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## 2020 ETH 03

### CAMPAIGN FINANCE – APPLICATION OF 50-PIECE RULE TO COMMUNICATIONS WITH PETITIONS SIGNATORIES AND NEWSPAPER ADVERTISEMENTS

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You are a state senator. You have asked for an advisory opinion regarding the application of [WIS. STAT. § 11.1205](#) (“the 50-piece rule”) to responses to petition signatories. You have also asked about your ability to place newspaper advertisements while under the 50-piece rule.

#### Summary:

The 50-piece rule is a content neutral statute. It does not concern itself with the contents of the message or the purpose for which the message is communicated. Rather, it is a blanket prohibition on the use of public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed during the campaign period. In the context of a petition that is sent directly to a legislator, the legislator may respond to each individual that has signed the petition as each petitioner has, by virtue of his or her signature, communicated their position on the subject of the petition. As such, it is the opinion of the Commission that responses to the petition’s signatories fit clearly within the statutory exception for answers to communications from constituents. In the context of a newspaper ad, it is the opinion of the Commission that the 50-piece rule would prohibit purchasing a newspaper ad if more than 50 individual newspapers are produced.

#### Analysis:

Concerning petitions, you advise that legislative offices receive petitions from time to time asking the lawmaker to support or oppose a bill. In your office, you have received a petition with 300+ signatures asking that you get a bill signed into law. The petition contains the name, signature, and municipality of each person that signed. You have provided the cover letter under which the petition was sent to you, the petition, and a page of signatures. With the information provided, you can identify which petitioners are your constituents and determine their mailing address. As a state legislator, it is important for you to be able to communicate with your constituents who contact your office. As a response to a petition is different than responding to individual letters, emails, phone calls, post cards, etc., you ask for specific guidance as to whether you would be allowed to respond to each petition signatory.

Concerning advertisements, you advise that you would be interested in using your state office account to buy newspaper ads in papers inside of your district, as well as one that is outside of the district that circulates to constituents within the district, to let voters know of your position and actions on the Governor’s recent call to special session. You further advise that, according to the FAQs in the Senate policy manual, the Chief Clerk’s Office is able to provide design and printing services for you. The policy manual provides that the Chief Clerk’s Office can provide these services concerning the following communications: “Communications that discuss a Senator’s legislative agenda, legislative achievements, constituent service, or legislative office; activities of the Senate; district community activities or information; current laws or regulations; public policy issues under debate; or other state government issues.” You advise that the intended ad(s) would fall under one or more of these categories.

Additionally, you inquire outside of the context of the special session, whether the following are permissible:

- Purchasing an ad to place your business card (also includes honoring holidays);
- Purchasing an ad to announce listening sessions;
- Purchasing an ad to promote constituent services performed by the office; or
- Purchasing an ad to discuss your agenda (e.g. your legislative newsletter or portions thereof).

Finally, concerning ads, you inquire whether the placement of an ad in a newspaper constitutes one piece under [Wis. STAT. § 11.1205](#) (“the 50-piece rule”).

Each of the inquiries above implicate Wisconsin’s 50-piece rule, which provides:

**(1)(a)** Except as provided in sub. (2), no person elected to state or local office who becomes a candidate for national, state, or local office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed after:

1. In the case of a candidate who is nominated by nomination papers, the first day authorized by law for circulation of nomination papers as a candidate.
2. In the case of a candidate who is nominated at a primary election by write-in votes, the day the board of canvassers issues its determination that the person is nominated.
3. In the case of a candidate who is nominated at a caucus, the date of the caucus.
4. In the case of any other candidate who is nominated solely by filing a declaration of candidacy, the first day of the month preceding the month which includes the last day for filing the declaration.

**(b)** This subsection applies until after the date of the election or after the date of the primary election if the person appears as a candidate on a primary election ballot and is not nominated at the primary election.

**(2)** This section does not apply to use of public funds for the costs of the following:

- (a)** Answers to communications of constituents.
- (b)** 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.
- (c)** Communications between members of the legislature regarding the legislative or deliberative process while the legislature is in session.
- (d)** 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.

This statute prohibits a person elected to state or local office, who becomes a candidate for a national, state, or local office from using public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material after the applicable date in [Wis. STAT. § 11.1205\(1\)\(a\)1.-4](#). As written, the statute provides a clear, bright-line rule. It does not consider the content of the materials or for what purpose it is being made or distributed.<sup>1</sup> This restriction applies

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<sup>1</sup> While state legislators are subject to the application of the public purpose doctrine, application of that doctrine is not within the purview of the Commission. In this case, the Chief Clerk provides guidance to members concerning

until the latter of either: the day after the primary, if the candidate loses the primary; or, if successful in the primary, the date after the election. The Legislature created four specific exceptions to the 50-piece rule. Specifically, a person elected to state or local office may use public funds for the costs of the following communications during the campaign period:

- Answers to communications of constituents;
- Communications where authorized or directed to communicate by specific law, ordinance, or resolution;
- Communications with members of the Legislature regarding the legislative or deliberative process while the Legislature is in session; or
- Communications not exceeding 500 pieces solely relating to the subject matter of a special or extraordinary session during the period from the date that the session is called or scheduled and 14 days after adjournment of the session.

## **Petitions**

You inquire whether you may reply to each of the 300+ individuals who signed the petition that was sent to you concerning a bill in the Legislature. You also inquire about whether you would be able to respond to other petitions that are sent to you. It would appear that, in this situation, you would be sending more than 50 pieces of substantially identical material using your office account to pay for the materials and distribution of those replies. In the absence of an applicable exception, the statute would prohibit you from using office funds for those replies.

The only exception implicated by your inquiry is the one for answering communications of constituents. The question is whether the petition is a communication from each of the petitioners or only the individuals who signed the cover letter. In order to answer this question, we must consider the nature of a petition. At its core, a petition is a written request to an official to take a certain position or action. Each person that has signed the petition is adopting the position of the petition by signing his or her name. In substance, it is not any different than a letter that is signed by multiple parties. The difference between a petition and a letter signed by multiple people is in form only. To treat them differently due to their form would be an absurd result.

Further, it is important to note that the statute does not require the constituent to request a response. In fact, it is not unusual for officials to receive communications from constituents that do not specifically ask for a response. Notwithstanding the lack of a request for a response, the official may determine that it is important to respond and provide additional information or insight. The fact that no response, other than taking the proposed action identified in the petition, is requested does not render that exception inapplicable. One of the most important responsibilities of an official is to communicate with his or her constituents. In the absence of express statutory language to the contrary, it does not matter whether each petitioner requested a response.

In light of the foregoing, it is clear that each petitioner has communicated with you. As such, you can respond to each petitioner under the exception for providing answer to communications of constituents. If you have questions concerning the content of the communications and whether the

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what are appropriate uses of public funds. To the extent that there is a question about whether the content of a particular message and whether public funds could be used to distribute those messages, we leave those determinations to the appropriate individuals in the Legislature.

expenditure of public funds for those messages would be allowed, we encourage you to consult with the Chief Clerk and other appropriate staff and legislative leadership.

## Advertisements

The first portion of the inquiry concerns whether you may take out advertisements in a newspaper to discuss the recent special session that was called by the Governor. The Governor called a special session on guns for November 7, 2019. The Legislature convened that day and adjourned the special session. This implicates the following exception to the 50-piece rule:

“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.” [WIS. STAT. § 11.1205\(2\)\(d\)](#).

The exception would have allowed for up to 500 pieces of communication relating solely to the subject of the special session from the date that the special session is called or scheduled until 14 days after the session is adjourned. In this case, that window has now closed. However, because there is the possibility of future special sessions while you are subject to the 50-piece rule, you asked us to address how that exception would be applied.

Additionally, you asked if under the 50-piece rule, generally, you would be allowed to purchase the following types of ads in a newspaper:

- An ad placing your business card in the newspaper (which could be part of a special edition, such as a Salute to Veterans on Veteran’s Day);
- Notice of listening sessions, roundtables, and other similar events where the public is invited to attend;
- An ad promoting the constituent services performed by the office; or
- An ad, such as your legislative newsletter (or parts thereof), discussing your agenda.

As noted above, the 50-piece rule does not contemplate the contents of communications. Rather, it simply prohibits a person elected to state or local office, who becomes a candidate for national, state, or local office from using public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material during the campaign period. Each of the types of ads you have inquired about are all newspaper ads. As such, the answer to your questions turn on the question of how to count the placement of a newspaper advertisement.<sup>2</sup> It is the opinion of the Commission that, in the case of a newspaper advertisement, there is an individual piece for each printed copy of a newspaper that is produced. Therefore, a newspaper ad would violate the 50-piece rule if there are more than 50 individual newspapers produced.

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<sup>2</sup> Before answering this question, it is important for us to distinguish this question from application of our recent guidance concerning electronic media. Due to the nature of the guidance concerning electronic media, the advice issued in that context is limited to just the realm of electronic media. When considering communications while under the 50-piece rule, an official should make sure to analyze the considerations for each type of media the official is contemplating using for communication. In many instances, electronic media may be treated differently than physical media.

**From:** [REDACTED]  
**To:** [Carlton, Daniel - ETHICS](#)  
**Subject:** RE: Formal Opinions  
**Date:** Wednesday, November 6, 2019 11:44:52 AM

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Thanks, Dan. Absolutely be happy to answer any questions whenever you need it.

Appreciate all the time you've invested.

Best,

[REDACTED]

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**From:** Carlton, Daniel - ETHICS <Daniel.Carlton@wisconsin.gov>  
**Sent:** Wednesday, November 6, 2019 9:39 AM  
**To:** [REDACTED]  
**Subject:** RE: Formal Opinions

Good morning, [REDACTED]!

I think that I have enough information here to get something put together. There's a good chance that I may still have some follow-up questions. If I do, I'll be in touch. Regardless of whether I have follow-ups, we'll definitely get this ready for the December 3<sup>rd</sup> meeting.

In the meantime, if you have any questions or any other information, please don't hesitate to touch base with me.

Thanks,

Dan

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**From:** [REDACTED]  
**Sent:** Tuesday, November 5, 2019 7:01 PM  
**To:** Carlton, Daniel - ETHICS <[Daniel.Carlton@wisconsin.gov](#)>  
**Cc:** [REDACTED]  
[REDACTED]  
**Subject:** Formal Opinions

Thanks again for your time last Friday. We would like to move forward to obtain 2 opinions from the Commission.

Since [REDACTED], we are under the 49-piece rule. However, a few issues have come up and we're seeking formal guidance from the Commission as it relates to two issues:

(1). Our ability to respond to our constituents who sign petitions; and

(2). Our ability to place newspaper advertisements

**Petitions:**

On the question of petitions. Legislative offices receive petitions from time to time asking the lawmaker to support or oppose a bill. In our office, we received 300+ signatures asking that Senator [REDACTED] get Senate Bill 100/Assembly Bill 114 signed into law. The petitions contain the name, signature, and municipality of each person that signed. In the attached scan, you can get an idea of what we were sent. There's a cover letter from two pharmacists who explain their concerns and those of their patients who signed the petition, there's a copy of the petition with the letter written to both Representative [REDACTED] and Senator [REDACTED], and the final is an example of the back page of the petition which contains the signatures. You had asked how we could identify from this petition who our constituents are and where they reside. I shared that we have a database called Forward that was created by our Legislative Technical Services Bureau (LTSB) many years ago. This database contains contact information for our constituents in the [REDACTED] Senate District. LTSB does update it with voter records, etc. It is easy to determine street address and zip code of those signing the petition by searching for their name.

What concerns Senator [REDACTED] most about being under the 49-piece rule is any inability to connect with constituents who directly contact [REDACTED] office. Direct contacts usually come in the form of letters, emails, phone calls, individual post cards, conversations he has at events and out in the community, and/or petitions (or so we believed). When I phoned the Senate Chief Clerk's Office, I asked if our office could respond to these constituents that not only printed their names but signed their names on the petitions. The Clerk thought it would be acceptable but also provided a counter-argument that if we drew a complaint, he wasn't sure how it would be resolved.

Last Friday you were very generous with your time and said that you would suggest we seek a formal opinion since there is no clear statutes, guidelines, or practices relating to petitions. The question being are these petitions a direct communication with our office?

**Advertisements:**

When we spoke last Friday, it was on the following email we sent you:

*The senator would be interested in using [REDACTED] state office account to buy newspaper ads in papers inside [REDACTED] district, as well as one outside the district that circulates to constituents within the district, to let voters know of [REDACTED] position and actions on the governor's recent call to special session.*

*The senator understands that because [REDACTED] is able to circulate nomination papers for a campaign in which [REDACTED] is engaged, it would have to be done within the 50-piece rule exception that allows for 500 pieces on a topic regarding a special session called by the governor (see statute 11.1205(4)(2)(d)).*

*Under the Senate policy manual FAQs, the chief clerk's office is able to provide design and printing services for the senator: "Communications that discuss a Senator's legislative agenda, legislative achievements, constituent service, or legislative office; activities of the Senate; district community activities or information; current laws or regulations; public policy issues under debate; or other state*

*government issues"* (p. 24).

*The intended ad would fall under these categories outlined on page 24 of the Senate policy manual, which are named appropriate state business. The policy manual does not disallow the use of an office account to buy newspaper ads of this nature.*

*It is vital that the senator be able to communicate with [REDACTED] constituents on these important issues that impact them. Would buying these newspaper ads regarding special session be allowed under the ethics statutes? We'd respectfully request a timely answer given the short window allowed in statute 11.1205.*

Special session will almost certainly be adjourned, but the Governor does have the ability to call another special session related to guns or any topic he wants, so still curious about our ability to purchase ads for the special session.

Outside of the special session, we would like some guidance on purchasing ads in general.

- Is it okay to purchase an ad to place the Senator's business card? The ad could be part of a special edition (Salute to Memorial Day, Veteran's Day, July 4<sup>th</sup>, etc.) or just appear in the regular newspaper.
- Okay to announce listening sessions, to announce a meeting that the public is invited to (example: a Cabinet Secretary will be visiting the district to discuss issues related to their agency that the Senator organizes), a law enforcement roundtable, etc.?
- Okay to promote constituent services performed by the office?
- Okay to discuss [REDACTED] agenda? Such as pieces of [REDACTED] legislative newsletter or the legislative newsletter in its entirety?

In the 2018 Campaign Season Guidelines for Senators and Staff, page 19, FAQ last question states that, “purchasing one ad (ad in a newspaper for an upcoming town hall), counts as one. The Senate Chief Clerk states that the Ethics Commission says ads count as one against the 49.

Could the Commission kindly provide their opinion.

Kind thanks in advance.

[illegible]

Dear Senator [REDACTED]

As an independent pharmacist I get to know our patients and create relationships with them. And for those who are battling an illness or chronic disease I know how critical their medications are to their overall health.

Daily I hear patient stories about prescription costs that would break your heart.

I hear from cancer patients who have to pay a higher out-of-pocket cost for using their insurance rather than paying the lower, uninsured rate, because I am prohibited by a "gag clause" required by Pharmacy Benefit Managers (PBMs) from informing them there could be a lower price option for them.

I hear from elderly patients, who have been utilizing our pharmacy for years, that are now required to order excessive supplies of their medicine and wait up to 10 days to get their prescriptions filled via mail-order.

And I see patients having to make the painful decision as to whether to even have their prescriptions filled, as the cost of medications are drastically increasing, while the PBMs pocket savings meant for consumers.

Last year we started a petition to ask our state legislators to create laws to crack down on this bad policy. We need even stronger regulations on insurers and their PBMs who have allowed this system to get wildly out of control, charging consumers more for prescription drugs by inflating costs and ultimately limiting accessibility. Things need to change quickly because for Wisconsin residents, especially those with chronic conditions, the clock is ticking.

More than 11,000 people statewide have signed this petition to say they've had enough of the PBMs and their practices and want them to be required to be more transparent. **Those who have signed this petition at my store, in your district, are attached.**

2019 Senate Bill 100 and Assembly Bill 114 will hold PBMs accountable by requiring them to register with the state; establishing price transparency requirements and eliminating intimidating gag clause provisions in PBM contracts with pharmacies, pharmacists, or health benefit plan sponsors. The bills also require PBMs to ensure patients are not denied coverage during a plan year if their medication/device was covered when the participant enrolled or renewed their coverage - often called non-medical switching. 97 cosponsors have signed onto the bi-partisan legislation supporting regulation of the PBMs. Thank you for supporting this bill that will help lower prescription medicines and create a fairer marketplace.

On behalf of your constituents who have signed onto this petition, please help us get SB 100/AB 114 signed into law this session.

Please feel free to contact me with any questions.

Sincerely,

[REDACTED]



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## CONSTITUENTS IN SUPPORT OF PBM TRANSPARENCY

Dear [REDACTED]

Pharmacy benefit managers were first created as middlemen to reduce administrative costs for insurers, validate a patient's eligibility, administer plan benefits, and negotiate costs between pharmacies and health plans. Over time, PBMs have been allowed to operate virtually unchecked. A lack of transparency in PBM practices has led many states to implement licensure/registration, fair pharmacy audit, or generic drug pricing legislation to try to level the playing field for pharmacies and patients.

PBM practices that must be addressed in Wisconsin include secret pricing schemes to gouge customers on drug cost, inflated copays well over the cost of drugs, "gag clauses" silencing pharmacists in communicating to customers lower out of pocket options, and false advertising mailers to restrict patient choice of pharmacy and into mail order or big chain pharmacies.

The undersigned on this petition call on our Wisconsin State Legislators to enact comprehensive "PBM transparency" legislation for lower drug costs, better medical care, and access to our local independent pharmacies.

**Name**

**Signature**

**Municipality**

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## CONSTITUENTS IN SUPPORT OF PBM TRANSPARENCY

**Name**

**Signature**

**Municipality**

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