
 Meeting of the Board

Wednesday, March 26, 2008

9:30 A.M.

Risser Justice Center, Rm 150

120 Martin Luther King Jr. Blvd.

 Madison, Wisconsin

 Agenda
 Open Session

Page #
A. Call to order.

Judge Deininger

B. Director's report of appropriate notice of meeting.
C. Approval of minutes. Approve minutes of previous meeting.

See attached minutes

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D. Public comment.
Break
E. Proposed Review Schedule Revisions
6
Review Ethic Board's opinions and guidelines related to:
1) State officials representing clients before district attorneys
7
Review of certain Elections Board's operating procedures, opinions and/or rules related to:
1) Scope of Campaign Finance Regulation
16
2) Coordination of Campaign Activity and Independent Expenditures
47
3) Use of Government Resources and State Employee Activity
51
4) Voter Registration.
56
Break
F. Director's report.

Elections division report.

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Ethics and accountability division report – campaign finance, state official financial disclosure, lobbying registration and reporting, contract sunshine.

73

Agency administration and legal issues – general administration and orders.

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G. Adjourn to closed session to consider written requests for advisory opinions and the investigation of possible violations of Wisconsin's lobbying law, campaign finance law, and Code of Ethics for Public Officials and Employees and confer with counsel concerning pending litigation pursuant to the following statutes:

5.05 (6a) and 19.85 (1) (h)	[The Board's deliberations on requests for advice under the ethics code, lobbying law, and campaign finance law shall be in closed session],
19.85 (1) (g)	[The Board may confer with legal counsel concerning litigation strategy],
19.851	[The Board's deliberations concerning investigations of any violation of the ethics code, lobbying law, and campaign finance law shall be in closed session],

The Government Accountability Board has scheduled its next meeting for May 5, 2008 at Risser Justice Center, Rm 150, 120 Martin Luther King Jr. Blvd., Madison, WI

State of Wisconsin\Government Accountability Board

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KEVIN J. KENNEDY
Director and General Counsel

WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD

Room 150, Risser Justice Building
120 Martin Luther King, Jr. Blvd.
Madison, Wisconsin
February 25, 2008
9:30 a.m.

DRAFT

Not yet approved
by the Board

Open Meeting Minutes

<u>Summary of Significant Actions Taken</u>	<u>Page</u>
A. Approved use of existing campaign finance, financial disclosure, and lobbying forfeiture schedules on an interim basis	2
B. Authorized staff to initiate proposed rule-making to adopt new proposed forfeiture schedules	2
C. Adopted proposed schedule for review of guidance, operating procedures, opinions, and rules of former boards	2
D. Reaffirmed opinions/guideline, and withdrew opinions regarding state officials' conflicts of interest	2
E. Reaffirmed ElBd Chapter 2 (election- related petitions) and two related Opinions	3
F. Declined to reaffirm Opinion El.Bd. 76-11	3

Present: Judge Thomas Cane, Judge David Deininger, Judge William Eich, Judge James Mohr, Judge Gerald Nichol

Absent: Judge Michael Brennan

Staff present: Kevin Kennedy, Jonathan Becker, George Dunst, Barbara Hansen, Sharrie Hauge, Bart Jacque, Kyle Richmond, Nat Robinson, Tommy Winkler

A. Call to order

Chairman Deininger called the meeting to order at 9:35 a.m.

B. Director's report of appropriate notice of meeting

The Director reported that the meeting had been properly noticed.

C. Approval of minutes of the previous meeting

MOTION: Approve minutes of the January 28, 2007 meeting of the GAB.

Moved by Nichol, seconded by Eich. Motion carried.

D. Public Comment

1. **Paul Malischke** appeared to comment on item H. 2, Recount, and item J, Elections Division report to the Board. Mr. Malischke provided written recommendations to the Board regarding elections administration.

Hearing no objection, the Chairman postponed the scheduled meeting break.

The following segments (Items E-H.1) were presented to the Board by Jonathan Becker

E. Ratify use of current forfeiture schedules on interim basis

MOTION: Approve use of existing campaign finance, financial disclosure, and lobbying schedules on an interim basis.

Moved by Eich, seconded by Nichol. Motion carried.

F. Initiate proposed rule-making to adopt new proposed forfeiture schedules

MOTION: Authorize staff to initiate proposed rule-making to adopt new proposed forfeiture schedules.

Moved by Eich, seconded by Cane. Motion carried.

G. Issue attached summaries of opinions

No action was taken by the Board. Board members reached consensus that in the future, once staff finishes summaries of opinions, those summaries should be sent to Board members for review.

H. Proposed schedule for review of guidance, operating procedures, opinions, and rules of former boards

MOTION: Adopt review schedule proposed by staff, giving the Director ability to alter it based on workload.

Moved by Eich, seconded by Nichol. Motion carried.

The Chairman called a recess for 10 minutes. The meeting reconvened at 11:57 a.m.

H. 1) State officials' conflicts of interest

MOTION: Reaffirm opinions and guideline pertaining to state officials' conflicts of interest and withdraw five opinions, as suggested by staff. Further, clearly identify the five withdrawn opinions as such for the public in future GAB documents and communications.

Moved by Eich, seconded by Cane. Motion carried.

H. 2) State officials representing clients before a state agency

The Board took no action. The Board reached consensus that the Ethics and Accountability Division Administrator should return to the Board with a memo analyzing the issue in greater detail.

The following segments (H.1 and H.2) were presented to the Board by Kevin Kennedy.

H. 1) Election-related petitions

MOTION: Reaffirm ElBd Chapter 2, Wis. Admin. Code, as a rule of the Government Accountability Board and change the chapter title to "Election-Related Petitions." Further, reaffirm two Elections Board formal opinions concerning election-related petitions, Opinion El.Bd. 76-08 and Opinion El.Bd. 86-2.
Moved by Cane, seconded by Eich. Motion carried.

H. 2) Recounts

MOTION: Decline to reaffirm Opinion El.Bd. 76-11.
Moved by Eich, seconded by Nichol. Motion carried.

The Board reached consensus that staff should revisit the remaining portion of this issue at the next Board meeting.

The Chairman called a recess for lunch. The meeting reconvened at 12:27 p.m.

I. Legal memorandum on Wisconsin Right to Life case
(Presented by George Dunst)

Discussion was held for informational purposes; the Board took no action.

J. Director's Report

Elections Division Update
(Nathaniel E. Robinson)

Report was made for informational purposes; the Board took no action. Judge Nichol expressed his commendations to the staff for the successful administration of the February 19, Spring Primary and Presidential Preference Vote.

Ethics and Accountability Division Update
(Presented by Jonathan Becker)

Report was made for informational purposes; the Board took no action.

Agency Administration and Legal Issues
(Presented by Kevin Kennedy)

The Board reached consensus that the Board Chair or a Board member designated by the Chair should certify official election results for the agency. The Chair noted that Judge Eich might be chosen to substitute for him for certification of the February 19 election results.

The Board reached consensus that items discussed in its closed session meetings should be disclosed in a non-specific manner in its open meeting minutes, including such items as:

- Requests for advice – how many requests considered and how many opinions issued
- Investigations – how many investigations opened and pending
- Litigation – how many cases considered
- Enforcement – how many complaints authorized for filing

The Chair called a 10 minute recess. The meeting reconvened at 2:00 p.m.

K. Move to Closed Session

MOTION: Move to closed session pursuant to Sections 5.05(6a), 19.85(g), (h), and 19.851 Wis. Stats. to consider written requests for advisory opinions, the investigation of possible violations of Wisconsin’s lobbying law, campaign finance law, and Code of Ethics for Public Officials and Employees, and to confer with counsel concerning strategy with respect to litigation in which the Board is, or is likely to become, involved. Moved by Eich, seconded by Cane.

Roll call vote:	Cane:	Aye	Deiningner:	Aye
	Eich:	Aye	Mohr:	Aye
	Nichol:	Aye		

Motion carried, 5-0.

The Board went into closed session at 2:02 p.m.

Summary of Significant Actions Taken in Closed Session Meeting

- A. Requests for Advice: Three items considered; no formal opinions issued.
- B. Investigations: Four items considered; one item closed, two items pending and one item referred to another body.

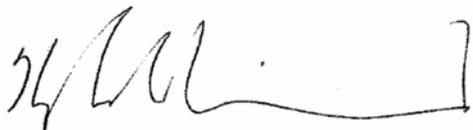
MOTION: Adjourn the meeting.
Moved by Eich, seconded by Cane. Motion carried.

The meeting was adjourned at 3:25 p.m..

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The next meeting of the Government Accountability Board is scheduled for 9:30 a.m., Wednesday, March 26, 2008, in Room 150 of the Risser Justice Center, 120 Martin Luther King Jr. Blvd., Madison, Wisconsin.

GAB minutes were prepared by:



Kyle R. Richmond, Public Information Officer

February 28, 2008

Date

Proposed Review Schedule of Guidelines, Orders, Opinions, Certain Operating Procedures and Rules

Wednesday, March 26, 2008

Ballot and Voting Equipment Security: ElBd Chapter 5

Coordination of Campaign Activity: (1 opinion - ElBd. Op. 00-2)

Government Resources: (4 opinions - ElBd. Op. 74-6, ElBd. Op. 76-12, ElBd. Op. 76-16, ElBd. Op. 78-12)

Independent Expenditures: (1 opinion - ElBd. Op. 78-8); ElBd 1.42, ElBd 1.50

Scope of Regulation: (11 opinions - ElBd. Op. 74-4, ElBd. Op. 76-12, ElBd. Op. 76-16, ElBd. Op. 77-3, ElBd. Op. 79-2, ElBd. Op. 79-3, ElBd. Op. 79-4, ElBd. Op. 86-3, ElBd. Op. 00-2, ElBd. Op. 03-1, ElBd. Op. 06-1); ElBd 1.28, ElBd 1.29

State Employee Activity: (3 opinions - ElBd. Op. 75-2, ElBd. Op. 76-2, ElBd. Op. 76-16)

Voter Registration: (3 opinions - ElBd. Op. 76-10, ElBd. Op. 80-1, ElBd. Op. 81-1), ElBd Chapter 3

State of Wisconsin\Government Accountability Board

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KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For March 26, 2008 meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Jonathan Becker, Administrator, Division of Ethics and Accountability

SUBJECT: State officials' representation of clients before a district attorney

Statutory provision

Section 19.45 (7), *Wisconsin Statutes*, provides:

19.45 (7) (a) No state public official who is identified in s. 20.923 may represent a person for compensation before a department or any employee thereof, except:

1. In a contested case which involves a party other than the state with interests adverse to those represented by the state public official; or
2. At an open hearing at which a stenographic or other record is maintained;

or

3. In a matter that involves only ministerial action by the department; or
4. In a matter before the department of revenue or tax appeals commission that involves the representation of a client in connection with a tax matter.

(b) This subsection does not apply to representation by a state public official acting in his or her official capacity.

Issue

Should the Government Accountability Board affirm the Ethics Board's opinions that the prohibition in §19.45 (7) does not apply to a state official's representing clients in discussions or negotiations with a district attorney's office?

Background

In its last formal opinion, 2008 Wis Eth Bd 1, the Ethics Board, adhering to its precedents, said that a legislator may represent a party in a criminal prosecution if a district attorney's office was the prosecutor because a district attorney is a judicial officer and excluded from the meaning of "department" as used in §19.45 (7). The Ethics Board's opinion relied on 1998 Wis Eth Bd 3 and 4 Op. Eth. Bd. 77 (1981).

In its 1981 opinion, the Ethics Board said: "We are persuaded that the legislature intended to exclude a district attorney from the meaning of 'department' and that both courts and the office of district attorney are treated as judicial offices within the Code's meaning of 'department'." (See attached opinion). The opinion cited a number of Wisconsin Supreme Court cases for the proposition that the Court has recognized a district attorney as a judicial officer. In its subsequent opinions in 1998 and 2008, the Ethics Board relied on 4 Op. Eth. Bd. 77, without elaboration.

Analysis

I have found no extraneous evidence of legislative intent that the Legislature intended to exclude district attorneys from the meaning of “department.” I have reviewed the Supreme Court cases on which the 1981 opinion relied. It may be a bit of a stretch to say that they stand for the proposition that a district attorney is a judicial office. Rather, they stand for the proposition that a district attorney is a *quasi*-judicial officer in the sense that it is a district attorney’s duty to administer justice rather than to obtain a conviction and that a district attorney has discretion in charging and is not purely an administrative officer in that regard.

This is not to say that there is no support for the proposition that a district attorney is a judicial officer. 27 C.J.S. District and Prosecuting Attorneys §2 states:

A prosecuting attorney is a judicial, quasi-judicial, or semi-judicial officer, and is part of the judicial system, or at least an officer of the judicial department of government, an attorney retained by the public primarily for the prosecution of persons accused of crime, and charged with the duty of exercising a sound discretion to distinguish between the guilty and innocent, between the certainly and the doubtfully guilty.

(Footnotes omitted).

The public policy behind §19.45 (7) has been articulated as avoiding even the appearance of a state official exerting undue influence on state agencies, officials, and employees on behalf of a private person for pay. To the extent that a public policy rationale may be used to inform an interpretation of the statute, it is unclear whether a district attorney’s office is more or less likely to be subject (or appear to be subject) to undue influence by a legislator or other state official.

Thus, while there may be some basis for holding that a district attorney should be considered a judicial officer, the arguments are not compelling.

But that does not end the discussion. The Ethics Board opinions do not address the meaning of the statutory language which prohibits an official to represent a person for pay before a department or employee thereof. A criminal case is not before a district attorney; it is before the court. For this reason, I believe the statute does not restrict an official to represent a person in a criminal matter once the court’s jurisdiction is invoked (that is, once a complaint has been filed). But, the statute does apply if an official is meeting with a district attorney’s office before such time, to negotiate an agreement not to file a criminal complaint.

Effect of 1989 amendment to definition of “department”

At the time of the 1981 opinion, §19.42 (5), *Wisconsin Statutes*, defined “department” as

The legislature, the university of Wisconsin system, any authority or public corporation created and regulated by an act of the legislature and any office, department, independent agency or legislative service agency created under ch. 13, 14 or 15, or any constitutional office *other than a judicial office*.

(Emphasis added). In 1989, the Budget Act (1989 Wis Act 31) created the state prosecution system, making assistant district attorneys state employees. The Act amended the definition of “department” to add the following sentence: “In the case of a district attorney, ‘department’ means the department of administration unless the context otherwise requires.”

I do not believe this amendment should make a difference in the analysis. Under §19.45 (7), the context appears to require that “department” for a district attorney means the district attorney’s office. There appears to be no discernable reason why district attorneys’ offices should, as a matter of public policy, be excluded wholesale from the prohibition on a state official representing persons before any department. There simply is no evidence that the Legislature intended this result when it amended the definition of “department” in 1989. Indeed, the 1989 Act created the state prosecution system and made assistant district attorneys state employees. If anything, the policy behind §19.45 (7) assumes even more importance since the act gave legislators a greater and more direct role in the operations of district attorney’s offices than previously.

Conclusion

In my view, there is some basis for holding that a district attorney should be considered a judicial officer, but it is not compelling. I also believe that the 1989 amendment to the definition of “department” should not be read to mean that the office of district attorney is excluded from the statutory restriction. I suggest that the best reading of §19.45 (7) is that the restriction on representation applies except when representation takes place in a matter that is already before the court.

I recommend that the Government Accountability Board modify 2008 Wis Eth Bd 1, 1998 Wis Eth Bd 3 and 4 Op. Eth. Bd. 77 (1981) by adding the following language:

The Government Accountability Board reviewed this opinion on March 25, 2008 as part of the review of Ethics Board opinions mandated in 2007 Wisconsin Act 1. The Board is not of the opinion that a District Attorney is a judicial office. The cases on which the Ethics Board opinion relies hold that a district attorney is a *quasi*-judicial office in the sense that it is a district attorney’s duty to administer justice rather than to obtain a conviction and that a district attorney has discretion in charging and is not purely an administrative officer in that regard. Nor is there any evidence of a legislative intent to exclude district attorneys from the meaning of “department” at the time the statute was created.

In 1989 Act 31, in which the Legislature created the state prosecution system and made assistant district attorneys state employees, the definition of “department” was amended by the addition of the following sentence: “In the case of a district attorney, ‘department’ means the department of administration unless the context otherwise requires.” Under §19.45 (7), the context requires that “department” for a district attorney means the district attorney’s office. There is no discernable reason why the Legislature would intend that district attorneys’ offices should be excluded wholesale from the prohibition on a state official representing persons before any department. There simply is no evidence that the Legislature intended this result when it amended the definition of “department” in 1989. Indeed, the 1989 Act created the state prosecution system and made assistant district attorneys state employees. If anything, the policy behind §19.45 (7) assumes even more importance since the act gave legislators a greater and more direct role in the operations of district attorney’s offices than previously.

But that does not end the analysis. The Ethics Board opinions do not address the meaning of the statutory language which prohibits an official to represent a person for pay before a department or employee thereof. A criminal case is not before a district attorney; it is before the court. For this reason, the statute does not restrict an official to represent a person in a criminal matter once the court’s jurisdiction is invoked (that is, once a complaint has been filed) even if such representation

involves private discussions or negotiations and regardless whether the district attorney or the attorney general is prosecuting the matter. But the statute does apply if an official is meeting with a district attorney's office or with the attorney general's office before such time to negotiate a disposition because, prior to the filing of a criminal complaint, the matter is before the prosecuting authority and not the court.

REPRESENTATION OF CLIENTS; LEGISLATORS; INTER-AGENCY COOPERATION; PUBLIC CONTRACTS; EMPLOYMENT CONFLICTING WITH OFFICIAL RESPONSIBILITIES

The Ethics Code does not pose an obstacle to a legislator's representing a client before a judicial officer, including a district attorney, in either a civil or criminal proceeding.

A legislator may not represent a client before the Department of Health and Social Services or before the Office of the Governor except in very limited circumstances.

The Ethics Code does not bar an attorney, who is a member of the legislature, from representing a defendant in a criminal or paternity case when remuneration is paid by the Office of the State Public Defender; but the legislator should notify the Ethics Board and the State Public Defender of the proposed arrangement prior to accepting that appointment if the legislator is likely to receive more than \$3,000 from the Office of the State Public Defender within 12 months. Eth. Bd. 221

4 March 1981

Facts

This opinion is based upon these understandings:

- a. You are a member of Wisconsin's legislature and hold a state public office.¹
- b. You are licensed to practice law in Wisconsin.

Questions

The Ethics Board understands your questions to be:

- a. May an attorney, while a member of the legislature, represent a client in a state criminal proceeding from arrest through appeal, when all remuneration for services comes from the defendant?
- b. May an attorney, while a member of the legislature, represent a convicted person during state probation revocation? During state proceedings concerning the granting or revoking or parole? During efforts to secure a state pardon from the Governor? This question again assumes completely private remuneration.

¹ Secs. 19.42(13)(c) and 20.923(2)(a)6, *Wisconsin Statutes*, provide in part:

19.42(13) "State public office" means:

(c) All positions identified under sec. 20.923(2). . . .

20.923(2)(a)6. Legislature, members. . . .

- c. May an attorney, while a member of the legislature, represent a defendant in a state criminal case or a state paternity case when remuneration is paid by the State Public Defender's Office? Are there any statutes or rules that prevent a legislator from being paid by another state agency for this kind of legal work?

Discussion

The Ethics Code does not forbid state public officials to accept employment or to follow pursuits which neither interfere with their official duties nor conflict with specific provisions of the Code.²

Among the Code's specific proscriptions, sec. 19.45(7), *Wisconsin Statutes*, deals with a legislator's representation of clients.³ This section prohibits a legislator's representation of a client before a department. Department means:

the legislature,
the University of Wisconsin System,
authorities created and regulated by the legislature,
offices, departments, independent agencies, and legislative service
agencies created under chapters 13, 14, or 15, and
constitutional offices other than judicial offices.⁴

We are persuaded that the legislature intended to exclude a district attorney from the meaning of "department" and that both courts and the office of district attorney are treated as judicial offices within the Code's meaning of "department".⁵

² Sec. 19.45(1), *Wisconsin Statutes*; 4 Op. Eth. Bd. 83 (1981).

³ Sec. 19.45(7), *Wisconsin Statutes*, provides:

19.45(7) No state public official who is identified in s.20.923 may represent a person or organization for compensation before a department or any employe thereof, except:

1. In a contested case which involves a party other than the state with interests adverse to those represented by the state public official; or

2. At an open hearing at which a stenographic or other record is maintained;

or

3. In a matter that involves only ministerial action by the department; or

4. In a matter before the department of revenue or tax appeals commission that involves the representation of a client in connection with a tax matter.

(b) This subsection does not apply to representation by a state public official acting in his or her official capacity.

⁴ Sec. 19.42(5), *Wisconsin Statutes*, defines "department" and provides:

19.42(5) "Department" means the legislature, the university of Wisconsin system, any authority or public corporation created and regulated by an act of the legislature and any office, department, independent agency or legislative service agency created under ch. 13, 14 or 15, any constitutional office other than a judicial office.

Thus, we do not discover in the Code a provision likely to be a substantial impediment to your representation of clients in either civil or criminal cases nor likely to impede your representation in proceedings for revocation of probation, at least to the extent that your efforts are directed to a court or district attorney and not to an agent of the Department of Health and Social Services into whose custody probationers are placed.⁶

Next we turn our attention to legal work concerning parole and pardon. The Department of Health and Social Services may parole certain prisoners and revoke parole if its conditions are violated.⁷ The Governor may pardon most offenses.⁸ You may represent a client before the Department of Health and Social Services or before the Office of the Governor only at an open hearing of which a stenographic or other record is kept or to the extent that your representation requires purely ministerial actions on the part of the Department or the Governor or the agents of either. You should not write, telephone, or visit the Governor or his representative or an officer or employe of the Department of Health and Social Services in the course of your client's representation except with respect to purely ministerial actions or in the course of an open hearing of which a stenographic or other record is maintained.⁹

Finally, you have questioned whether a legislator may, in addition to his legislative salary, accept remuneration from the Office of the State Public Defender. The Ethics Code does not bar that payment in this case. The Code forbids a full-time salaried state official from holding a second position with the state from which he or she receives more than \$5,000 annually, but that proscription is inapplicable to legislators.¹⁰ Although we don't claim to have

⁵ The Supreme Court of Wisconsin has recognized a district attorney as a judicial officer State v. Coubal, 248 Wis. 247, 21 N.W.2d 381 (1946); O'Neill v. State, 189 Wis. 259, 207 N.W.280 (1926); Ex parte Bentine, 181 Wis. 579, 196 N.W. 213 (1923) and as acting in a quasi-judicial capacity State v. Karpinski, 92 Wis.2d 599, 285 N.W.2d 729 (1979); State ex rel. White v. Simpson, 28 Wis.2d 590, 137 N.W.2d 391 (1965); State v. Peterson, 195 Wis. 351, 218 N.W. 367 (1928)). "A prosecuting attorney is a judicial or quasi-judicial officer, an attorney retained by the public primarily for the prosecution of persons accused of crime." 27 C.J.S. District & Prosecuting Attorneys, sec. 1.

We recognize that a district attorney is not the equivalent of a neutral and detached magistrate and is not a judicial officer for the purpose of determining the existence of probable cause under the Fourth Amendment to the Constitution of the United States. Schmeier v. Gagnon, 276 F. Supp. 4 (Wis., 1967); White v. Simpson, supra. Nevertheless, we are persuaded that the legislature intended to exclude a district attorney from the meaning of "department".

⁶ Sec. 973.10, *Wisconsin Statutes*.

⁷ Sec. 57.06, *Wisconsin Statutes*.

⁸ Article 5, sec. 6, Wisconsin Constitution; sec. 57.08, *Wisconsin Statutes*.

⁹ The dimensions of "representation" are discussed at 4 Op. Eth. Bd. 45 (1981) and 1 Op. Eth. Bd. 125 (1978).

made an exhaustive search of the statutes apart from the Ethics Code, we are unaware of a provision that forbids your remuneration by the Office of the State Public Defender.¹¹

You may enter into a contract involving payments of more than \$3,000 within a 12-month period in whole or in part derived from state funds only after giving written notice of your intention to do so to the Ethics Board and to the state agency from which you will derive those payments.¹² This note need not be elaborate. In this case, it should merely state that you are a legislator and that you want to perform some legal services under the public defender program. We will place that note with the Statements of Economic Interests you have filed with this Board.

Advice

The State of Wisconsin Ethics Board advises you that Wisconsin's Code of Ethics does not pose any obstacle to your representing a client before a judicial officer, including a district attorney, in either a civil or criminal proceeding regardless of whether you are compensated by your client or by the Office of the State Public Defender.

You may not represent a client before the Department of Health and Social Services or before the Office of the Governor except in the very limited circumstances we have noted in our discussion.

¹⁰ Sec. 19.45(9m), *Wisconsin Statutes*. This provision applies to a state employe with a salary exceeding two-thirds of the midpoint of executive salary group 2. Sec. 20.923(2)(b), *Wisconsin Statutes*, sets legislators' salaries at 65% of the midpoint of that salary group.

¹¹ Although we doubt its application to your remuneration by the Office of the State Public Defender, we invite your attention to sec. 13.04(2), *Wisconsin Statutes*, which provides:

13.04(2) Compensation. Members of the legislature elected, appointed or employed in or to any other salaried state office, position or employment concurrent but not incompatible with their membership in the legislature shall be paid only such part of the salary fixed for such office or employment as is in excess of the salary paid them as members of the legislature.

¹² Sec. 19.45(6), *Wisconsin Statutes*, provides:

19.45(6) No state public official, member of a state public official's immediate family, nor any organization with which the state public official or a member of the official's immediate family owns or controls at least 10% of the outstanding equity, voting rights, or outstanding indebtedness may enter into any contract or lease involving a payment or payments of more than \$3,000 within a 12-month period, in whole or in part derived from state funds unless the state public official has first made written disclosure of the nature and extent of such relationship or interest to the board and to the department acting for the state in regard to such contract or lease. Any contract or lease entered into in violation of this subsection may be voided by the state in an action commenced within 3 years of the date on which the ethics board, or the department or officer acting for the state in regard to the allocation of state funds from which such payment is derived, knew or should have known that a violation of this subsection has occurred. This subsection does not affect the application of s.946.13.

The Ethics Code does not bar an attorney, who is a member of the legislature, from representing a defendant in a criminal or paternity case when remuneration is paid by the Office of the State Public Defender. Nevertheless, if you are likely to receive more than \$3,000 from the Office of the State Public Defender within 12 months, you should send a brief note stating your intention to accept an appointment to the Ethics Board and to the Office of the State Public Defender prior to accepting that appointment.

State of Wisconsin\Government Accountability Board

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KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For March 26, 2008 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy, Director and General Counsel

SUBJECT: Review of Certain Opinions and Rules of the State Elections Board Relating to Scope of Campaign Finance Regulation

This memorandum presents certain opinions and rules of the State Elections Board presently in effect relating to the scope of campaign finance regulation for review and reaffirmation by the Government Accountability Board (GAB). The materials for review consist of 2 administrative rules, 11 formal opinions and 3 informal opinions. The subject matter, scope of regulation, addresses what campaign finance activity is subject to regulation under the jurisdiction of the Board through its administrative rules, opinions, guidelines and enforcement authority. The administrative rules are discussed first followed by a discussion of the formal opinions.

Administrative Rules Related to Scope of Campaign Finance Regulation

The administrative rules, ElBd 1.28, ElBd 1.29, establish the current scope of regulation as adopted by the State Elections Board. Since the adoption of the administrative rules there have been two major U.S. Supreme Court decisions that impact the range of activity that may be subject to regulation. At its last meeting the Board reviewed a report from staff attorney George Dunst on the two U.S. Supreme Court cases.

There have also been several pieces of legislation introduced in the past several sessions that have sought to expand the scope of regulation to address what are commonly referred to as "issue ads." The legislation introduced in this session includes 2007 Senate Bill 463 (<http://www.legis.state.wi.us/2007/data/SB-463.pdf>), which passed the State Senate; 2007 Senate Bill 12, 2007 Senate Bill 182, 2007 Assembly Bill 355, 2007 Assembly Bill 704 which failed to pass either house; and 2007 Special Session Senate Bill 1 (<http://www.legis.state.wi.us/2007/data/de7SB1hst.html>) which is still pending.

The State Elections Board embarked on a comprehensive review of its administrative rule governing the scope of campaign finance regulation, ElBd 1.28, following a Wisconsin Supreme Court decision which prevented the Board from prosecuting an enforcement action to regulate campaign ads that did not contain terms of express advocacy urging the election or defeat of a clearly identified candidate. *Elections Board v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 597 N.W.2d 721 (1999).
<http://www.wisbar.org/res/sup/1999/98-0596.htm>

The administrative rule in its current form is the result of the State Elections Board deliberations following the WMC case. Following the U.S. Supreme Court decision in *McConnell v. Federal Election Commission*, 504 U.S. (2003) (<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&navby=case&vol=000&invol=02-1674>) the Board discussed expanding its regulation of campaign finance activity to cover issue ads. The Board failed to reach an agreement. One key element of the Board's failure to reach an agreement was the assertion by the Legislature that expanding the scope of campaign finance regulation was for it to determine, not an administrative agency.

The Board will hear from several parties on this matter and additional materials are included in the meeting packet. Board members have already received a copy of a memorandum from the Brennan Center to Common Cause in Wisconsin and the Wisconsin Democracy Campaign on regulation of issue ads.

EIBd 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.

History: Emerg. cr. eff. 8-25-76; cr. Register, January, 1977, No. 253, eff. 2-1-77; am. (1) (b) and (2) (a), Register, February, 1986, No. 362, eff. 3-1-86; am. (2) (c), Register, May, 2001, No. 545, eff. 6-1-01.

The following rule relating to scope of regulation of referenda-related campaign finance activity was designed to make clear that groups that are not formed primarily to expressly advocate the passage or defeat of a referendum question or other ballot issue are still subject to the recordkeeping and disclosure requirements of §11.23, Wis. Stats. For example, a corporation is permitted to make expenditures to advocate for a particular referendum electoral outcome. The corporation is required to register unless it is making a direct contribution to another political group.

The rule is not well phrased. Staff believes the rule should be re-written for clarity and to add three policy positions not addressed by the rule:

- An organization or individual making a direct contribution to a political group does not have to register, report or keep records related to that contribution.
- A political group does not have to register until the governing body sets the referendum, but it must account for any funds raised before registration that are used to expressly advocate the passage or defeat of the referendum.
- The group does not have to report referendum-related expenditures made before the governing body sets the referendum unless the expenditures are for materials used to expressly advocate the passage or defeat of a referendum after it is set.

EIBd 1.29 Scope of regulated activity; referenda.

The requirements of disclosure and recordkeeping of s. 11.23, Stats., are applicable to individuals and groups other than groups formed primarily to influence the outcome of a referendum as to contributions, disbursements and obligations which are directly related to express advocacy of a particular result in a referendum. Nothing contained herein should be construed to exempt groups formed primarily to influence the outcome of a referendum from the requirements of disclosure and recordkeeping of s. 11.23, Stats.

History: Emerg. cr. eff. 8-25-76; emerg. am. eff. 9-7-76; cr. Register, January, 1977, No. 253, eff. 2-1-77.

Formal Opinions Related to Scope of Campaign Finance Regulation

Board members should note the interplay between several Board opinions related to the scope of regulated activity and other areas of regulation. For example **Opinion El. Bd. 00-02** covers the scope of regulated campaign finance activity, coordination of campaign activity and a discussion of what activity qualifies as exempt from regulation as part of a non-partisan GOTV or voter registration effort. It also provides the Wisconsin specific background on scope of regulation based on the WMC case and a Court of Appeals case arising from the State Elections Board investigation and subsequent enforcement action in the 1997 Supreme Court race. The opinion is discussed in this section as well as in the memo on coordinated campaign activity.

Opinion El. Bd. 74-4

Communications mediums offering space to incumbent candidate for newsletter without printing statutory identification does not fall within regulation of campaign finance law. (Issued to James C. Coxe, August 6, 1974)

The staff believes this opinion permitting communications media to disseminate columns or news articles by candidates without treating the material as a contribution should be reaffirmed.

Opinion El.Bd. 76-12

Distribution of printed materials; “political purposes”: Questions of whether officeholder’s purchase and distribution of printed materials to constituents are subject to reporting and identification requirements and in violation of election bribery statute depends on whether intentions of distributor as to political office, content of materials, time and manner of distributions, pattern and frequency of distribution, and value of materials indicate purchase and distribution are for “political purposes.” Secs. 11.01(16), 11.06, 11.30(2), 12.11, Stats. (Issued to Richard A. Soletski, August 25, 1976)

The staff believes this opinion describing factors for consideration related to the treatment of the distribution of certain materials as subject to regulation should be reaffirmed. State law limits the use of public funds, by an incumbent elected official, to pay for and distribute certain material after the first date to circulate nomination papers. §11.33, Wis. Stats.

Opinion El.Bd. 76-16

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 in unlawful; Test established for determining whether a state-funded newsletter is primarily for political purposes. Sec. 11.36, Stats., s. 11.33, Stats., Op.El.Bd. 76-2. (Issued to David E. Clarenbach, December 18, 1976)

The staff believes this opinion describing the use of government funded newsletters in political campaigns should be reaffirmed. The opinion contains an excellent discussion of considerations related to use of government resources and limitations on the campaign activities of government employees.

Opinion El.Bd. 77-3

A national political party committee’s payment of compensation to another specifically in exchange for full-time political services performed on behalf of a Wisconsin committee is a contribution, which subjects the national committee to registration and applicable reporting requirements. Such committee’s payment of compensation to an employee or employees performing occasional services for a Wisconsin committee, when such services are merely incidental to the work of the employee or employees on behalf of the national committee, is not a contribution. Sec 11.01(5), Stats. (Issued to George Innes, July 21, 1977)

The staff believes this opinion describing factors related to a national political party committee providing services to a state registrant should be reaffirmed.

Opinion EI.Bd. 79-2

Applicability of Ch. 11, Stats. to Lawyers' Judicial Endorsement Poll: A poll conducted for the purpose of endorsing candidates which the only information disseminated to those polled is biographical information on the candidates is not political activity and, therefore, not subject to regulation under Ch. 11, Stats. The same is true of a press release indicating the results of a poll. (Issued to Richard S. Gallagher, April 19, 1979)

The staff believes this opinion describing activities of a local bar association related to the results of a members poll on judicial candidates should be reaffirmed.

Opinion EI.Bd. 79-3

School District Annual Meetings: The registration and reporting requirements of the campaign finance law do not apply to school district annual meetings. (Issued to Orvin R. Clark and Cindy Schultz, September 20, 1979)

The staff believes this opinion asserting that school district annual meetings are not subject to campaign finance regulation should be reaffirmed. This opinion would also be applicable to town annual or special meetings and other public fora sponsored by governing bodies to discuss issues of public concern.

Opinion EI.Bd. 79-4

The registration, record-keeping, and reporting requirements of the campaign finance law, Chapter 11, Stats., do not apply to a corporation which communicates its views on a general issue which may later become the subject of a referendum question. (Issued to Robert M. Whitney, October 18, 1979)

The staff believes this opinion describing factors related to corporate spending on issues that may become the subject of a referendum at a later date should be reaffirmed. The corporate activity may be subject to the lobby law if it involves contact with legislators or legislative employees to influence the passage of proposed legislation

Opinion EI.Bd. 86-3 (Amended)

Organization or PAC that sponsors a partisan "get out the vote" drive voter registration drive must register with the appropriate filing officer and meet the applicable requirements of the campaign finance law. Ss.11.05(1), 11.12, 11.20, and 11.26, Stats. Disbursements used in the drive are not allocable as in-kind expenditures. (Issued to Brady C. Williamson)

The staff believes this opinion should be reaffirmed. The opinion states an organization conducting a partisan get out the vote (GOTV) drive is subject to regulation. Where the effort does not portray a clearly identified candidate, the costs would not constitute an in-kind contribution to party candidates. A discussion of informal agency opinions addressing non-partisan GOTV efforts is set out at the end of this memorandum.

Opinion El.Bd. 00-02

Guidelines Relative to Non-advocacy Candidate Commentary, Voter Registration, and Get-out-the-Vote Efforts: 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 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 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 covers the scope of regulated campaign finance activity, coordination of campaign activity and a discussion of what qualifies as exempt from regulation as part of a non-partisan GOTV or voter registration effort. It also provides the Wisconsin specific background on scope of regulation based on the WMC case and a Court of Appeals case arising from the State Elections Board investigation and subsequent enforcement action in the 1997 Supreme Court race. The staff believes the opinion should be reaffirmed. If the Board chooses to direct staff to promulgate an administrative rule that expands the scope of regulation it would supersede that portion of the opinion that suggests a more restrictive area of regulation.

Opinion El.Bd. 03-01

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.

The staff believes this opinion requiring individuals or organizations that spend money to challenge the sufficiency of a candidate’s ballot access documents or qualifications to appear on the ballot to register and report under Chapter 11, Wis. Stats., should be reaffirmed.

Opinion El.Bd. 06-01

Ancillary events, like a golf outing, held in conjunction with a political fundraiser are treated as part of the fundraiser unless the registrant/beneficiary of the fundraiser is able to show that the fundraiser was a separate and independent event. In determining whether ancillary events are separate and independent from a political fundraising event, PAC/Conduit events to raise money for the PAC are evaluated differently from events held to raise money for a candidate. Compensation for time and travel for persons paid to attend fundraising events is not considered a contribution to the beneficiary of the fundraising event unless the compensated attendee performs, in the course of the fundraiser, services for the beneficiary of the fundraiser.

The staff believes this opinion describing activities and providing guidance on the interplay between fundraising activity, ancillary events and the actions of participants should be reaffirmed.

Informal Opinions Related to Scope of Campaign Finance Regulation

The Elections Board staff has issued three informal opinions related to nonpartisan get out the vote (GOTV) efforts. These opinions are set out following this memorandum. The opinions provide guidance on the use of funds in an area specifically excluded from regulation under Chapter 11, Stats. These informal opinions contrast with the formal opinion described earlier with respect to partisan GOTV efforts. Opinion El. Bd. 86-03.

Supplemental Materials

Brennan Center Memo on Regulating Issue Ads in Wisconsin
Godfrey Kahn Letter on ElBd 1.28
Godfrey Kahn Letter on Opinion El. Bd. 06-01
SEB Informal Opinions - Non-Partisan GOTV Activity (3)

BRENNAN
CENTER
FOR JUSTICE

MEMORANDUM

To: Jay Heck, Common Cause Wisconsin
Mike McCabe, Wisconsin Democracy Campaign

From: Brennan Center for Justice at NYU School of Law

Date: December 5, 2007

Re: Proposed Revisions to the Regulation of Certain Kinds of Electoral Advocacy
in Wisconsin

Introduction

You have asked us to consider whether the proposed revisions to Wisconsin’s law regulating electoral advocacy raise significant constitutional concerns in light of the recent decision of the United States Supreme in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (“*WRTL II*”), and, if so, to recommend new statutory language. In *WRTL II*, the Supreme Court found that the ban on using corporate treasury funds for “electioneering communications,” as defined in the federal Bipartisan Campaign Reform Act (“BCRA”), was unconstitutional as applied to the plaintiff, a corporation, because the plaintiffs’ advertisements were not express advocacy or its functional equivalent. Technically, the holding applies only to the particular ads reviewed in *WRTL II*, but the ruling is widely recognized to have a broader impact. Indeed, the Federal Election Commission (“FEC”) recently has approved a new rule carving out an exemption from BCRA’s restriction on corporate electioneering communications, based on the *WRTL II* decision. It is important to note, however, that *WRTL II* did not consider, let alone invalidate, the application of reporting and disclosure requirements to such communications paid for with corporate funds, and the FEC rule did not change those requirements.

The revision proposed in Section 9 of SB 12 raises constitutional concerns under *WRTL II* because it includes a blanket prohibition on the use of corporate treasury funds to sponsor communications naming a candidate, an office to be filled, or political party within 60 days of an election. In light of the *WRTL II*, we suggest revisions to SB 12 that would maintain the prohibition on corporate sponsorship of some electoral advocacy but exempt communications that are not the “functional equivalent of express advocacy.” 127 S. Ct at 2667. We offer proposed statutory language to implement that standard, based on a recent rulemaking by the Federal Election Commission. Because efforts to require disclosure of such communications

still have significant constitutional support, we recommend that all communications defined in Section 9 of SB 12 be subjected to disclosure requirements.

The Proposed Amendment of Wisconsin Law

Under current Wisconsin law, corporations are prohibited from making “disbursements,” defined under section 11.01(7) as a “purchase, payment . . . made for political purposes.” Wis. Stat. § 11.38. 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 . . .” § 11.01(16). Subsection (a) of that provision further defines such acts to include:

- (1) The making of a communication which expressly advocates the election, defeat, or recall or retention of a clearly identified candidate or a particular vote on a referendum[; and]
- (2) The conduct of or attempting to influence an endorsement or nomination . . .

Id. § 11.01(16)(a)(1), (2). Section 9 of SB 12 proposes amending subsection (a) to include “communications” made by means of “communications media . . . that [are] made during the period beginning on the 60th day preceding an election and ending on the date of that election, and that include[] a reference to a candidate whose name is certified under s. 7.08(2)(a) or 8.50(1)(d) to appear on the ballot at that election, a reference to an office to be filled at that election, or reference to a political party.”

Analysis of *WRTL II*

The proposed absolute prohibition on corporate sponsorship of communications that identify a candidate or political party in the 60 days before an election will raise constitutional concerns under the Supreme Court’s plurality opinion in *WRTL II*. Based on the following analysis of the Court’s opinion, we propose statutory language that will bring the amendments in section 9 of SB12 in line with decision.

On its face, the Supreme Court’s opinion holds *only* that BCRA cannot be applied to bar the Wisconsin Right to Life ads at issue in the case.¹ But, effectively, the decision held that corporations and unions, under federal law, cannot constitutionally be prohibited from using treasury funds to pay for advertisements simply because they meet BCRA’s definition of electioneering communications. *Id.* at 2667. Instead, the Court ruled, the funding restrictions

¹ Because this decision arises from an as-applied challenge, it does not technically apply to other communications, and as such, corporations and unions are still prohibited from using treasury funds to pay for electioneering communications until they are told otherwise. As a practical matter, however, the FEC and courts are unlikely to apply BCRA’s prohibition to any future advertisements that do not include the “functional equivalent of express advocacy.”

could apply only to ads that were express advocacy or “the functional equivalent” of express advocacy.

The Court provided some guidance as to whether an ad is “the functional equivalent of express advocacy,” beginning with the statement that it must be “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.* at 2667. The Court’s application of its “no reasonable interpretation test” to the Wisconsin Right to Life ads establishes a framework for determining whether an ad is subject to BCRA’s funding restrictions. Describing the ads at issue and why they are not covered, the Court wrote:

First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy. The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office.

Id. at 2667. The plurality described its test as being “objective, focusing on the substance of the communication rather than the amorphous consideration of intent and effect.” *WRTL II*, 127 S. Ct. at 2666.²

The Court’s opinion suggested that ads that fall within BCRA’s definition of electioneering communications and include these “indicia of express advocacy” (mention an election, candidacy, political party, or challenger and take a position on a candidate’s character, qualifications, or fitness for office) may still be subject to funding restrictions. A corporation or union may run such ads only through a separate segregated fund, similar to a political committee (“PAC”), contributions to which are subject to limits on source and amount. *Id.* at 2667.

The FEC Rulemaking

On November 20, 2007, the Federal Election Commission adopted regulations implementing the Court’s decision.³ In relevant part, the new regulations create a “safe harbor” for any corporate or union electioneering communication that:

² The Court provided further guidance in distinguishing the Wisconsin Right to Life ads from the hypothetical attack ad discussed in *McConnell* that “condemned Jane Doe’s record on a particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think[,]’” *McConnell*, 540 U.S. at 127, noting that the ads here did not condemn Senator Feingold’s position on the issue but articulated the group’s position and “exhort[ed] constituents to contact Senators Feingold and Kohl to advance that position.” *WRTL II*, 127 S. Ct. at 2667 n. 6.

³ They are available at http://www.fec.gov/pdf/nprm/electioneering_comm/2007/provisions_approved_nov-20-2007.pdf.

- (1) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public;
- (2) Does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office; and
- (3) Either:
 - (i) Focuses on a legislative, executive or judicial matter or issue; and
 - (A) Urges a candidate to take a particular position or action with respect to the matter or issue, or
 - (B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue; or
 - (ii) Proposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event.

11 C.F.R. § 114.15(b). The new regulations also provide that the FEC will consider on a case-by-case basis whether, on balance, a communication that does not qualify for the safe harbor is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate, by considering whether the ad has “indicia of express advocacy” and is susceptible to interpretation other than as such an appeal. *Id.* The FEC explains:

- (1) A communication includes indicia of express advocacy if it:
 - (i) Mentions any election, candidacy, political party, opposing candidate, or voting by the general public; or
 - (ii) Takes a position on any candidate's or officeholder's character, qualifications, or fitness for office.
- (2) Content that would support a determination that a communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate includes content that:
 - (i) Focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue; or
 - (ii) Proposes a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event; or
 - (iii) Includes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political party.
- (3) In interpreting a communication under paragraph (a), any doubt will be resolved in favor of permitting the communication.

Id. § 114.15(c).

Recommendation

In accordance with our analysis of *WRTL II* and the FEC's new regulations, we propose that SB 12 include an exemption from the provisions of Wis. Stat. § 11.38 for certain corporate communications that lack the indicia of express advocacy. We suggest, however, that all such communications be subject to the state's standard disclosure requirements.

Specifically, we propose that SB 12 include the following amendment to section 11.38, "Contributions and disbursements by corporations and cooperatives":

(3)(a) Notwithstanding subd. 1, corporations may make disbursements for political purposes as defined in s. 11.01(16)(a)(3) [as amended by SB 12], unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a candidate whose name is certified under s. 7.08(2)(a) or 8.50 (1)(d) to appear on the ballot at that election.

(b) A disbursement for political purposes is permissible under paragraph (a) if it:

(1) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public;

(2) Does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office; and

(3) Either:

(i) Focuses on a legislative or executive matter or issue; and

(A) Urges a candidate to take a particular position or action with respect to the matter or issue, or

(B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue; or

(ii) Proposes a commercial transaction, such as purchase of a book, video, or other product or service.

(c) Corporations that make disbursements for political purposes under paragraph (a) are subject to disclosure and reporting requirements as defined in s. 11.06.

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March 17, 2008

VIA HAND DELIVERY

Government Accountability Board
17 West Main Street, Suite 310
Madison, WI 53703

Review of ElBd 1.28 / March 26 Meeting

Dear Board Members:

On behalf of the Association of Wisconsin Lobbyists, Greater Wisconsin Committee, Wisconsin Bankers Association, Wisconsin Builders Association, Wisconsin Education Association Council, Wisconsin Farm Bureau Federation, Wisconsin Grocers Association, Wisconsin Manufacturers & Commerce, Wisconsin Realtors Association and Wisconsin Right to Life,¹ we respectfully request that the Government Accountability Board (the "Board") affirm Wis. Admin. Code § ElBd 1.28, which regulates political speech.

The Board and its predecessor have had, for more than 30 years, the administrative responsibility for the state's campaign finance and election laws. In that time, the U.S. Supreme Court has decided at least a dozen significant cases involving political speech and, with surprising frequency, Wisconsin's state and federal judges and members of the Elections Board have been called upon to address civil complaints, administrative proceedings and legislation all directly affecting the rights of individuals and organizations to express their points of view on issues of public importance and concern. Most of these cases, all controversial and decided in a complex and evolving area of constitutional principles, bear on the administrative rule, ElBd 1.28, now before the Board. It is one of the first administrative rules the Board has chosen to review. It may well be the most important.

The remarkably diverse group of organizations that join this letter are actively and directly involved in the political life of this state, including lobbying and political activities. These organizations express varied – and often diametrically opposed – points of view on issues, all in an effort to advance their respective goals, protect the interests of their memberships and constituents, and shape the state's public policies. These organizations regularly communicate with public officials, and also communicate with the general public on issues and the positions of public officials and candidates on those issues. While these organizations frequently disagree,

¹ This is an initial list of organizations joining this letter. At the Board's March 26 meeting, we will provide a full list of the supporting organizations.

they have common cause on this principle: the First Amendment protects their right to communicate with the public about the issues that matter to them.

ElBd 1.28 recognizes the First Amendment rights of every speaker to participate in an on-going dialogue on public policy. The rule was adopted in 2001 following the Wisconsin Supreme Court's decision in *Elections Board v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 597 N.W.2d 721, *cert. denied*, 528 U.S. 969 (1999). It has not changed. ElBd 1.28 resulted from an extended, formal rule-making process and defined the communications that would be considered express advocacy, a category subject to regulation under Wisconsin campaign finance law.² See Clearinghouse Rule 99-150. At the same time, ElBd 1.28 necessarily provides guidance on the speech that is *not* subject to regulation, recognizing that a discussion of issues cannot be limited simply because the issue might be pertinent in an election or to a candidate.

ElBd 1.28 reflects the standard for regulating political communication that the U.S. Supreme Court established in *Buckley v. Valeo*, 424 U.S. 1 (1976). Moreover, it is consistent with the Supreme Court's holding last year in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007). Accordingly, ElBd 1.28 should be affirmed, and the Board should decline any request to promulgate a new rule in its place. Any standard that goes beyond the narrow construction of ElBd 1.28 is very likely to violate the First Amendment and have the effect, intended or not, that:

pure or genuine issue ads like those of [Wisconsin Right to Life] would be swept along with real "electioneering communications" – having the effect of hanging a few innocent people in order to hang a few more guilty ones. The interest in regulating "express advocacy" and even its functional equivalent does not justify that effect. To the majority [on the U.S. Supreme Court], where the 1st Amendment is implicated, the tie between regulation and free speech goes to the speaker, not to the censor.

George Dunst, Staff Counsel, Memorandum on *Wisconsin Right to Life* to the Board (Feb. 25, 2008)

² In drafting the rule, the Elections Board appears to have heeded Justice Prosser's concurring opinion in *WMC*:

Wisconsin Statutes regulating political expression must be very narrowly construed. If the term "express advocacy" encompasses more than the magic words enumerated in footnote 52 of *Buckley v. Valeo*, the additional words and phrases should be explicitly disclosed. Those words and phrases must advocate the election or defeat of a clearly identified candidate by urging citizens how to vote or directing them to take other specific action unambiguously related to an election.

227 Wis. 2d at 686 (citations omitted)

EXPRESS ADVOCACY AND ISSUE ADVOCACY: A LEGAL HISTORY

In *Buckley v. Valeo*, the U.S. Supreme Court held that government can regulate only those political communications that expressly advocate a candidate's election or defeat. That is, under *Buckley*, the First Amendment precludes any regulation of political speech that does *not* "in express terms advocate the election or defeat of a clearly identified candidate. . ." 424 U.S. at 44.³ In subjecting only "express advocacy" to regulation, the Supreme Court in *Buckley* concluded, in effect, that many forms of political communication would remain wholly unregulated. ElBd 1 28 reflects that fundamental point of constitutional law.

Communication that does not expressly advocate the election or defeat of a clearly identified candidate – generally called "issue advocacy" – had not (prior to the enactment of the federal Bipartisan Campaign Reform Act of 2002 ("BCRA") and the holding in *McConnell v. FEC*, 540 U.S. 93 (2003)) been subject to *any* campaign finance regulation. By definition, issue advocacy communications avoid any explicit discussion of an identified candidate's election or defeat and, instead, provide information on an issue or policy question associated with a public official or candidate often, though not always, as part of a grassroots lobbying effort.

The line between issue advocacy and express advocacy often defines the line between legal conduct and illegal conduct. For example, the absolute prohibitions under state and federal law on corporate expenditures in connection with a state or federal election, *see* 2 U.S.C. § 441b; Wis. Stat. § 11.38, make it essential to determine whether a corporation's financial support is for express advocacy or for issue advocacy.

In *McConnell*, the U.S. Supreme Court upheld the new "electioneering communication" standard established by Congress in BCRA against a facial challenge and, in turn, the Court permitted the regulation of a specific subset of issue advocacy, based primarily on its timing and only with respect to federal elections.⁴ The federal electioneering communication standard did not, however, replace the express advocacy / issue advocacy distinction; rather, it refined that distinction – but only for federal candidates and only for specified time periods and only for broadcast advertising.⁵ That is, neither the *McConnell* decision nor the new federal electioneering communication law has changed this constitutional distinction between express advocacy and issue advocacy, which remains integral to state and federal law.

³ Similarly, in Wisconsin, regulated political speech includes "[t]he making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified [state] candidate or a particular vote at a referendum." Wis. Stat. § 11.01(16)(a)1

⁴ BCRA expanded the scope of regulated communication and prohibited corporations and labor organizations from engaging in certain forms of broadcast (but not print, telephonic or Internet) issue advocacy but only within 30 days of a federal primary election or 60 days of a federal general election. *See* 2 U.S.C. §§ 434(f)(3) and 441b

⁵ The subsequent *Wisconsin Right to Life* decision, 127 S.Ct. 2652 (2007) (discussed below), an as-applied challenge to the electioneering communication statute, further narrowed the range of permissible regulation

ISSUE ADVOCACY COMMUNICATIONS

The distinction between issue advocacy and express advocacy can be elusive, more easily stated in theory than made in practice. Consider the broad range of lobbying and political communications. At one end is a communication that obviously supports or opposes a clearly identified candidate: “Vote for Joe Smith,” for example. Communication that contains language such as “elect,” “defeat,” or “vote for” is almost always express advocacy. At the other end of the continuum is the communication that does not explicitly address the election or defeat of a particular candidate or even mention a candidate: “Taxes are bad. We should just say ‘no’ to tax increases.” That, undoubtedly, is protected issue advocacy. Between the two examples are the communications that some would argue could fall into either category, depending on the perspective of the listener or viewer – an advertisement broadcast two weeks before an election, for example, stating: “Taxes are bad. State Senator Joe Smith keeps supporting higher taxes. Give Joe Smith a call and let him know how you feel about taxes and his votes for higher taxes.”

Many organizations long have engaged in some form of issue advocacy about issues that affect them and about the positions that candidates take on issues.⁶ While, by definition, these issue advocacy messages avoid any explicit discussion of a candidate’s election or defeat, many of these communications draw attention to a policy question associated with a candidate and refer directly to a candidate, who may or may not be a public official, by name. The format and content of an issue advocacy communication are virtually limitless.

Prior to *McConnell*, a long and unbroken line of court decisions struck down virtually *every* government attempt (state or federal, legislative or administrative) to regulate issue advocacy under campaign finance law or expand the definition of express advocacy beyond those communications expressly advocating the election or defeat of a clearly identified candidate. Unless the communication contained a “magic word” of express advocacy, or a synonym that expressly advocated the election or defeat of an identified candidate, it was considered unregulated “issue advocacy.” By statute, Congress in BCRA interrupted that unbroken line of cases – but *only* for certain issue advocacy communications broadcast in connection with a *federal* election. For the first time, those electioneering communications became regulated. Indeed, in the defined pre-election time periods, it became illegal for corporations or labor organizations to even sponsor such communications (a restriction that was later undone in *Wisconsin Right to Life*).

BCRA and the *McConnell* decision were landmark developments, and they can provide a framework for state regulation of issue advocacy (subject to the limitations subsequently established in *Wisconsin Right to Life*). Yet, any such regulation should first be enacted by a

⁶ Political action committees (“PACs”) connected to those organizations may also, simultaneously and in a coordinated manner with their sponsoring organization, engage in regulated express advocacy through independent expenditures.

state legislature.⁷ Moreover, even as the U.S. Supreme Court's decision in *McConnell* opens the possibility of issue advocacy regulation, any such regulation must be extremely limited as required by *Wisconsin Right to Life*, and neither decision mandates such regulation.

FEC V. WISCONSIN RIGHT TO LIFE (2007)

In the weeks just before U.S. Senator Russ Feingold's 2004 primary election, Wisconsin Right to Life, Inc. – a tax-exempt section 501(c)(4) advocacy organization (“WRTL”) – began broadcasting a series of radio advertisements. (Copies of the radio advertisements are available at: www.jamesmadisoncenter.org) One of the advertisements, “Wedding,” stated:

PASTOR: And who gives this woman to be married to this man?

BRIDE'S FATHER: Well, as father of the bride, I certainly could. But instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up...

VOICE-OVER: Sometimes it's just not fair to delay an important decision. But in Washington it's happening. A group of senators is using the filibuster delay tactic to block federal judicial nominees from a simple “yes” or “no” vote. So qualified candidates don't get a chance to serve. It's politics at work, causing gridlock and backing up some of our courts to a state of emergency. Contact Senators Feingold and Kohl and tell them to oppose the filibuster. Visit befair.org.

VOICE-OVER: Paid for by Wisconsin Right to Life (befair.org) which is responsible for the content of this advertisement and not authorized by any candidate or candidate's committee.

WRTL planned on airing the radio advertisements throughout August 2004 (the Wisconsin primary election was September 14, 2004) and paying for the advertisements with general corporate treasury funds. WRTL then filed a federal lawsuit challenging the federal electioneering communication provisions in BCRA that would prohibit these advertisements.

The matter was litigated for several years before several courts, on both procedural and substantive grounds. In a procedural decision, *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) (per curiam), the U.S. Supreme Court opened the door to an “as-applied” challenge to those electioneering limits. The Supreme Court explained that although it upheld the constitutionality of BCRA's limits on electioneering communications in *McConnell*, it “did not purport to resolve future as-applied challenges” to those limits. On remand, a three-judge panel

⁷ While BCRA only affects federal (not state) elections, similar issue advocacy regulations have been proposed in Wisconsin – but not enacted – for state elections. For example, during Wisconsin's 2007-08 legislative session, state legislators proposed several bills to restrict issue advocacy for state elections: S.B. 1; S.B. 12; S.B. 77; S.B. 182; S.B. 463; A.B. 272; A.B. 355; and, A.B. 704.

granted summary judgment for WRTL, holding that the electioneering communication provision adopted by Congress was unconstitutional as applied to WRTL's advertisements. The case was then appealed again to the U.S. Supreme Court.

In its second decision, *Federal Election Commission v. Wisconsin Right to Life*, 127 S.Ct. 2652 (2007) ("*Wisconsin Right to Life*"), the Court reviewed the merits of specific WRTL advertisements, affirmed the three-judge panel, and narrowed the scope of BCRA in connection with some forms of issue advocacy communication. The 5-4 majority opinion, written by Chief Justice John G. Roberts, was unequivocal⁸ While the decision did *not* invalidate BCRA's federal electioneering communication standard (or any other provision of the 2002 campaign finance reform legislation), it called into question any attempt to broadly regulate speech

Justice Roberts' majority opinion discusses extensively the role of the First Amendment in regulating speech and the importance of encouraging more speech, not less:

[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it. 127 S.Ct. at 2659.

Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose – uninvited by the ad – to factor it into their voting decisions. *Id.* at 2667

Discussion of issues cannot be suppressed simply because the issue may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor. *Id.* at 2669

[D]iscussion of issues cannot be banned merely because the issues might be relevant to an election. . . . [I]n a debatable case, the tie is resolved in favor of protecting speech. *Id.* at 2669, fn. 7.

[W]hen it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban. . . we give the benefit of the doubt to

⁸ Joining in Chief Justice Roberts' majority opinion was Justice Alito with Justice Scalia filing a separate concurring opinion joined by Justices Kennedy and Thomas. The three concurring justices would have invalidated the federal electioneering communication provision outright – not just as applied to WRTL. Justice Souter filed a dissenting opinion joined by Justices Stevens, Ginsburg and Breyer.

speech, not censorship. The First Amendment's command that "Congress shall make no law... abridging the freedom of speech" demands at least that. *Id.* at 2674

Justice Roberts' majority opinion emphasizes that any regulation of issue advocacy will always be subject to a strict scrutiny analysis and, "[u]nder strict scrutiny, the *Government* must prove that applying BCRA to [issue advocacy] furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* at 2664 Accordingly, if a government regulator cannot demonstrate either that a communication is express advocacy or the "functional equivalent" of express advocacy (advertisements "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *id.* at 2667), the communication cannot be restricted in any way under campaign finance law.

The Court's majority opinion also rejects any attempt to regulate political communication based on a "free-ranging intent-and-effect test" Moreover, "there generally should be no discovery or inquiry into 'contextual' factors."⁹ *Id.* at 2669, fn. 7 The majority decision stands as the latest and most comprehensive discussion of the permissible scope of regulation for political speech

AFTER WISCONSIN RIGHT TO LIFE: RULEMAKING AND LITIGATION

After the *Wisconsin Right to Life* decision in June 2007, the Federal Election Commission ("FEC") attempted to quickly bring its BCRA electioneering communications regulations into compliance by developing a new rule on electioneering communications for corporate and labor organizations' issue advocacy After a comment period lasting several months, the FEC issued its new rule last December. 72 FR 72899 (December 26, 2007) Notably, the new rule did *not* change the existing "electioneering communication" definition in federal law. Instead, adopting Justice Roberts' use of the phrase "functional equivalent of express advocacy," the FEC established a new standard for "functional equivalent" that can be clearly defined for – and, thus, heeded by – corporations and labor organizations seeking, appropriately, to sponsor communications and broadcast issue advocacy advertisements.

Under the new federal test, an advertisement constitutes the "functional equivalent of express advocacy" if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 11 C.F.R. § 114.15. Implicitly acknowledging that this standard is vague, the FEC crafted a "safe harbor" provision Under it, a communication is exempt from electioneering communications restrictions if it: (1) does not refer to "any election, candidacy, political party, opposing candidate, or voting by the general public"; (2) does not take a position on a candidate's character, qualifications, or fitness for office; and, (3) either (i) "focuses on a legislative, executive, or judicial matter or issue" and "urges a candidate to take a particular position or action with respect to the matter or issue"; or "urges the public to adopt a

⁹ FEC Chairman David Mason recently acknowledged that it would be unconstitutional after *Wisconsin Right to Life* to consider the timing or context of a communication and regulate beyond the words of a communication. See "Mason: FEC Cannot Enforce Rule Broadly Defining 'Express Advocacy,'" *BNA Money & Politics Report* (Feb 29, 2008).

particular position and contact the candidate with respect to the matter or issue”; or, (ii) proposes a commercial transaction, such as the purchase of print or other media. 11 CFR § 114.15(b)(1)-(3).

Furthermore, even if a communication does not meet the “safe harbor” standard, the FEC will still consider two factors when evaluating whether the communication complies with the regulation. The first is whether the communication includes indicia of express advocacy; the second is whether the communication includes content that would support an interpretation other than its characterization as an appeal to vote for or against a clearly identified federal candidate. See 11 C.F.R. § 114.15(c)(1)-(2).

The new rule also requires corporate and labor organizations that finance more than \$10,000 per calendar year in permitted electioneering communications to file donor disclosure reports with the FEC – as required under the statute. 2 U.S.C. § 434(f)(1); 11 CFR §§ 104.2(c)(1)-(6), 104.20(b). Last December, Citizens United, a conservative group seeking to advertise and distribute a film entitled *Hillary: The Movie*, challenged the constitutionality of these disclosure requirements. See *Citizens United v. FEC*, 1:07-cv-02240-RCL-RWR (D.D.C.). Citizens United has based its challenge on associational privacy rights protected under the First Amendment. The group has since appealed the federal district court’s denial of its motion for a preliminary injunction to the U.S. Supreme Court. *Id.* (Docket No. 41). The Supreme Court has docketed this challenge as No. 07-953, but has not yet taken further action.

An electioneering communication disclosure regulation – similar to that adopted by the FEC after *Wisconsin Right to Life* – first requires an electioneering communication statute. Such a statute does not yet exist in Wisconsin. That is, any change with respect to an issue advocacy regulation should come from legislative, not administrative, decision-making – precisely as it did at the federal level. It is the Wisconsin legislature, not the Board, that should consider what, if any, electioneering communication standard is appropriate after BCRA, *McConnell*, *Wisconsin Right to Life*, and the subsequent developments.

THE STATE CASES: *ELECTIONS BOARD V. WMC*

WMC Issues Mobilization Council, Inc. (“WMC-Issues”), an advocacy organization affiliated with Wisconsin Manufacturers & Commerce, engaged in a grassroots lobbying campaign during the fall of 1996. The issue advocacy communications consisted of television and radio advertisements that highlighted the voting record of six incumbent legislators (in contested races for re-election) and encouraged viewers and listeners to contact them to express their approval or disapproval of the legislators’ position.

WMC-Issues did not consider the advertisements express advocacy and, accordingly, the nonstock corporation did not register with the Elections Board, nor did it disclose the source of the funds used to pay for the communications. (The group freely acknowledged that it had raised corporate funds to pay for the advertisements.) The Elections Board disagreed. Since the advertisements had the “political purpose of expressly advocating” the defeat or re-election of

the state senators and representatives named in the advertisements, the Elections Board maintained, the group and its contributors were subject to regulation including full disclosure of those contributors. Eventually, the Elections Board charged WMC-Issues with violations of the campaign finance laws¹⁰ – including, of course, a violation of the absolute prohibition on corporate contributions in Wis. Stat. § 11.38 – but the Dane County Circuit Court eventually dismissed the case¹¹

In 1999, the Wisconsin Supreme Court upheld the circuit court’s dismissal, concluding in a split decision that WMC-Issues lacked fair notice that the advertisements could be considered express advocacy even under the context-based analysis used by the Board. *See Elections Board v Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650 (1999) (“*WMC*”).¹² The Elections Board had engaged “in effect, . . . [in] retroactive rule-making,” and the Wisconsin Supreme Court found this practice to be a violation of the constitutional right to due process. *Id.* at 678. WMC-Issues could not be prosecuted for the advertisements.

Having reached its decision on a procedural ground, the Wisconsin Supreme Court did not explicitly decide whether the WMC-Issues advertisements were – or were not – express advocacy, nor did it establish a prospective standard for express advocacy. Rather, the Court left that to the state legislature or the Elections Board. To provide guidance, the Court did reiterate that “the definition of the term express advocacy is not limited to the specific list of ‘magic words’ [identified in footnote 52 in the *Buckley* decision] such as ‘vote for’ or ‘defeat.’” (No one had argued that the definition was limited only to those words.) Rather, the Wisconsin Supreme Court held that, consistent with *Buckley*, any legislative or administrative definition of express advocacy must be “limited to communications that include explicit words of advocacy of election or defeat of a candidate.” *Id.* at 682 (quoting *Buckley*, 424 U.S. at 43)

At issue in *WMC* was whether the communications under review were express advocacy. There was no need to consider whether or not the legislature, more than 10 years ago, could regulate certain forms of issue advocacy in a new, different or expanded way. Accordingly, the

¹⁰ The Elections Board also named WMC itself, ABC Corporation, and XYZ Corporation in its complaint. The parties are collectively referred to as “WMC-Issues” in this memorandum.

¹¹ In 1998, four state legislative candidates filed a new series of administrative complaints with the Elections Board about new political broadcasts sponsored by WMC-Issues and, again, litigation followed almost immediately. The Elections Board dismissed these complaints outright, because it concluded that the communications were not express advocacy. On review, the Dane County Circuit Court rejected the candidates’ request to enjoin WMC-Issues from broadcasting its political commercials, concluding that the commentary was not express advocacy and that, in any event, prior restraint of political speech is unconstitutional. *See Erpenbach v IMC* (Case No. 98 CV 2735), Bench Decision, Transcript, pp. 6-17 (Foust, J.).

¹² The Wisconsin Supreme Court’s plurality opinion was authored by Justice Crooks, joined by Justice Steinmetz. Justices Bablitch and Prosser, in separate concurrences, agreed with the Court’s conclusion but (for very different reasons) not with its reasoning. Justice Bradley and Chief Justice Abrahamson, in dissent, found that the advertisements did amount to express advocacy – under a context-based analysis. *See* 227 Wis. 2d at 694-96 (citing *Buckley*). The seventh member of the Court, Justice Wilcox, did not participate in the decision.

Wisconsin Supreme Court's 1999 directive to the legislature and the Elections Board was to try to clarify the definition of express advocacy – that is, political speech subject to regulation – consistent with the First Amendment. The Supreme Court did *not* in any way suggest that the Elections Board had the authority to promulgate a new rule regulating issue advocacy.

In *McConnell*, four years later, the U.S. Supreme Court upheld the ability of Congress to regulate specific forms of broadcast issue advocacy and, in so doing, left the express advocacy / issue advocacy framework in place. Nothing in the Supreme Court's decision suggests that the definition of express advocacy has been broadened, narrowed or otherwise affected. In *Wisconsin Right to Life*, the U.S. Supreme Court addressed only the constitutionality of regulating some forms of issue advocacy as electioneering communication but still did not modify the express advocacy / issue advocacy framework – despite repeated entreaties that it do so. Instead, the Court reaffirmed the basic construct of *Buckley* and limited the scope of issue advocacy subject to regulation to those communications that are the “functional equivalent of express advocacy” – broadcast advertisements “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” 127 S.Ct. at 2667.

WISCONSIN'S APPROACH: ELBD 1.28

Following the Wisconsin Supreme Court's decision in *WMC*, the Elections Board began an extended, formal rule-making process to try to clarify the communications it would consider express advocacy. See Clearinghouse Rule 99-150. The standing committees in the Senate and the Assembly that then evaluated the rule promptly objected to it and, under Wis. Stat. § 227.19(5)(a), the proposed rule was referred to the Joint Committee for Review of Administrative Rules (the “JCRAR”).

On April 11, 2000, the JCRAR held a public hearing on the rule proposed by the Elections Board. See *JCRAR Report to the Legislature on Clearinghouse Rule 99-150*, LRB 99-4936/1. To some, the rule was unnecessary and redundant. It merely reflected in general, if not precisely, the Supreme Court's decision in *Buckley*. That is, the rule defined express advocacy as speech that contained the magic words from *Buckley's* footnote 52. The proposed rule also used the phrase “functional equivalent” to suggest, quite properly, that express advocacy can include synonyms for the eight examples provided by the U.S. Supreme Court.¹³ To others who testified at the public hearing, the rule was not strong enough to be effective. Merely reflecting current law, some argued, the Elections Board proposal was weak because it did not address the “context” in which the communication occurred.

On April 14, 2000, the JCRAR voted unanimously to concur in the bicameral objections of the standing committees to the Elections Board's proposed rule. The proposed rule, the JCRAR simply and briefly concluded, was “arbitrary and capricious because it regulates some speech and not other speech on the basis of specific words, even though the intent of both communications is the same – the election or defeat of a given candidate.” See *JCRAR Report* at 4. As required by Wis. Stat. §

¹³ No one has ever seriously argued that *only* the words listed in footnote 52 qualify as express advocacy.

227.19(5)(e), the Joint Committee then voted on May 10, 2000 to introduce companion bills in both chambers of the legislature to support its objections to Clearinghouse Rule 99-150 and to replace the proposed administrative rule with legislation that addressed the context (not just the words) of political communication. This alternative legislation (Senate Bill 2 and Assembly Bill 18) was then introduced during the 2001-02 legislative session. After the legislature failed to pass either bill, the Elections Board's proposed rule took effect by law on June 1, 2001. *See* Wis. Admin. Register No. 545 (May 2001); Wis. Admin. Code § EIBd 1.28(2)(c).

As adopted, EIBd 1.28(2)(c) clarifies those communications that will be considered "express advocacy" and, accordingly, subjects individuals (other than candidates) and committees (other than political committees) to the applicable disclosure-related and recordkeeping-related requirements of ch. 11, Stats., only when they:

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."

The rule in effect and intent provides a more detailed explanation of those communications that will be considered *express* advocacy. It was not an attempt, nor could it have been, to regulate *issue* advocacy.

CONCLUSION

If the Board decides not to affirm EIBd 1.28, the Board should consider both the nature of the administrative rule it would adopt in its place and its own authority to adopt such a new rule – a determination to be made prior to commencing a rulemaking procedure under Wis. Stat. § 227. The Board, as you know, may exercise only those powers granted it by the legislature. *See Mallo v. Wis. Dept. of Revenue*, 253 Wis. 2d 391, 407, 645 N.W.2d 853, 859-60 (2002). While the Board may promulgate rules to interpret the statutes it administers or enforces, its rules may not conflict with state law or legislative intent, nor may they exceed the bounds of correct interpretation. *See Seider v. O'Connell*, 236 Wis. 2d 211, 246-49, 612 N.W.2d 659, 676-77 (2000). Accordingly, it is debatable, at best, whether the Board has the authority to promulgate a rule similar to the federal electioneering communication standard – especially in the absence of any legislative direction.

EIBd 1.28 provides a bright line: establishing an appropriately limited category of speech regulated as express advocacy in Wisconsin. Nothing else is or would be consistent with the U.S. Supreme Court's holding in *Wisconsin Right to Life*. The Board should affirm EIBd 1.28 and let the legislature, not the Board, decide when, if, and how to regulate some forms of issue advocacy communications in Wisconsin.

We will be making a public appearance at that meeting in support of EIBd 1.28 and look forward to responding to any questions you may have at that time.

Sincerely

GODFREY & KAHN, S.C.

A handwritten signature in black ink that reads "Mike B. Wittenwyler". To the right of the signature is a circular stamp containing a stylized logo, possibly a dollar sign with a cross through it.

Mike B. Wittenwyler
Brady C. Williamson

HAND DELIVERED

RECEIVED

08 MAR 17 PM 3:00

ONE EAST MAIN STREET
POST OFFICE BOX 2719
MADISON WI 53701-2719
TEL 608-257-3911
FAX 608-257-0609
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March 17, 2008

STATE OF WISCONSIN
ELECTIONS BOARD

VIA HAND DELIVERY

Government Accountability Board
17 West Main Street, Suite 310
Madison, WI 53703

Review of Elections Board Opinion 06-01

Dear Board Members:

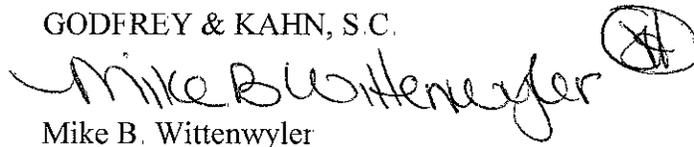
On behalf of the Association of Wisconsin Lobbyists (the "Association"), we respectfully request that the Government Accountability Board (the "Board") affirm Elections Board Opinion 06-01 on the campaign finance implications of golf outings and other events held in conjunction with political fundraisers. According to the schedule released earlier this month, this Elections Board advisory opinion will be reviewed at the Board's March 26, 2008 meeting.

The adopted version of Advisory Opinion 06-01 was the result of several months of consideration by the Elections Board of the issues at hand and many meetings with stakeholders involved in these events – including several meetings that I attended on behalf of the Association. The end result of this thorough review and comprehensive discussions was an advisory opinion that provides for the necessary regulation of in-kind contributions and fundraising expenses while acknowledging the attendance of lobbyists at such events and the differences between political action committee ("PAC") events and candidates fundraisers.

I will be making a public appearance at March 26 meeting in support of Advisory Opinion 06-01 and can answer any questions that you may have at that time.

Sincerely

GODFREY & KAHN, S.C.

 
Mike B. Wittenwyler

cc: Association of Wisconsin Lobbyists

3012423_2

State of Wisconsin \ Elections Board



DAVID HALBROOKS
CHAIRPERSON



June 12, 1996

P.O. Box 2973
132 EAST WILSON STREET
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(608) 266-8005
FAX (608) 267-0500

Kevin J. Kennedy
Executive Director

Attorney Sheila M. Reynolds
Quarles & Brady
411 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-4497

Re: Corporate Sponsorship of Nonpartisan Voter Drives

Dear Sheila:

This letter is to confirm our recent conversation to the effect that the Elections Board's staff's understanding of ss.11.04 and 11.38(1), Stats., is that the prohibition of s.11.38(1), Stats., on direct or indirect corporate contributions does not apply to corporate sponsorship of a nonpartisan effort to promote voter registration, voting on election day or voting absentee for those people who are not able to vote at the polls on election day.

Sub.(1)(a)1. of s.11.38, Stats., prohibits direct or indirect corporate contributions or disbursements as follows:

11.38 Contributions and disbursements by corporations and cooperatives.

(1)(a)1. No foreign or domestic corporation, or association organized under ch.185, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

Contributions and disbursements are defined in ss.11.01(6) and (7), Stats., as expenditures made for a "political purpose," and "political purpose" is defined in s.11.01(16), Stats., as an act done for the purpose of influencing the nomination or election of a clearly identified candidate or a particular vote at a referendum. A campaign to promote registration or voting (including absentee voting) at an election is not considered to serve a political purpose within the meaning of the contribution and disbursement provisions, if the campaign is truly nonpartisan and does not support or oppose any candidate. Consequently, the expenses incurred in that nonpartisan, non-candidate campaign are not considered contributions or disbursements, and the s.11.38, Stats., prohibition on contributions or disbursements by a corporation doesn't apply.

The blanket exception from many of the provisions of ch.11, Stats., contained in s.11.04, Stats., is also predicated on the absence of any support for, or opposition to, "any specific candidate, political party or referendum." Thus, the Board's staff believes that that express exception can be extended to corporate sponsorship of such nonpartisan, non-candidate get-out-the-vote drives as equally as to anyone else's sponsorship.

ATTORNEY SHEILA M. REYNOLDS
QUARLES & BRADY
June 19, 1996
Page 2

The Board's staff would sound a note of concern about the absentee-voting portion of your question. If that part of the voter drive is limited to providing voter information and education, as well as providing absentee ballot applications, leaving the processing of the application to the elector and the municipal clerk, then the Board's staff does not have a problem. But if the absentee voting portion of the campaign includes receiving and forwarding absentee ballot applications, the Board's staff is concerned about the potential consequences of mishandling those applications, and we have some discomfort with corporations facilitating a specific vote at an election.

I hope that this letter has been responsive to your questions and concerns, but if it hasn't, or if you have further questions, please let us know.

This is an informal opinion of the staff of the State Elections Board and not a formal opinion, issued pursuant to s.5.05(6), Stats., of the Elections Board, itself.

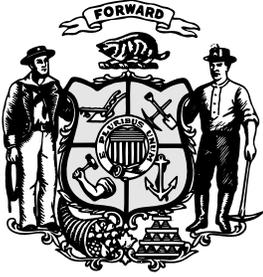
Sincerely,

STATE ELECTIONS BOARD

George A. Dunst
Legal Counsel

GAD/tg

State of Wisconsin \ Elections Board



DAVID HALBROOKS
CHAIRPERSON



February 13, 1997

P.O. Box 2973
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FAX (608) 267-0500

Kevin J. Kennedy
Executive Director

James M. Wigderson
4806 Eldorado Lane
Madison, Wisconsin 53716

Re: Exemption of Registration and Voting Drives from Ch.11, Stats., Regulation

Dear Mr. Wigderson:

This letter is in response to your inquiry of February 11, 1997, to wit: Can an individual or group of people form a club and raise funds with the sole intention of using that money to inform citizens when and where they may vote -- without filing any paperwork with the Elections Board? You have stated in your letter that

this club would not advocate a party, an issue, a committee, or a candidate. Written communication between the club and individual citizens would simply provide the time, date and place where a citizen may vote. The mission of the group would be to raise voter turnout.

The answer to your question would appear to be provided by the language of s.11.04, Stats., which reads as follows:

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 "file any paperwork with the Elections Board." A written communication that would provide "the time, date and place where a citizen may vote," without any suggestion of which candidate, which party or which referendum choice to vote for, would be consistent with a voter registration or voter turnout drive, under s.11.04, Stats., above, and would not trigger a registration requirement.

You have also asked whether the form of the get-out-the-vote organization -- whether a partnership, corporation or LLC -- would affect the exemption from filing requirements. The answer to that question is "No." The nature of the organization's activity (i.e., nonpartisan, voter-

JAMES M WIGDERSON
February 13, 1997
Page 2

turnout only), not the nature of the organization's business form, controls its exempt status under elections/campaign finance law.

I hope that this letter has been responsive to your questions and concerns, but if it hasn't, or if you have further questions, please let us know.

This is an informal opinion of the staff of the State Elections Board and not a formal opinion, issued pursuant to s.5.05(6), Stats., of the Elections Board, itself.

Sincerely,

STATE ELECTIONS BOARD

George A. Dunst
Legal Counsel

GAD/dl

State of Wisconsin \ Elections Board



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Kevin J. Kennedy
Executive Director

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Re: Application of ch.11, Wis. Stats., to Voter Registration and Get-Out-The-Vote Drives

Dear Mr. Taffora:

This letter is in response to your inquiry of February 24, 1997, and to our recent conversation concerning the application of ch.11 of the Wisconsin Statutes to nonpartisan voter registration or voter turnout drives. The circumstances surrounding your question are as follows:

I have a client who wishes to establish an organization and raise funds with the intention of using the funds raised to inform citizens when and where they may vote in the Spring, 1997 election. The funds raised may include funds from corporations and other business interests, in addition to individual contributions. This organization would not advocate the election or defeat of a particular candidate or take a position on a referendum. The organization would call persons who appear on the lists of certain organizations and political parties, requesting that such persons cast a ballot on election day.

You have asked the Elections Board's staff to confirm your understanding that the spending of money by an organization for the purpose of publishing a "written or oral communication that provides times, dates and places where citizens may vote without advocating which candidate, which political party or which referendum choice to vote for is consistent with a voter registration or voter turnout drive under s.11.04 and would therefore not be subject to a registration requirement, reporting of contributions to the organization, or reporting the organization's expenditures under ch.11." Your second question is whether the same conclusion "holds regardless of whether the organization utilizes voting lists from certain special interest groups or even political parties."

Your initial conclusion appears to be a quote from a letter that the staff recently sent, regarding this same subject matter, to a James Wigderson of Madison, Wisconsin. A copy of that letter is appended to this letter. As I told Mr. Wigderson, the answer to your first question would appear to be provided by the language of s.11.04, Stats., which reads as follows:

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.

Because your client's activities will be directed at increasing voter registration and voter participation at the 1997 spring election and will not support or oppose any specific candidate, political party or referendum, its activities -- and the money-raising and expenditures therefor -- would appear to be excluded from the disclosure provisions of ss.11.05 to 11.23, Stats. The only caveat to that conclusion is raised by your second question: what if the organization uses voter lists from special interest groups or even from political parties.

The staff believes that the exemption from disclosure requirements is, and was intended to be, predicated on the content of an organization's get-out-the-vote message and not predicated on which persons the organization contacted or how it developed the list of persons it attempted to contact. Nevertheless, your question raises an interesting issue about the meaning of the term "nonpartisan" in the statutory phrase: "nonpartisan campaigns to increase voter registration or participation."

The staff believes that the legislature intended that an organization's message urging citizens to register and to vote could not, within the exemption of s.11.04, Stats., exhort or suggest that they vote to support one party or another or that the voter participate in a designated party's partisan primary. The staff is not blind, moreover, to the argument that the spending of money to rally only persons who have, in the past, shown partiality to only one party constitutes a "partisan" (not a "nonpartisan") campaign. The staff would not construe s.11.04, Stats., in that manner, however, as long as the organization only urges citizens to register and to vote and does not, in any way, suggest how they should vote. After all, how persons have voted in the past is no guarantee how they will vote in the future. (Just ask Jimmy Carter or George Bush.) The organization could be spending its money and effort to get to the polls people who will prove to disappoint them.

I hope that this letter has been responsive to your questions and concerns, but if it hasn't, or if you have further questions, please let us know.

This is an informal opinion of the staff of the State Elections Board and not a formal opinion, issued pursuant to s.5.05(6), Stats., of the Elections Board, itself.

Sincerely,

STATE ELECTIONS BOARD

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Legal Counsel

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KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For March 26, 2008 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy, Director and General Counsel

SUBJECT: Review of Certain Opinions and Rules of the State Elections Board Relating to Coordination of Campaign Activity and Independent Expenditures

This memorandum presents certain opinions and rules of the State Elections Board presently in effect relating to coordination of campaign activity and independent expenditures for review and reaffirmation by the Government Accountability Board (GAB). The materials for review consist of 2 administrative rules and 2 formal opinions. Coordination of campaign activity is discussed first followed by a discussion of independent expenditures.

Formal Opinion Related to Coordination of Campaign Activity

Opinion EI.Bd. 00-02

Guidelines Relative to Non-advocacy Candidate Commentary, Voter Registration, and Get-out-the-Vote Efforts: 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 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 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 covers the scope of regulated campaign finance activity, coordination of campaign activity and a discussion of what qualifies as exempt from regulation as part of a non-partisan GOTV or voter registration effort. It also provides the Wisconsin specific background on scope of regulation based on the WMC case and a Court of Appeals case arising from the State Elections Board investigation and subsequent enforcement action in the 1997 Supreme Court race.

The discussion on coordination of campaign activity is comprehensive and provides good guidance to agency clientele. The staff believes the opinion should be reaffirmed. If the Board

chooses to direct staff to promulgate an administrative rule that expands the scope of regulation it would supersede that portion of the opinion that suggests a more restrictive area of regulation.

Formal Opinion Related to Independent Expenditures

Opinion El.Bd. 78-8

Voluntary committees; public financing: Establishment and operation of voluntary committees; guidelines for distinguishing between contributions and independent expenditures of voluntary committees acting on his or her behalf; permissibility of such contributions to non-voluntary committees acting in support of the candidate; use of public grant. Secs.11.12(1), 11.16(1), 11.10, 11.06(7), 11.31, 11.26, Stats. Section El.Bd. 1.42, Wis. Adm. Code. (Issued to Cloyd Porter, June 22, 1978)

While this opinion provided useful guidance when it was issued, the administrative rule governing independent expenditures has been revised several times since the opinion was issued to reflect the rulings in court cases delineating the scope of independence. Notably the factors for evaluating independence have changed from ensuring independent expenditures are not done with the “encouragement, direction and control of candidate or candidate’s agent” to ensuring independent expenditures are not “made in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported or opposed, and in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed.”

However, the opinion contains some definitive direction on certain specific interplay between the candidate and an independent committee. Except for the articulated standards for independence the answers to questions 1, 2, 3, 5 and 6 in the opinion are good guidance. The guidelines articulated in response to question 4 have been superseded by the criteria in EIBd 1.42 (6), Wis. Admin. Code. Staff believes the opinion should be modified to reflect the standards for independence have been changed and to refer to the current administrative rule defining independent activity.

Administrative Rules Related Independent Expenditures

EIBd 1.42 Voluntary committees; scope of voluntary oath; restrictions on voluntary committees.

(1) NECESSITY OF VOLUNTARY OATH FOR INDEPENDENT CANDIDATE-RELATED ACTIVITIES.

No expenditure may be made or obligation incurred over \$25 in support of or opposition to a specific candidate unless such expenditure or obligation is treated and reported as a contribution to the candidate or the candidate’s opponent, or is made or incurred by or through an individual or committee filing the voluntary oath specified in s. 11.06 (7), Stats.

(2) SCOPE OF VOLUNTARY OATH. *A committee or individual filing the voluntary oath may make expenditures or incur obligations in support of or opposition to a candidate if the expenditures or obligations incurred are made in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported or opposed, and in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed, so long as the expenditures or obligations are treated and reported as a contribution to such candidate. A committee or individual filing the voluntary*

oath is prohibited from making expenditures in support of or opposition to a candidate if the expenditures or incurred obligations are made in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported or opposed, and in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed, and the expenditures or obligations are not reported as a contribution to such candidate.

(3) TREATMENT AND REPORTING OF INDEPENDENT ACTIVITY BY VOLUNTARY COMMITTEE.

When a committee or individual filing the voluntary oath makes an expenditure or incurs an obligation in support of or in opposition to a candidate and the individual or committee does not act in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported or opposed, and in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed, the expenditure or incurred obligation shall be treated and reported as an “independent disbursement” or “independent incurred obligation”. When such disbursements or obligations are reported, the candidate in whose support or opposition the disbursement is made or obligation incurred should be identified on a separate schedule (EB-9) giving the name and address of the candidate, the amount, the date, and the purpose of the disbursement and an indication whether the candidate is supported or opposed.

(4) AN INDIVIDUAL OR COMMITTEE MAY MAKE BOTH DIRECT CONTRIBUTIONS AND INDEPENDENT EXPENDITURES.

An individual or the committee filing the voluntary oath may make both direct contributions, and independent expenditures on behalf of a candidate in support or opposition to a candidate as long as the direct contributions are within the contribution limits set out in s. 11.26, Stats., and the individual or committee making the independent expenditure does not act in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported or opposed, and in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed.

(5) SPECIAL DISCLAIMER REQUIREMENT.

A political message in support of or opposition to a candidate by a committee or individual not acting in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported or opposed, and in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed shall contain, in addition to the ordinary identification required by s. 11.30 (2), Stats., the words: “The committee (individual) is the sole source of this communication and the committee (individual) did not act in cooperation or consultation with, and in concert with, or at the request or suggestion of any candidate or any agent or authorized committee of a candidate who is supported or opposed by this communication”.

(6) GUIDELINES.

a) Any expenditure made on behalf of a candidate will be presumed to be made in cooperation or consultation with any candidate or agent or authorized committee of a candidate who is supported or opposed, and in concert with, or at the request or suggestion of, any candidate or

any agent or authorized committee of a candidate who is supported or opposed and treated as an in-kind contribution if:

1. It is made as a result of a decision in which any of the following persons take part:

- a. A person who is authorized to raise funds for, to spend the campaign funds of or to incur obligations for the candidate's personal campaign committee;
- b. An officer of the candidate's personal campaign committee;
- c. A campaign worker who is reimbursed for expenses or compensated for work by the candidate's personal campaign committee;
- d. A volunteer who is operating in a position within a campaign organization that would make the person aware of campaign needs and useful expenditures; or 2. It is made to finance the distribution of any campaign materials prepared by the candidate's personal campaign committee or agents;

(b) The presumption in par. (a) may be rebutted by countervailing evidence that the expenditure is not made in cooperation or consultation with any candidate or agent or any authorized committee of a candidate who is supported or opposed, and in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed.

History: *Cr. Register, January, 1978, No. 265, eff. 2-1-78; emerg. am. eff. 9-4-84; am. Register, March, 1985, No. 351, eff. 4-1-85; correction in (6) (a) 1. c. made under s. 13.93 (2m) (b) 5., Stats., Register, January, 1994, No. 457.*

Staff recommends this administrative rule be reaffirmed. The rule accurately articulates the standards for determining independence of interactive campaign activity.

EIBd 1.50 Non-candidate committees collecting on behalf of a specific candidate and the voluntary oath.

When a non-candidate committee accepts contributions on behalf of a specific candidate, it must file the voluntary oath in s. 11.06 (7), Stats., by which the committee's independence of the candidate is affirmed. A political action committee whose campaign finance reports show support of only one candidate is presumed to be accepting contributions in support of that candidate and required to file the voluntary oath in s. 11.06 (7), Stats., by which the committee's independence of the candidate is affirmed. That presumption may be overcome by countervailing evidence.

History: *Cr. Register, June, 1979, No. 282, eff. 7-1-79.*

This rule is designed to ensure any contribution received by a non-candidate committee that is earmarked for the benefit of a candidate is used only for independent expenditures. Otherwise the contribution violates the provisions of §11.16 (4), Wis. Stats. Staff recommends this administrative rule be reaffirmed.

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KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For March 26, 2008 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy, Director and General Counsel

SUBJECT: Review of Certain Opinions of the State Elections Board Relating to Use of Government Resources and State Employee Activity

This memorandum presents certain opinions of the State Elections Board presently in effect relating to use of government resources and state employee activity for review and reaffirmation by the Government Accountability Board (GAB). The materials for review consist of 7 formal opinions. Use of government resources is discussed first followed by a discussion of state employee activity.

Formal Opinions Related to Government Resources

Opinion El.Bd. 74-6

A candidate-incumbent who distributes business cards to members of the public who are without normal cause to have business with him would be required to include statutory identification. If such a person places newspaper ads identifying himself, the information may also be required, absent a non-political rationale for such placement. (Issued to Richard C. Kelly, August 28, 1974)

Staff recommends this opinion be reaffirmed. The opinion provides guidance on the treatment of certain activity that may be subject to disclosure. It used to be common practice in southeastern Wisconsin for candidates or their supporters to distribute business cards to voters as they entered the polling place. Current law requires any communication paid with campaign funds to contain a disclaimer with limited exceptions. §11.30 (2), Wis. Stats. The opinion provides guidance on the treatment of distributing business cards and placing newspaper advertisements to ensure campaign messages are paid for with campaign funds and contain the required identifying information.

Opinion El.Bd. 76-12

Distribution of printed materials; "political purposes": Questions of whether officeholder's purchase and distribution of printed materials to constituents are subject to reporting and identification requirements and in violation of election bribery statute depends on whether intentions of distributor as to political office, content of materials, time and manner of distributions, pattern and frequency of distribution, and value of materials indicate purchase and

distribution are for “political purposes.” Secs. 11.01(16), 11.06, 11.30(2), 12.11, Stats. (Issued to Richard A. Soletski, August 25, 1976)

Staff recommends this opinion be reaffirmed. The opinion provides guidance for registrants to consider related to the treatment of the distribution of certain materials that may be subject to regulation. State law limits the use of public funds by an incumbent elected official to pay for and distribute certain material after the first date to circulate nomination papers. §11.33, Wis. Stats. This opinion also appears under scope of regulation.

Opinion El.Bd. 76-16

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. Sec. 11.36, Stats., s. 11.33, Stats., Op.El.Bd. 76-2. (Issued to David E. Clarenbach, December 18, 1976)

Staff recommends this opinion be reaffirmed. The opinion provides guidance on the use of government funded newsletters in political campaigns. The opinion contains an excellent discussion of considerations related to use of government resources and limitations on the campaign activities of government employees. This opinion also appears under scope of regulation and state employee activity.

Opinion El.Bd. 78-12

Prohibition on mass mailings after filing of nomination papers: Secretary of State’s office may use state funds for regular mass mailing necessary to carry out duties of office after filing nomination papers and before election, provided that the mailings are not directed toward political purposes. Sec. 11.33, Stats. (Issued to Terrence S. Waitrovich, July 20, 1978)

Staff recommends this opinion be reaffirmed. The opinion provides guidance for government officials concerning an exception to the prohibition on the use of government resources to pay for and distribute 50 or more substantially similar items with public funds after the first day for circulating nomination papers. This opinion compliments the statutory restrictions in §11.33, Wis. Stats.

Formal Opinions Related to State Employee Activity

Opinion El.Bd. 75-02

The state does not occupy University of Wisconsin owned and operated student residences, dormitories, and the facilities incidental thereto which are the subject of a housing lease or agreement entered into by the University with its students. Other University of Wisconsin owned or operated facilities are occupied by the state except when the University of Wisconsin enters into an agreement with the individuals or groups, to allow those individuals or groups to use the facilities for non-academic purposes. (Issued to Richard A. Hyde, September 16, 1975)

Staff recommends this opinion be reaffirmed. The opinion provides guidance and direction on the use of government owned facilities for campaign purposes when the use is not related to the governmental function of the building. The opinion focuses on state university facilities

including student housing, auditoriums and meeting rooms that may be used for political purposes without violating campaign finance regulation. This opinion is also the basis for staff providing advice to local government on the rental of government facilities for campaign fundraising events.

Opinion El.Bd. 76-02

Section 11.36, Stats., prohibits any officer or employee of this state from receiving from any other officer or employee of this state while on state time or engaged in his official duties any contribution or service which is primarily for a political purpose and not incidental to the officer's or employee's official duties. (Issued to Thomas S. Smith, February 18, 1976)

Staff recommends this opinion be withdrawn. The opinion provides no guidance or direction on activity that is presently viewed as prohibited by §11.36, Wis. Stats., and legislative rules adopted at the direction of the State Elections and State Ethics Boards in resolving enforcement of possible violations by state employees using state resources and doing campaign related work on state time. See the attached list of prohibited activities set out in the agreement.

Opinion El.Bd. 76-16

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. Sec. 11.36, Stats., s. 11.33, Stats., Op.El.Bd. 76-2. (Issued to David E. Clarenbach, December 18, 1976)

The staff believes this opinion describing the use of government funded newsletters in political campaigns should be reaffirmed. The opinion contains an excellent discussion of considerations related to use of government resources and limitations on the campaign activities of government employees. This opinion also appears under scope of regulation and use of government resources.

Supplemental Materials

List of Prohibited Political Activity by Legislative Staff

C. General Rules concerning campaign activity:

1. Campaign activity defined. The term "campaign activity" means activity that does not reasonably and primarily fulfill and arise from official duties and that contributes to, enhances, or furthers a person's ability to run for, or chance of election or reelection to, public office. Illustrative activities include:
 - a. Arranging or assisting in arranging a campaign-related event or the raising of campaign contributions;
 - b. Soliciting, receiving, or acknowledging campaign contributions;
 - c. Preparing or distributing television, radio, newspaper, or other forms of campaign advertisements;
 - d. Preparing or designing campaign brochures, literature, nomination papers, or other campaign promotional materials;
 - e. Distributing or arranging for the distribution of campaign materials;
 - f. Directing, seeking or coordination of campaign volunteers;
 - g. Preparing a campaign budget;
 - h. Directing or participating in "get out the vote" drives;
 - i. Creating, maintaining, editing, adding to, or deleting information from a list or database of campaign contributors or supporters;
 - j. Creating, maintaining, editing, adding to, or deleting information from a list or database designed or intended for a campaign purpose;
 - k. Preparing, coordinating, or conducting polling operations for a campaign purpose;
 - l. Transporting voters to polls or campaign rallies;
 - m. Preparing campaign finance reports required by law;
 - n. Directing or participating in candidate recruitment.
2. Legislators/supervisors not to assign campaign work. A legislator or supervisor of legislative employees may not assign, authorize, or request an employee of the Legislature to engage in campaign activity to be performed while the employee is on State time, with the use of State resources or on State property.
3. Legislative employees not to engage in campaign activity in State offices or on State time.
 - a. An employee of the Legislature may not assign or authorize campaign activity to be performed on State time or in State offices.
 - b. An employee of the Legislature may not use, or make available for use by another, State property or resources in connection with campaign activity except as the property or resources are normally available to anyone under similar circumstances.

- c. An employee of the Legislature may not engage in campaign activities:
 - i. during hours of employment claimed; or
 - ii. while on any form of paid leave (including compensatory or "comp" time) other than vacation time and then only after having submitted to the Chief Clerk a request to use vacation time and a finding that the leave will not be contrary to the interests of that house; or
 - iii. during regular hours of employment unless the employee has submitted to the Chief Clerk a request to work variant hours or for unpaid leave and a finding that such variant hours or unpaid leave will not be contrary to the interests of that house.

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KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For March 26, 2008 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy, Director and General Counsel

SUBJECT: Review of Certain Opinions and Rules of the State Elections Board relating to Voter Registration

This memorandum presents certain opinions and rules of the State Elections Board presently in effect relating to voter registration for review and reaffirmation by the Government Accountability Board (GAB). The materials for review consist of several administrative rules and 3 formal opinions. The administrative rules are discussed first followed by a discussion of the formal opinions.

Administrative Rules Related to Voter Registration

Beginning in 2006 the State Elections Board began developing a series of administrative rules to address the responsibilities of state and local election officials with respect to the implementation of the Statewide Voter Registration System (SVRS). The rules also detailed specific responsibilities for voters. The rules have had extensive review by the Legislature, public comment and revision as part of the rule promulgation process over the past two years.

Two reports by the Legislative Audit Bureau (LAB) recommended more detailed rules and faulted the Board for its progress in developing rules that established training requirements for special registration deputies and clearly delineated duties for municipal clerks with respect to voter registration.

Chapter 3 of the agency's administrative code is the location for the rules related to voter registration. The following rules are currently in effect and should be reaffirmed. Additional rules are being drafted that define voter registration responsibilities of municipal clerks. These rules codify the detailed procedures developed by the agency staff and currently utilized for the administration of the SVRS. The procedures are presently in the SVRS Application Participant Manual.

Additional rules will spell out the procedures for implementing the match of new voter records with death, felon and motor vehicle records. Those rules will be presented to the Board for approval after the next version of SVRS with the matching capability is rolled out to local election officials following the Spring election.

Staff recommends all of the current rules in ElBd Chapter 3 relating to voter registration be reaffirmed.

Chapter ElBd 3 - VOTER REGISTRATION

ElBd 3.01 Voter registration.

In this chapter:

- (1) “Applicant” is an individual who submits a voter registration application form or a special registration deputy application form.*
- (2) “Appointing authority” means the board, a municipal clerk or board of election commissioners.*
- (3) “Board” means the state elections board.*
- (4) “By mail” means the completing and signing of a voter registration application form other than in the presence of a special registration deputy, county clerk, deputy clerk or municipal clerk.*
- (5) “Close of registration” is the third Wednesday preceding the election.*
- (6) “Election cycle” means the period beginning on January 1 of an odd-numbered year and continuing through December 31 of the following even-numbered year.*
- (7) “In person” means the completing and signing of a voter registration application form in the presence of a special registration deputy, county clerk, deputy clerk or municipal clerk.*
- (8) “Municipal clerk” has the meaning given in s. 5.02 (10), Stats., and includes the Milwaukee city board of election commissioners.*
- (9) “Provider” means a municipality or county that provides election administration services in conjunction with the Statewide Voter Registration System for a relier municipality.*
- (10) “Qualified elector” has the meaning given in s. 6.02, Stats.*
- (11) “Registration” means registration to vote under subch. II of ch. 6, Stats.*
- (12) “Registration period” means the time period occurring between the date of a special registration deputy’s appointment and the close of registration for the election immediately following the appointment. For purposes of this subsection, the term “election” includes any primary that precedes the election.*
- (13) “Relier” means a municipality that enters into an agreement with another municipality or county to provide election administration services in conjunction with the Statewide Voter Registration System.*
- (14) “Self-provider” means a municipality that provides its own election administration services in conjunction with the Statewide Voter Registration System.*
- (15) “Special registration deputy” means a qualified elector appointed pursuant s. 6.26 (2) (a) and (am), 6.55 (6), Stats., to register voters.*
- (16) “Statewide Voter Registration System” is the election administration software application provided by the board to enable local election officials to register voters, track absentee voting and administer elections.*
- (17) “Voter registration application form” means the board– prescribed form (EB–131) on which voter registration information is recorded before entry in the Statewide Voter Registration System.*

History: CR 07–059: cr. Register January 2008 No. 625, eff. 2–1–08.

This rule lays out the definitions applicable for the rules chapter on voter registration.

EIBd 3.02 Content of the voter registration form.

An elector shall provide all of the following information on the voter registration application form:

- (1) The elector's full name, including first and last name.*
- (2) The elector's complete address, including street, number and municipality.*
- (3) The elector's date of birth.*
- (4) The elector's driver's license number or, if the elector has not been issued a valid and current driver's license but has a department of transportation issued identification card, the transportation identification card number, or the last four digits of the elector's social security number. If the elector has not been issued a valid and current driver's license and does not have a social security number, the elector shall indicate that the elector has neither of those documents.*
- (5) An indication of the elector's age.*
- (6) An indication of the elector's citizenship.*
- (7) An indication that the elector is not disqualified from voting because the elector has not completed the terms of a sentence resulting from a felony conviction.*
- (8) If the elector was registered at a different location, the complete address including street, number and municipality of the previous address.*
- (9) If the elector was registered under a different name; the elector's former name, including first and last name.*
- (10) The signature of the elector certifying that the elector is qualified to vote in this state.*

History: *Emerg. cr. eff. 7-1-76; cr. Register, August, 1976, No. 248, eff. 9-1-76; CR 07-059: r. and recr. Register January 2008 No. 625, eff. 2-1-08.*

This rule sets out the requirements for the basic voter registration form. This is important because the National Voter Registration Act of 1993 (NVRA) has established a national form that has to be adapted to the requirements of the 50 states. In addition many municipalities modify the size of the form to meet administrative filing requirements. The rule ensures municipalities include the required voter information to effectuate registration on their form.

EIBd 3.03 Treatment of voter registration applications.

- (1) If an applicant for voter registration fails to check either or both of the boxes indicating the elector is a U.S. citizen and indicating the elector is or will be at least 18 years old at the time of the next election, the municipal clerk may process the voter registration application if the elector has signed the certification on the application form indicating the voter meets or will meet the applicable requirements to vote in this state.*
- (2) If information is missing from a voter registration application form, the municipal clerk shall contact the applicant by any means feasible, including in person, by email, facsimile transmission or telephone, to obtain the missing information.*

History: *CR 07-059: cr. Register January 2008 No. 625, eff. 2-1-08.*

This rule implements State Elections Board policy to address common errors in completing the registration form. In some states these mistakes have been treated as fatal despite the fact the age and citizenship information is addressed in the certification language on the form.

ELBD 3.04 Requiring provision of certain information by election-day voter registration applicants.

(1) A qualified elector registering to vote at a polling place on election day, who has been issued a current and valid Wisconsin driver's license, shall list his or her Wisconsin driver's license number on the voter registration application before the registration may be accepted or processed and before the person is allowed to vote at any election in Wisconsin. A Wisconsin driver's license that has expired, or has been suspended or revoked, is not a current and valid driver's license.

(2) If a current and valid Wisconsin driver's license has been issued to the registration applicant, but the registration applicant does not list the driver's license number on the registration application, the applicant shall be allowed to vote a provisional ballot using the procedures set forth in s. 6.97, Stats. Individuals voting provisional ballots shall be given the written information required under s.6.97(1), Stats. If the person voting a provisional ballot provides his or her driver's license number to the municipal clerk, by any means feasible, including, but not limited to: in person, email, facsimile or telephone; not later than 4:00 p.m., on the day following the day of the election, the person's ballot shall be counted.

(3) If a current and valid Wisconsin driver's license has not been issued to the applicant, the applicant shall list on the registration application either the last four digits of the applicant's social security number, or the Wisconsin department of transportation identification card number if one has been issued to the applicant. If neither a driver's license nor a social security number has been issued to the applicant, and the applicant has not been issued a Wisconsin department of transportation identification card number, the applicant shall check the appropriate box on the application before the application may be accepted or processed and the registrant is allowed to vote.

This rule was developed in the summer of 2006 in response to concerns raised by the U.S. Department of Justice with respect to Election Day registration issues.

EIBd 3.10 Special registration deputies.

(1) A qualified elector of this state may apply to any municipal clerk or board of election commissioners to be appointed a special registration deputy, under s. 6.26, Stats., for the purpose of registering electors of that municipality before the close of registration.

(2) A qualified elector of this state may apply to the board to be appointed a special registration deputy for the purpose of registering electors of any municipality before the close of registration.

(3) Application to be appointed a special registration deputy shall be made by completion of the application form (EB-158) prescribed by the board and submission of the form to the appointing authority.

(4) Appointment shall be consummated by issuance of the special registration deputy's oath of office, on a form (EB-156) prescribed by the board.

(5) The term of an appointment under this chapter continues through the registration periods remaining in the election cycle at the time of application, and expires at the end of the election cycle.

History: CR 07-059: cr. Register January 2008 No. 625, eff. 2-1-08.

This rule details the procedure for becoming a special registration deputy. The rule addresses a concern described in the LAB report issued in 2005.

EIBd 3.11 Special registration deputy application form.

- (1) An application to be appointed a special registration deputy shall require the applicant to provide the applicant's name, address, and contact information.*
- (2) The application shall contain a certification that the applicant is a qualified elector of the state.*
- (3) The applicant shall agree to follow the procedures established by the board and the municipal clerk.*
- (4) Before being appointed a special registration deputy the applicant shall attend a training session conducted by the appointing authority.*
- (5) The applicant shall be issued, by the appointing authority, a unique number that the applicant shall list on all voter registration forms collected by the applicant.*

History: CR 07-059: cr. Register January 2008 No. 625, eff. 2-1-08.

This rule details the application process for a special registration deputy.

EIBd 3.12 Special registration deputy training.

- (1) The content and curriculum of the training session required of each special registration deputy shall be prescribed by the board.*
- (2) The training shall include all of the following elements:*
 - (a) Review of Wisconsin voter eligibility requirements.*
 - (b) Directions on the completion of the voter registration application form, including a direction that the special registration deputy shall affix to the form his or her printed name, signature and identification number.*
 - (c) Directions that the information on the form shall be legible.*
 - (d) Review of the applicable statutory deadlines for submitting a voter registration application form.*
 - (e) Directions on the treatment of confidential voter information and on the handling of proof of residence documents received from an applicant.*
 - (f) Review of the deadlines and procedures for delivering the completed voter registration application form to the appointing authority.*
 - (g) Information on the consequences of failing to follow the prescribed procedures for registering voters.*
 - (h) Information on providing assistance to individuals with difficulty understanding the English language and individuals with disabilities.*
 - (i) Information on the provisions of s. 12.13 (3) (ze), Stats., prohibiting compensation of special registration deputies according to the number of registration forms collected.*
 - (j) Information on the criminal sanctions applicable to the misuse of appointment as a special registration deputy.*
 - (k) Any other information prescribed by the board.*
- (3) The board shall provide training at times and locations designed to facilitate the participation of applicants.*
- (4) The board may authorize a municipal clerk to provide training for an applicant applying for appointment by the board.*

History: CR 07-059: cr. Register January 2008 No. 625, eff. 2-1-08.

This rule details the subject matter required to be addressed in training special registration deputies. The rule addresses a concern described in both LAB reports on training special registration deputies. The Board is currently offering training for special registration deputies on a regular basis. The staff has developed a curriculum that can also be used by municipal clerks to conduct training consistent with the requirements of the rule.

EIBd 3.13 Revocation of special registration deputy appointment.

- (1) Under s. 6.26 (2) (b), Stats., an appointing authority may, for cause, decline to appoint an applicant as a special registration deputy, or may revoke the appointment of an existing special registration deputy.*
- (2) The basis for denying or revoking an appointment includes:*
 - (a) The applicant or special registration deputy lacks the qualifications of an election official as set forth in s. 7.30 (2), Stats.*
 - (b) The applicant or special registration deputy fails to attend training sessions scheduled by the appointing authority.*
 - (c) The applicant or special registration deputy has previously had an appointment revoked for cause.*
 - (d) The applicant or special registration deputy fails to adhere to procedures established by the appointing authority, including submission of completed voter registration application forms in the time and manner prescribed by the appointing authority.*
 - (e) The applicant or special registration deputy falsifies, fails to submit, or wrongfully suppresses a voter registration application form or otherwise commits official misconduct.*
 - (f) The applicant has been convicted of a crime delineated in s. 12.13, Stats.*

History: CR 07-059: cr. Register January 2008 No. 625, eff. 2-1-08.

This rule establishes the procedures for revoking the authority of special registration deputies to register voters.

EIBd 3.20 Voter registration drives.

- (1) Individuals or organizations conducting voter registration drives shall use the voter registration application form (EB-131).*
- (2) Individuals or organizations conducting voter registration drives may not retain the following voter registration information: the date of birth, driver's license number, department of transportation identification number, or last four digits of the social security number of an individual completing a voter registration application form.*
- (3) Individuals or organizations conducting voter registration drives may utilize special registration deputies to assist in the collection of voter registration application forms.*
- (4) Individuals or organizations conducting voter registration drives that do not utilize special registration deputies to assist in the collection of voter registration application forms shall collect a copy of the required forms of proof of residence for first-time voters and submit the copy to the appointing authority with the completed voter registration application form.*
- (5) Individuals or organizations conducting voter registration drives may not retain a copy of any form of proof of residence collected from an individual.*
- (6) Individuals or organizations conducting voter registration drives may not pay any individual collecting voter registration application forms compensation based on the number of registration forms collected as prohibited in s. 12.13 (3) (ze), Stats.*

History: CR 07-059: cr. Register January 2008 No. 625, eff. 2-1-08; s. 13.92

(4) (b) 7., Stats., Register January 2008 No. 625.

This rule sets out specific directives with respect to the conduct of voter registration drives. These rules are designed to protect the privacy of voters by prohibiting retention of confidential or statutory protected information.

EIBd 3.50 Charges for voter registration data.

(1) In this section:

(a) "Custom report" means a report that is not programmed to run in the Statewide Voter Registration System at the time a request for the report is made, or a report that requires additional programming tasks.

(b) "Election official" has the same meaning as provided in s. 5.02 (4e), Stats.

(c) "Official registration list" has the same meaning as provided in s. 6.36, Stats.

(d) "Protected information" means any information that is protected from general public disclosure by ss. 6.36 (1) (b) 1. a. and 6.47, Stats.

(e) "Report" means a defined list of related voter registration data records generated from the Statewide Voter Registration System.

(f) "Voter registration data" means data contained in the official registration list.

(g) "Voter registration data record" means a set of related information requested from the official registration list which consists of a core data element and related attributes. A core data element is the basic unit of data that is being requested, including, but not limited to, a voter name, candidate, election official, or address. The related attributes consist of pieces of data associated with that core data element.

(2) The official registration list shall be open to public inspection consistent with the requirements of ss. 6.36, 6.45 to 6.47, and ss. 19.31 to 19.36, Stats.

(3) Any person may obtain, from the official registration list, voter registration data that is not protected information, upon payment of the applicable charges.

(4) The charge for reports in electronic format is a \$25 base fee per report; plus \$5 for the first 1,000 voter registration data records, or up to 1,000 voter registration data records; plus \$5 for each additional 1,000 voter registration data records, rounded to the nearest thousand. The maximum charge for an electronic report is \$12,500.

(5) The charge for a paper copy of a report is \$.25 per page, plus the cost of postage and shipping.

(6) Any request for a report or custom report submitted to the elections board shall be made in writing by the requester or reduced to writing by the elections board's staff. Any request by the elections board for payment in advance for the report requested shall include a copy of the report request in writing as submitted by the requester or as memorialized by the elections board's staff.

(7) Any person may request a copy of the poll list used at an election from the municipal or county clerk who has custody of the list. The charge for a copy of a poll list provided by a municipal or county clerk shall be a charge determined by that clerk not to exceed the cost of reproduction.

(8) The elections board, its staff, and each municipal or county election official shall take steps to ensure that any protected information contained in the Statewide Voter Registration System, or on a poll list, is not made available for public inspection.

(9) If a request for voter registration data requires a custom report, and the elections board staff determines that it can produce the report, the charge for producing the custom report charged to the requester shall be calculated by the elections board's staff on a case-by-case basis and shall include, in addition to the charges articulated in subs. (4) and (5), any applicable charges for handling and mailing; charges for reproduction, including programming costs; and costs of

maintenance of the Statewide Voter Registration System as authorized by s. 6.36 (6), Stats. Requests fulfilled under this subsection are not subject to the maximum charge limitations in subs. (4) and (5).

(10) The money received from requests for voter registration data shall remain with the municipality, county, or elections board, whichever produces and provides the report.

History: CR 07-043: cr. Register January 2008 No. 625, eff. 2-1-08.

This rule has generated the most controversy because some individuals believe the cost for access to voter registration data is too high. However, the rule was subject to extensive review by the Legislature, public comment and revision as part of the rule promulgation process in 2006. The State Elections Board re-opened the rule for review and comment one year after promulgation to evaluate its impact on the user community. The Board received no public comment or recommendations for change in the fall of 2007.

Formal Opinions Related to Voter Registration

Opinion El.Bd. 76-10

Special registration deputies are not authorized to register voters at the polls. Authority to do so rests solely with the inspectors. (Issued to Raymond H. Ott, May 12, 1976)

The staff recommends this opinion be withdrawn. State law now expressly permits the appointment of special registration deputies to process voter registration applications at the polling place. § 6.55 (6), Wis. Stats.

Opinion El.Bd. 80-1

A municipality may use a computer generated listing of students provided by a college, technical institute, or university to determine the residence of an elector who desires to register at a polling place on election day, provided that the list, certified by the institute of higher education, in conjunction with some other means of identification meets the requirements of s.6.55(7)(a), Stats. (Issued to Robert M. Meyer, June 19, 1980)

The staff recommends this opinion be reaffirmed. Although state law now expressly permits this process, the rule provides historical perspective and adds detail missing from the statutory provisions in §6.34 (3)(a)7., Wis. Stats.

Opinion El.Bd. 81-1

Questions of the electors residence for voting purposes depend on the given facts of a particular situation, taking into consideration the elector's physical presence within the ward or election district and his or her intent to make that their residence for the purposes of voting. (Issued to Cynthia Tuczynski, January 21, 1981)

The staff recommends this opinion be reaffirmed. The opinion is an excellent discussion of the statutory and case law affecting voter residence in Wisconsin. The opinion provides useful guidance for clerks and others with questions about voter eligibility based on residence.

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JUDGE DAVID DEININGER
Chair

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the March 26, 2008 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy, Director and General Counsel
Wisconsin Government Accountability Board

Prepared by: Nathaniel E. Robinson, Administrator
Elections Division

SUBJECT: Elections Division Activities

Elections Administration Update

Introduction

Since the February 25, 2008, GAB Meeting, the Elections Division's efforts have mostly focused on the following initiatives.

1. Assisting County and Municipal Clerks to prepare for the April 1 spring election. There is one statewide referendum relating to the partial veto power of the Governor. Also, there is a supreme court race.
2. Completed the official canvass for the February 19 Presidential Preference Vote. The Canvass was certified (signed) by GAB Member, Judge William Eich on behalf of GAB Chairman, Judge David Deininger.
3. Additional follow-up was conducted on the February 19 onsite monitoring of accessibility compliance, and the pre-testing results of our draft survey.
 - 12 staff members conducted site visits/reviews, one served as a poll worker, and one observed polling places in Milwaukee and Kenosha.
 - 20 counties were visited, including a total of 49 polling locations in 29 municipalities (17 cities, 7 villages, and 5 towns).
 - The 36 polling locations that the LAB reviewed in November 2006, regardless of whether the LAB had identified the location as having a compliance issue, were visited. The other 13 locations were either chosen randomly from the list of surveys reviewed by LAB or selected for review based on concerns from citizens. A few of

the former polling locations were no longer available, so the new polling venues were assessed for complying with GAB's accessibility requirements.

- All 12 GAB staff members attended a required training session before going out on Election Day. All had the necessary equipment to monitor compliance such as levels, tape measures, door pressure gauges, and cameras to document both good and bad examples of accessibility. Staffers used the draft revised survey to conduct the on-site compliance reviews.
- The City of Madison pre-tested the survey in 73 of its 79 polling places.

During this update period, we continued to meet with our accessibility advisors, and plans are in progress for conducting additional onsite accessibility compliance monitoring on April 1 during the spring election. Mr. Paul Malischke's recommendations made to GAB on January 28, 2008, regarding a formula for allocating funds to improve polling place accessibility is part of future discussions planned by our Accessibility Advisors.

4. Made presentation at the Wisconsin County Clerks Association's Spring Conference, in Madison, on March 4, on the need, importance and necessity of conducting voluntary post elections audits.
5. Participated in ad-hoc committee meetings of a small group of county and municipal clerks who are providing advice on the proposed Administrative Rule for EIBd Chapter 5 - Ballot and Electronic Voting System Security. Note that Mr. Paul Malischke's recommendations made to GAB on January 28, 2008, regarding Ballot security are being considered in this forum. Mr. Malischke attended part of the March 18 meeting.
6. Followed-up Mr. Malischke's February 25, 2008, request made to the GAB, for an investigation of a newspaper article published in the Appleton Post Crescent Newspaper on February 19, titled, "Confusion rankles voters who failed to cast presidential vote." A report will be provided at the March 26 GAB meeting.
7. Also, during the GAB's February 25 meeting, Mr. Malischke made recommendations regarding our Recount Manual. This Manual is being reviewed and Mr. Paul Malischke's recommendations are being considered.
8. Participated in staff meetings regarding the drafting of Administrative Rules intended to supplement current Chapter EIBd Chapter 3 – Voter Registration.
9. Assisted an ex-felon who was eligible to vote on February 19, but was denied because his name incorrectly appeared on the ineligible list. Based on our investigation, the subject had satisfactorily completed all requirements of his sentencing, and was eligible to regain his right to vote. Guidance was sent to respective clerks on how to handle future situations.
10. Worked to ensure the recruitment of qualified temporary high level computer staff. Resources were made available to continue with the SVRS following the conclusion of the GAB-Accenture negotiated agreement on Thursday, February 28, 2008.

Key Metrics

Training, technical assistance and public information/education initiatives continue to be the heart of our efforts to ensure that our customers, constituents and partners are well prepared to assist us to carryout our statutory elections administration responsibilities. Summaries of our training, technical assistance and public information/education initiatives since your last meeting, are attached.

1. Training

Attachment # 1.

2. Public Information/Education

Attachment # 2

Noteworthy Activities

Received notice that the GAB was awarded \$201,727 Section 261 Help America Vote Act (HAVA) funds to help advance access for individuals with disabilities. The recruitment and selection process for a Limited Term Employee (LTE) is continuing. Under close supervision of the Division Administrator, the LTE's priority will be to address short and long term accessibility objectives.

30-day Forecast

1. Continue to meet with the GAB Accessibility Advisors to finalize the draft accessibility survey, and gear-up for more on-site accessibility monitoring and compliance reviews during the April 1 elections.
2. Continue to address findings in the 2007 Legislative Audit Report and prepare a report to submit to the Legislature's Joint Committee on Audit by March 31, 2008.
3. In the process of preparing supplemental information to access an additional \$2,111,219 Help America Vote Act (HAVA), under Section 251, Requirements Payments, and convene a meeting with our Election Administration Council to get input on expending these funds that are made available to states to meet HAVA requirements including upgrading voting machines and voter registration databases.
4. Coordinating the preparation of an application process to apply for a \$2 million competitive grant to develop a model program to improve the collections, analyses and distributions of election data for Federal offices. Such data will also be provided to the Election Assistance Commission.

Statewide Voter Registration System Update

Barbara A. Hansen, SVRS Project Director

Introduction

This update describes major noteworthy SVRS activities with respect to Clerks Election Support and Staffing, including SVRS Data, GAB Help Desk, and HAVA Interfaces and Technical Staffing.

Key Metrics

1. Post 2008 Presidential Preference and Spring Primary Activities

Thousands of Voter Registration Applications have been received by the Government Accountability Board in recent weeks. Special interest groups encourage voter registration and have used a standard federal form. The form substantially conforms to Wisconsin requirements, and as such, we must accept the form if completed properly.

These forms have been mailed to Wisconsin citizens from different groups since early 2005. In 2006, one of the statewide mailings was sent by “Women’s Voices Women’s Vote,” which targeted females who were turning 18 before the November election. This year, forms have been sent at least twice to the same list by “Voter Participation Center” from Boston affiliated with “Women’s Voices Women’s Vote.” This and other groups will continue to make similar mailings as we approach the November Presidential election.

All of these forms are pre-addressed to the “Wisconsin State Elections Board” (Government Accountability Board) and Board staff must handle each application several times: open the envelope, staple it to the application, determine which municipality should receive it, and mail it to the appropriate municipality for entry into SVRS. This occupies a lot of staff time and we are evaluating ways to streamline the process. Since February 4, 2008, we have received 6,143 applications.

2. SVRS

Elections Specialists continue to support classroom training for the Statewide Voter Registration System. Staff also work with the municipal and county clerks as they close out their February 19 Primary and set-up for April 1 election. An updated Voter Registration Application form was made available that conforms to new legislation and legislative preferences. That form is now being translated into Hmong and Spanish languages and they will all be available on the Board’s web page.

The Ineligible Voter List that tracks all felons who are currently under the Department of Correction’s (DOC) supervision (probation, parole, or extended supervision), and the 2007-2008 Wisconsin Deaths document provided by the Department of Health and Family Services, Vital Records Office, were submitted to 1,851 municipal and 72 county clerks to assist in identifying persons who are ineligible to vote under Wisconsin state statutes. The clerks use the lists to maintain current registration records. The Ineligible Voter List is also used during the late registration process and when issuing absentee ballots in the clerk’s office. Poll workers also use the Ineligible Voter List when registering voters at the polling place on Election Day. For the April 1, 2008, Spring Election, the Ineligible Voter List was prepared and distributed to clerks by March 7, with the assistance of the Department of Administration, Division of Enterprise Technology (DET).

The SVRS Team continues the planning process for implementing SVRS’ latest version (6.4) into production and full implementation of the HAVA-required interfaces scheduled for late May/early June 2008. The following tasks have recently been completed.

- A critical piece of third party software (Dev Express) has been successfully acquired and installed.
- Two additional critical components of SVRS documentation were successfully negotiated and obtained from Accenture. These include build scripts necessary to prepare the SVRS Source Code to be installed in the test environment, and the Source Code Library necessary to perform the migration of the SVRS Source Code into the GAB/DET environment.
- DET performed some initial hardware changes in the SVRS Production Environment to help improve performance of the application during the busy election period. Further updates are being planned.

Critical tasks in progress:

- ✓ GAB continues to fully complete the application's functional team.
- ✓ The SVRS Source Code is still in the process of being migrated into the GAB/DET environment.
- ✓ GAB application's functional team continues to work on the configuration of the GAB workstations to facilitate application work once the SVRS Source Code is fully migrated.
- ✓ GAB application functional team is re-engineering the process used to generate SVRS data requests to improve performance during the busy election period.

Staffing

A Professional Consultant – Limited Term Employee joined the GAB staff to work on supporting the SVRS application on March 13, and a new Elections Specialist began work on March 17.

30-Day Forecast

- Clerk Support – SVRS staff will support clerks as they finalize voter participation and Election Day voter registrations from the February election event and prepare for the April Spring Election.
- Voter Comparison with Felon Records – Once all records are updated in SVRS following the February Primary event and April 1, staff will perform a comparison between voter's voting history and the felon list prepared by the Department of Corrections on Election Day.

Elections Division's Action Items

No action is required by the Board.

GAB Elections Division
Training Initiatives
 February 17 – March 13, 2008

Training Type	Description	Class Duration	Target Audience	Number of Classes (since 2/17/2008)	Number of Students (since 2/17/2008)
SVRS “Initial” Application and Election Management	Instruction in core SVRS functions – how to navigate the system, how to add voters, how to set up elections and print poll books.	16 hours	New Provider and Self-Provider clerks and staff (Rice Lake)	1	8
SVRS “Advanced” Election Management	Instruction for those who have taken “initial” SVRS training and need refresher training or want to work with more advanced features of SVRS.	3 types of classes, 4 hours each	Provider and Self-Provider clerks and staff (Oconto Falls)	1	16
Voter Registration	Basic training in adding voter registration applications, searching for voters, updated voters.	3 hours	Temporary election workers in Milwaukee, Madison, Racine, New Berlin, Eau Claire, LaCrosse, Beloit, Kenosha, South Milwaukee, Green Bay, Waukesha, Fitchburg, West Allis	35 individuals trained in Milwaukee by GAB staff; remaining classes were conducted by municipal clerks	65
Business Process	Instruction in voter registration and election management roles and responsibilities	3 hours	Provider, Self-Provider, Relier clerks and staff	0	0

GAB Elections Division
Training Initiatives
February 17 – March 13, 2008

Absentee Workshops	Advanced training in using the absentee function of SVRS.	5 hours	Self-Providers who use the absentee functionality of SVRS	1 (Madison); daily training and support in Milwaukee	10
Municipal Clerk	2005 Wisconsin Act 451 requires that all municipal clerks attend a state-sponsored training program at least once every 2 years.	3 hours	1851 Municipal clerks; other staff	0	1788 clerks completed training; 63 non-compliant
Chief Inspector	Instruction for new Chief Inspectors before they can serve as an election official for a municipality during an election.	3 hours	Election workers for a municipality: LaCrosse, Fennimore, Racine, Oconto Falls, Wausau, Oshkosh, Hudson, Siren, Rhinelander, Madison	10 classes scheduled between 2/17/08 and 2/28/08	≥ 1000
Special Registration Deputy	2005 Wisconsin Act 451 allows a qualified elector of Wisconsin to be appointed as a Special Registration Deputy (SRD) for the purpose of registering electors of any municipality in Wisconsin during periods of open voter registration	2 hours	Qualified electors in Wisconsin	3 (Fitchburg and Madison)	26
WisLine	Series of 10 programs designed to keep local government officers up to date on the administration of elections in Wisconsin	80 minute conference call, hosted by the UW Extension, conducted by	Clerks and chief inspectors	1 (March 11, "Recount How-to's") Coming soon: 4/15/08 ("Fall	Average 200

GAB Elections Division
Training Initiatives
February 17 – March 13, 2008

		Elections Division staff.	County and municipal clerks and their staff	Elections”)	
WBETS	Web Based Election Training System.	Varies	County and municipal clerks and their staff	23 lessons being developed.	The WBETS training site was made available to all current SVRS users on 2/19. They have access to reference material and some of the lessons. By March 25 the clerks will have access to enough material so they can use the site to properly train their temporary election workers.

**GAB Elections Division
Communications Initiatives
February 26 – March 26, 2008**

Topic	Message	Media	Audience	Follow-up Activities
April 1 Spring Election topics	Be Prepared for Election Day.	GAB media kit (draft news releases) for municipal clerks: 3/11/08	General public through municipal and county clerks.	Informal instructions to individual clerks; monitoring the statewide press.
GAB Review Process	The Board has scheduled its review, and the public and stakeholders may submit written comments.	News release: 3/7/08	General public; stakeholders; Legislature.	Schedule also sent out with news release, and posted to the website.
Primary election re-cap and preparation for April 1 General Election	Various post-election reminders for clerks.	March <i>Election Update</i> : 3/7/08	Municipal and county clerks	Posted to GAB website and paper-mailed to clerks without e-mail.
GAB merger and SVRS project progress	The new agency is progressing with its merger, and SVRS repairs are continuing.	Testimony, Assembly Committee on Elections & Constitutional Law: 3/6/08	Committee members; news media.	
Post-election voting equipment audits	Post-election audits help reinforce public confidence in elections.	Talking points, Wisconsin County Clerks Assn. meeting: 3/4/08	County clerks.	Packet for county clerks concerning voluntary audits, ballot security and proposed administrative rule from Ross Hein.
Director's biography	Welcome to the annual meeting and Madison.	Remarks to Wis. County Constitutional Officers luncheon: 3/4/08	County clerks, treasurers and registrars of deeds.	
February 19 Primary results certification	Official results of the Wisconsin Presidential Preference Vote and other primary elections are now available.	News release: 3/3/08	General public.	

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KEVIN J. KENNEDY
Legal Counsel

MEMORANDUM

DATE: March 26, 2008 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy, Legal Counsel
Wisconsin Government Accountability Board

Prepared by: Jonathan Becker, Administrator
Ethics and Accountability Division

SUBJECT: Ethics and Accountability Division Activities

Campaign Finance Update

Sharrie Hauge, Special Assistant to the Legal Counsel

Introduction

Under Chapter 11 of the Wisconsin State Statutes, the Campaign Finance Section administers the campaign finance reporting responsibilities, which includes:

- Auditing Campaign Finance reports for compliance;
- Notifying registrants of filing requirements;
- Administering the Wisconsin Election Campaign Fund Program; and,
- Creating a Campaign Finance Database to ensure public disclosure.

Key Metrics

1. **Audits**

Staff completed 25 audits this reporting period. One committee was terminated and 4 committees were put on "R" status. The committees on "R" status are no longer required to file campaign finance reports, however, they are required to be available to answer questions and resolve any violations prior to termination being granted.

2. **January 2008 Continuing Report**

The January 2008 Continuing report for all registrants (Candidates, PACs, Parties, Referendum Committees, Conduits and Corporations) was due in the GAB office on January 31, 2008. Of the 1250 registrants required to file, 1164 timely filed and 86 failed to file. On February 11, staff sent 10-day reminder notices to 32 Candidate committees, 20 PACs, 14 Corporations, 9 Parties, 7 Conduits and 1 Referendum.

On February 13, staff sent settlement offer letters to 3 candidate committees for failure to file their election-related report. As a result of the settlement offer letters, two committees filed their reports and paid their settlement offers. One settlement offer was waived because the committee's report was timely postmarked.

On March 7, staff sent 30-day reminder notices to the remaining 16 Candidate committees, 7 PACs, 5 Corporations, 5 Parties and 4 Conduits for the non-filing of their January continuing report.

3. **2007 Annual Filing Fee**

Each individual, committee, group, or corporation that is registered with the Government Accountability Board whose spending exceeds a total of \$2,500 in any year, shall pay an annual filing fee of \$100. *This provision does not apply to candidates or personal campaign committees.* It does apply to PACs, Conduits, Corporations and Political Party committees. The \$100 filing fee was due on January 31, 2008 with the committees January 2008 continuing report.

Of the approximately 328 registrants required to pay the 2007 filing fee 277 timely paid. On March 4, 2008 staff sent filing fee reminder notices to 51 committees. Of the 51 committees, 11 committees paid a \$300 settlement offer for the late payment of the annual filing fee, which isn't due until April 4, 2008. To date, \$36,000 has been collected for 2007 annual filing fees.

4 **Pre-Primary Spring Report**

Staff sent **700** filing notices for the Pre-Primary Spring report. Notices were sent to 40 candidates and their treasurers, all conduits, political parties, and PACs. (For all non-candidate committees this is the only notice they receive to file the spring Primary and Election reports). The Pre-Primary report was due in the Elections Board office on February 11, 2008. This report covers activity from January 1, 2008 through February 4, 2008.

On February 15, 2008, staff sent four settlement offer notices to candidate committees for the non-filing of the election-related report. One committee filed their report and paid the settlement offer. One committee filed their report and went on exempt status. One settlement offer was waived because the committee's report was timely postmarked. One committee has not submitted their report or paid their settlement offer to date.

5. **Pre-Election Spring Report**

On February 26, 2008, staff sent filing notices to 32 candidates and their treasurers on the spring ballot. The Pre-Election report is due in the Elections Board office on March 24, 2008. This report covers activity from February 5, 2008 through March 17, 2008.

Noteworthy Activities

1. Campaign Finance Information System

There has been significant progress made in the development of the Campaign Finance Information System (CFIS) since the last GAB meeting. The first series of Joint Application Design (JAD) sessions to determine the design of the Campaign Finance Information System was completed on March 7. This phase was completed ahead of schedule.

All agencies engaged in major IT projects are required to submit a Dashboard report to the Division of Enterprise Technology monthly. On March 7, staff submitted its second CFIS Dashboard report. The report summarizes the schedule status, scope status, budget status and risk status of the project. Currently, the project is progressing on time and on budget.

Looking Ahead

The Campaign Finance staff will be very busy over the next 30 days continuing to work on the Campaign Finance Information System. As a result of the JAD sessions, PCC will be providing the GAB with the Functional Requirements Document (FRD). Staff will review and update the FRD to ensure the system meets Wisconsin's business requirements.

In Mid-April, PCC and GAB staff will finalize the draft of the Functional Requirements documents, incorporating all the staff changes. Currently, GAB staff is engaged in the following tasks:

- Specifying the contents of various reference tables (e.g., contribution limits by office),
- Writing content for the system's help screens,
- Re-writing the Campaign Finance Treasurer's handbook and the WECF Manual,
- Preparing test cases and data for user acceptance testing,
- Working with PCC to organize files for data conversion,
- Meeting to discuss and redefine GAB policies and procedures in anticipation of the new system.

Additionally, staff will be entering the spring pre-election reports and send notices to registrants who failed to file their spring pre-election reports.

Action Items

No action is required of the Board at this time.

Contract Sunshine Update

Tommy Winkler, Contract Sunshine Program Director

Introduction

Wisconsin's Contract Sunshine Act (2005 Act 410) calls for the creation and maintenance of an Internet site at which anyone may access information about every state contract, purchase, and solicitation of bids or proposals that involves an annual expenditure of \$10,000 or more. *Wisconsin Statutes* direct the Wisconsin Government Accountability Board to create and maintain this site. In enacting the Contract Sunshine Act, the Legislature's intention was to enhance citizens' confidence in the State's procurement process by providing a one-stop Internet location where citizens, the press, vendors, and others can learn about current procurement activities. The legislature intended that the Act provide potential vendors of goods and services with ready access to information about the State's purchases and confirm that the State's procurement programs are operating fairly and efficiently.

Key Metrics

- 12 The number of Department of Administration Consolidated Agency Purchasing Section (CAPS) employees who recently participated in a Contract Sunshine reporting and training session. This section will be reporting procurement information to the website for state agencies participating in the CAPS program.
- 4 The number of Government Accountability Board staff who recently completed Contract Sunshine training and are authorized to use the new application for the GAB.

Noteworthy Activities

Government Accountability Board staff met with the management team in the Bureau of Procurement on February 28 to clarify business processes associated with state procurement activity to ensure the Contract Sunshine application accurately reflects these processes. Staff also met with Sundial Software personnel (the website's developers) on March 13 to discuss corrections in the existing website's functionality and modifications to the application's internal reporting format and external appearance.

Looking Ahead

Government Accountability Board staff will continue to work with state agencies in beginning to report procurement information required under the Contract Sunshine Act using the Contract Sunshine application. Website enhancements and improvements will be developed based upon feedback from both internal and external stakeholders. The application's developers will be working on implementing corrections in the system's functionality as well as applying the enhancements identified by stakeholders. The completion and implementation of these changes should occur in the near future.

Action Items

No action is required of the Board at this time.

Financial Disclosure Update

Tommy Winkler, Contract Sunshine Program Director

Introduction

State officials and candidates file Statements of Economic Interests under Chapter 19 of Wisconsin Statutes. These statements are filed on an annual basis with the Government Accountability Board, and they are open for public inspection at the time they are filed. A statement identifies a filer's, and his or her immediate family's, employers, investments, real estate, commercial clients, and creditors. The idea is to identify which businesses and individuals an official is tied to financially. The focus is on identifying a filer's financial relationships, not on identifying the individual's wealth. This information is entered into an online index that is managed by Government Accountability Board staff.

Key Metrics

- 2078** The number of pre-printed 2008 Statements of Economic Interests staff prepared to mail to state public officials required to file under Section 19.43, *Wisconsin Statutes*.
- 760** The remaining number of state public officials who still need to file a 2008 Statements of Economic Interests with the Government Accountability Board.
- 1321** The number of annual statements of economic interests filed with the Government Accountability Board as of noon on March 17, 2008.
- 1218** The number of annual statements of economic interests processed by GAB staff into the Eye on Financial Relationships website for the public to view an index of state public officials' financial interests.

Noteworthy Activities

All annual pre-printed Statements of Economic Interests were mailed out to state public officials in January and February. Annual statements are due for all filers no later than April 30, 2008. On March 31, 2008, staff will mail quarterly transaction reports to State Investment Board employees. These reports are due for filers no later than April 30, 2008.

Looking Ahead

Government Accountability Board staff will evaluate the current Eye on Financial Relationships database in terms of data processing efficiency and accuracy relating to the 2008 filing period in early May. Government Accountability Board staff will continue to process Statements of Economic Interests into the online index as they arrive over the next five weeks.

Action Items

No action is required of the Board at this time.

Lobbying Update

Barton Jacque, Lobbying Program Director

Introduction

Wednesday March 19 is my last day. I will be returning in Mid-October to continue working for the Government Accountability Board. In my absence, Helena, Tommy, and Cindy will be covering my duties. I cannot thank all of the staff here enough for their support while I am gone. It is very appreciated and I look forward to working with all of you again in the near future!

Key Metrics

- 779** Number of lobbying organizations registered as of March 18, 2008.
- 822** Number of licensed lobbyists as of March 18, 2008.
- 1,734** Number of authorizations of lobbyists to lobbying for a particular organization as of March 18, 2008.

Noteworthy Activities

Statements of Lobbying Activities and Expenditure Reports have been received.

We determined that a lobbying principal failed to authorize a lobbyist on a timely basis, and sought a forfeiture of \$200. This forfeiture was received and the issue has been speedily resolved.

Looking Ahead

Statements of Lobbying Activity and Expenditures will be coming due at the end of July. I have tremendous confidence in Tommy, Helena, and Cindy's ability to manage this filing. Legislative Liaison Reports will also be due at the same time. Cindy and I have covered the requirements for the filing and I believe she is readily prepared to manage this report.

Action Items

No action is required of the Board at this time.

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KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the March 26, 2008 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy, Director and General Counsel
Wisconsin Government Accountability Board

Prepared by: Kevin J. Kennedy, Director and General Counsel
Sharrie Hauge, Special Assistant to the Director

SUBJECT: Administrative Activities

Agency Organization

Introduction

This has been a very busy time since the last meeting. Preparations for the Spring Non-Partisan election along with continuing Joint Application Design (JAD) sessions for the campaign finance reporting application and the end of the legislative session has kept agency staff intensely focused. These substantive items are discussed in the Division reports.

Noteworthy Activities

1 Resolution of Eligibility Issue Concerning Certain Board Members

We continue to wait for a response from the Attorney General on our request for an opinion with respect to the eligibility of certain Board members. The Department of Justice is treating the matter as a request for a formal opinion, which means additional time. Based on recent discussions I expect a formal opinion shortly.

2. Accounting

Helena Huddleston and Greg Stebler have diligently worked on closing out the State Elections Board and State Ethics Board agency accounts. They have prepared over 200 transactions to accomplish this goal. There are a few outstanding issues, but we expect the books to be closed out by the end of the month. Next, they will begin setting up the new agency's internal budget tracking system.

3. Space Planning

We are continuing to work on obtaining new leased space. Given the moratorium on new space requests, the process has been cumbersome, but we are moving forward.

We are preparing a space request and justification for the Department of Administration in order to proceed. Once DOA approves our request, they will solicit bids from leasing companies to determine potential properties for us to lease.

4. Staffing

Currently, staff is in the process of recruiting for one vacant Elections Specialist and three vacant Information Technology positions. We are also recruiting for a limited term employee to assist us in developing tools to improve disability accessibility at polling sites. We will be submitting a request to fill the vacant attorney position on the staff before the next meeting as well.

5. Budget Issues

The agency is anticipating having to address budget reduction issues as part of the response to the proposed budget reduction legislation. I have recommended the Legislature eliminate the reimbursement of certain municipalities for extended polling place hours originally imposed by 2005 Wisconsin Act 333. This sum sufficient appropriation would save the state \$80,000 and the agency additional unfunded staffing costs to process the reimbursements.

We have received approval to fill the vacant attorney position and are proceeding. We have set up meetings with assigned state budget staff to review agency needs, but twice have had to postpone the meetings at their request.

6. Litigation

Board members were recently sued in their official capacity with respect to the constitutionality of certain referenda registration and reporting requirements as applied to an individual in the town of Whitewater who wants to spend a small amount of money challenging a proposal to change the alcohol laws in the town. The suit raised some process issues for staff.

It had been the practice of the State Elections Board for the staff to accept service when Board members are named in litigation. This avoids having a plaintiff send process servers to the Board members' homes. It also saves staff from sending admission of service documents to Board members. Generally, staff counsel or the director accepts service. I recommend the Government Accountability Board continue this approach.

The Department of Justice had to make a determination on how to respond to the initial request for a temporary injunction. After discussing this with our staff attorney and the DOJ attorney assigned to the case, I contacted the Vice-Chair, in the absence of the Chair, to seek direction. I subsequently was able to follow up with the Chair. I recommend I consult with the Board Chair on interim decisions with respect to litigation. If the Chair believes the Board should weigh in on the decision, a special meeting can be called.

Any settlement proposals would involve the full Board unless our attorneys had been given specific direction at a prior briefing. Board members will receive a briefing on litigation strategy with respect to this matter in closed session.

7. Legislative and Rule Making Activity

The end of the legislative session brought a flurry of activity on a number of campaign finance and election related legislative proposals. I was asked to appear before the Assembly Committee on Elections and Constitutional Law to provide an update on the SVRS. The Committee was also reviewing several bills on campaign finance and election administration and requested comment for information purposes.

I appeared before the Senate Committee on Labor, Elections and Urban Affairs to discuss a proposal to permit political parties a one-time adjustment in the deadline for certifying presidential candidates to the Board for ballot placement. The Republican Party national convention starts after the current deadline of September 2, 2008.

The special legislative session on campaign finance reform continues. I will send an informational summary of legislative action to Board members following this meeting.

The Legislative Reference Bureau has accepted our proposed numbering system for agency administrative rules along with technical changes with respect to references to the Government Accountability Board, our address information and the Director in the existing rules. These changes will be effective on April 30, 2008.

8. Presentations

In addition to my appearances before legislative committees, I also made presentations about the agency to the American Red Cross and the Wisconsin County Officers Association, and voter identification to the Alpha Kappa Alpha professional society. I made a presentation to the Wisconsin County Clerks on pending state and federal legislation. Ross Hein and I also discussed voting equipment security with the clerks. Nat Robinson and Ross also talked with the County Clerks about post-election audits.

Looking Ahead

The staff will be preparing for the May 5, 2008 meeting. There are a number of key items for review including a discussion of campaign finance registration, recordkeeping and reporting requirements, voting equipment approval and security issues, review of the recount manual, administrative rules on election observers and challenging electors.

The staff has a number of deadlines for filing financial reports on the use of HAVA funds. Staff is also completing the application process for additional federal funding. Staff is also preparing a report for the Joint Legislative Audit Committee for March 31, 2008.

I will continue to work on organizational matters including staff assignments, office space relocation and staff recruitment.

Action Items

1. Policy on litigation decisions including service of Board Members