

Opinion Withdrawn – Wisconsin Ethics Commission – 12/06/2016

Summary:

Legislative newsletters and campaign finance laws: Campaign funds cannot be used to pay any part of the cost incurred for newsletters funded in any part by state funds; Use of state employees on state time to prepare newsletters intended primarily for political purposes is unlawful; Test established for determining whether a state-funded newsletter is primarily for political purposes. §§11.36, Stats., 11.33, Stats., El. Bd. Op. 76-2. (Issued to David E. Clarenbach, December 18, 1976)

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

Opinion:

You state that the State Assembly provides "each legislator \$3,000 per biennium for stationary, postage and various mailings including newsletters." You ask a number of questions concerning the relationship of campaign finance laws and legislative newsletters. The first set of questions is:

"(1) If a legislator mails a newsletter prior to filing nomination papers and as a result of that mailing exceeds the \$3,000 allowance, in repaying the excess must the funds used be channeled through his or her campaign treasurer? If not, could campaign contributions be used to satisfy the debt anyway? May the expenditure be split in such a way that the legislator's allowance would be used entirely and the excess paid by campaign contributions"? "

Those questions go to whether the cost of a newsletter can be paid in part by the state allowance and in part by campaign funds. Campaign funds can only be used for "political purposes." §11.25 (2)(a), Stats., El. Bd. Op. 76-6. In order to answer your questions here, it is necessary to determine whether a legislator's allowance may be used for "political purposes."

In the opinion of the Board, such practice would be unlawful. First, it would be inconsistent with the well-established constitutional principle that public funds can only be used for public purposes. *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201. Second, the preparation and mailing of a newsletter with state resources almost necessarily involves the use of state employees' time. Such use for political purposes would violate §11.36, Stats., providing in part:

Political solicitation by state employees and officers restricted. No officer or employee of this state may solicit or receive or be involved in soliciting or receiving any contribution or service for any political purpose from any officer or employee of this state while on state time or engaged in his official duties as an officer or employee....

Given that campaign funds can only be used for political purposes and given that a legislator cannot use any part of his state allowance for political purposes, the answers to your questions in "(1)" are as follows: When the cost of preparing and distributing a newsletter is paid in any part by the use of the state allowance, the newsletter's purposes are necessarily non-political and campaign funds cannot be used to pay for any part of its preparation and distribution. The "excess" of which you

speech must be paid from some source other than campaign funds and cannot be channeled through a campaign treasurer.

You second set of questions is:

"(2) If a legislative newsletter is considered an act done for "political purposes" (§11.01 (16)) or "in support of or in opposition to" (§11.01 (10)), can state funds be used in preparing and distributing the newsletter? If so, must those funds be considered a contribution and corresponding disbursement and so reported? Must the newsletter contain a political disclaimer? (§11. 30)"

The first question in "(2)" has been answered in the negative. Accordingly, it is unnecessary to answer the remaining two questions in "(2)."

Finally, you ask:

"(3) When a legislator mails a newsletter, what standards are used or factors considered in determining whether the act is for "political purposes" (§11.01 (16)) and when it is "in support of or in opposition to" (§11.01 (10))?"

This question is pertinent to §11.36, quoted in part above, because a legislator's use of state employees on state time for the preparation and distribution of a newsletter will violate §11.36 if the newsletter is directed toward "political purposes." Section 11.01 (16), Stats., defines "political purposes." Applied literally, §11.01 (16), Stats., would preclude the use of the legislative allowance for any newsletter which " ...by its nature, intent or manner ... directly or indirectly influence(s) ...or tend(s) to influence voting at any election.... "

The result would significantly inhibit the use of newsletters. The Board recognizes that the legislative newsletter is an important means of effectuating open government. In light of the value of newsletters, the legislature could not have intended to limit their distribution to the narrow area which would be protected from a literal application of §§11.36 and 11.01 (16). Further supporting that conclusion is §11.33, Stats., which provides:

No person elected to state office may use public funds for mailings of 100 (now 50) or more pieces of substantially identical material after filing nomination papers as a candidate for national, state or local offices, until after the date of the election or after the date of the primary election if such person is not nominated and does not file nomination papers as an independent candidate.

By explicitly prohibiting state-funded distribution of newsletters in quantities of 100 or more after the filing of nomination papers and before the primary or election in which the distributor is a candidate, the legislature impliedly recognized that distribution of newsletters in other circumstances may be proper.

Finally, the Board has previously recognized that §11.36 should not be applied to inhibit state employees and officials in carrying out their official duties and effectuating governmental policy. In El. Bd. Op. 76-2, the Board held that §11.36 does not apply to those acting pursuant to official duties and not primarily for political purposes.

Based on the above, the Board believes that questions of whether newsletters are intended for "political purposes" should be answered as follows: First, in order to violate §11.36 preparation and distribution of newsletters with state funds must be done primarily for "political purposes" and not incidental to the performance of official duties or the furtherance of proper legislative goals. Second, §11.33 raises a presumption that a newsletter which is distributed at a time and in a manner consistent with that statute is not intended for "political purposes." In other words, newsletters distributed prior to the filing of nomination papers, in numbers of less than 100 after that date, or in any quantity after a primary in which the distributor was not nominated are presumed to be for non-political purposes. That presumption is overcome only where other factors conclusively demonstrate that the purpose of such distribution is primarily political. Among those factors are, in order of importance: (1) the distributor's intentions as to re-election, (2) the content of distributed materials, (3) the time of distribution, (4) the manner of distribution, and (5) the frequency and pattern of distribution. The application of these factors is discussed at length in El. Bd. Op. 76-12.

However, a legislator can determine that a newsletter is for a "political purpose" if not prepared by state employees on state time, and pay full costs for printing and postage, with disclaimer, from campaign funds.