rule to Social Media Communications

The language of the 50-piece rule does not distinguish between electronic pieces and printed pieces. It simply prohibits the use of public funds for the distribution of 50 or more pieces of substantially identical material by a covered person during a specified time period. Reading the statute literally, electronic communications are almost always a multiple-piece communication, even when sent to only a single recipient, as such communications are often copied multiple times and/or stored in multiple places once sent. However, it is practically impossible for the sender to determine how many copies may be created by the technical systems that enable electronic communications.

The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶44. Statutory interpretation begins with the language of the statute. *Id.* at ¶45. Statutory language is given its common, ordinary, and accepted meaning. *Id*. Statutory language should also be interpreted in the context in which it is used; not in isolation, but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. *Id*. at ¶46. If the meaning of the statute is plain, the inquiry ordinarily ends there. *Id*. at ¶45. However, a literal reading of a statute may be rejected if it would lead to an absurd or unreasonable result that does not reflect the legislature's intent. *State v. Jennings*, 2003 WI 10, ¶11. Additionally, statutory interpretations that render provisions meaningless should be avoided. *Belding v. Demoulin*, 2014 WI 8, ¶17.

In this case, the literal reading of the statute seems to lead to the unreasonable result where a sender could be held liable for a violation due to the processes of the technical systems over which they have no control (or possibly even knowledge of). A more reasonable reading of the statute is to only count those instances of communication intended by the sender.
This can be accomplished by distinguishing between active and passive messages. An active message is one that is communicated to individually targeted recipients such as emails, instant messages, or direct messages. A passive message is one that is published in a singular form but may be read by multiple individuals such as a website, Facebook post, or a tweet. An active message is counted as one piece per recipient, but a passive message is only counted as a single piece. This closely tracks how these messages would be delivered in a pre-digital era. An email is the digital equivalent of a letter, where the sender controls who will receive the message. A Facebook post or tweet is the digital equivalent of placing a message on a bulletin board or sending out a press release, where the sender no longer controls the distribution of the message after the initial communication. While both of these analogies fail at points due the complexities of electronic media, they provide a useful rule of thumb which appears to honor the intent of the Legislature, which was to prevent candidates from using public resources to communicate a substantially similar message 50 or more times during a campaign period.

It is the opinion of the Commission that instances of communication via social media will be counted under the 50-piece rule by categorizing the communication as either active or passive

as described above, with active messages being counted as one piece per recipient, while passive messages are counted as a single piece.

[redacted]

David Buerger
Wisconsin Ethics Commission
P.O. Box 7125
Madison, WI 53707
David.Buerger@wisconsin.gov

VIA EMAIL

April 6, 2018

Dear Chairperson Halbrooks:

As you know, the 2018 election cycle is starting this month, and Wis. Stat. Sec. 11.1205 prohibits persons elected to state or local office who become candidates for national, state, or local office ("candidates") from using public funds for the cost of materials or distribution for 50 or more pieces of substantially identical materials.

[redacted] distributes some standard business materials (such as; event invitations, introduction letters within scheduled publications, press releases and pre-existing [redacted] materials) that should not be included in the 50-piece distribution rule outlined in Wis. Stat. Sec. 11.1205.

Including elected officials in those materials supports [redacted]'s statutory [redacted] work throughout Wisconsin. As [redacted] continues its duties of [redacted] a key component of [redacted]'s duties require utilizing our stakeholders – including elected officials – to help achieve that mission.

Before getting into the facts, it is important to note that a violation of Wis. Stat. Sec. 11.1205 occurs through the candidate's use of public funds. Wis. Stat. Sec. 11.1205 does not apply in this case because it is [redacted], not the candidates themselves, that use and control the use of public funds relating to the [redacted] materials discussed herein. The materials are generated pursuant to [redacted]'s [redacted] duties as set forth under Wisconsin law and [redacted] has final authority over the substance of the materials created, where the materials will be published, and the distribution of that content.

[redacted] requests an informal opinion from the Wisconsin Ethics Commission to confirm that the distribution of event invitations, press releases, standard introduction letters and pre-existing [redacted] materials does not fall within the restrictions under Wis. Stat. Sec. 11.1205. [redacted] also asks for clarity as to how social media communications (tweets, Instagram posts, Facebook posts, etc.) should be counted.

[redacted]

Invitations to [redacted] events often list attendee(s) and/or keynote speaker(s), and that may include persons elected to state or local office.

These invitations are part of everyday business within [redacted]. Attending such events is also among the everyday duties of elected officials. As such, [redacted] seeks confirmation that it can continue to treat candidates identically to similarly situated non-candidates on [redacted] invitations.

Press releases that [redacted] distributes to the media highlight [redacted] projects and initiatives across the state. Within these press releases, there are two primary scenarios where a candidate may be referenced. The first would be to include a quote from a state representative from the area they represent relating to the [redacted] project. The second would be to identify that candidate's attendance or participation in a [redacted] event. Increasing awareness and highlighting the state and local support for [redacted] is a key component of [redacted]'s [redacted] duties and should continue without restriction.

Introduction letters also fall into the category of standard materials that [redacted] may sponsor, publish or distribute in everyday [redacted] practices. One example of this type of letter would be the "Governor's Letter and Message from [redacted]" within the forthcoming [redacted] publication. This letter is an annual introduction to the publication that outlines the ongoing initiatives and accomplishments resulting from the efforts of [redacted]. Letters from the governor are an important facet of [redacted]'s efforts to [redacted]. One of the governor's duties is to act as the ambassador for the state of Wisconsin by communicating through a variety of platforms – a duty that still exists in an election year.

Finally, there are pre-existing [redacted] materials that may include de minimis references to persons elected to state or local office. Potential examples of these types of materials include [redacted] fact sheets, [redacted] program information among others. (The one example that we've uncovered to date relates to a [redacted]. These materials are generally pre-printed and available to [redacted] staff who can utilize these materials as needed for meetings or events. The use of pre-existing material should not be regulated under Wis. Stat. Sec. 11.1205 as the public funds used to generate these materials occurred outside of the election cycle. Further, the cost (both in public funds and staff time) of redesigning and reprinting replacement materials would be a greater expenditure than utilizing the materials created prior to the election cycle.

Our view is that the standard business materials identified herein are part of everyday business at [redacted] and necessary to carry out [redacted]'s [redacted] duties. These activities occur year-round, not just over the course of the election cycle. A change to these standard practices will impede [redacted]'s ability to conduct it's statutorily required [redacted] duties.

For social media communications, we ask for a two-part analysis. First, we request confirmation that specifically identified content is not regulated by Wis. Stat. Sec. 11.1205. And second, if certain social media content is regulated, that each social media post or tweet by [redacted] should be counted as 1 piece of substantially identical material.

With regard to the social media content itself, there are two primary scenarios where a candidate may be referenced. The first relates to a candidate's attendance or participation in [redacted] event. The second relates to scenarios where [redacted] would repost or "retweet" a [redacted] related communication from a state or local public official. These types of

[redacted]

communications are a key component of [redacted]'s statutory [redacted] duties and should continue without restriction.

For social media communications that are regulated under Wis. Stat. Sec. 11.1205, each social media post or tweet by [redacted] should be counted as one piece of substantially identical material. The reach of one tweet should be viewed the same way as posting a flyer in a dead-end street verse a busy intersection. In both cases, only one piece of substantially identical material was produced.

In summary, Wis. Stat. Sec. 11.1205 does not apply because it is [redacted], not the candidates, that use and control the use of public funds relating to the materials discussed herein. The materials are generated pursuant to [redacted]'s [redacted] duties as set forth under Wisconsin law and [redacted] has final authority over the substance of the materials created, where the materials will be published, and the distribution of that content. But, as to regulated social media content, each post or retweet should be counted as one communication.

Thank you for your assistance. Please let me know if you have any questions.

Kind regards,

[redacted]

Enclosure

Cc: [redacted]

[redacted]