

El. Bd. Op. 07-1 (Reaffirmed 6/9/08)

Summary:

The Elections Board finds that the solicitation of signatures, on a petition that is not related to the election at hand, without any attempt to influence that day's vote of the voter solicited, is not, per se, "electioneering" within the meaning of §12.03, Stats., and, therefore, not a violation of that statute.

This opinion was reviewed by the Government Accountability Board pursuant to 2007 Wisconsin Act 1 and was reaffirmed on June 9, 2008.

Opinion:

You requested a formal opinion on the legality of the following factual situation:

On November 7th, members of our local affiliate, Citizens for Responsible Government, were outside certain Milwaukee polling locations collecting signatures for the recall of Milwaukee Alderman Michael McGee. Per the accounts of our circulators, they were directed move to outside a 100 foot radius of the polls, per State Statute 12.035, first by City of Milwaukee Police and then by a City of Milwaukee election official both of whom relented after a discussion of the statute relied on. Shortly thereafter, Deputy City Attorney Linda Burke arrived on the scene demanding our circulators move outside the 100 foot radius.

I contacted the Milwaukee County District Attorney's office and spoke with Assistant District Attorneys Bruce Landgraf and Jim Griffin. Relying solely on §12.035, Mr. Griffin decided to rule against allowing our members to circulate the petition within a 100ft radius of the polls. I believe Mr. Griffin made an error in his decision. To wit, the following arguments were made by Mr. Griffin.

1. That a petition for recall is election-related material. The statute describes election-related material as "any written matter which describes, or purports to describe, the rights or responsibilities of individuals voting." First, petitioning the government is not election related. Even in the case of a petition for recall, no election exists until such time as sufficient signatures are obtained and certified. Second, the petition contains no language describing "the rights or responsibilities of individuals voting." Mr. Griffin offers the specious argument that because the template used is an SEB document and that it refers to the statutes that delineate recall it therefore describes the rights of voters. At best, the petition vaguely references rights of recall, not voting rights.

2. That circulating a petition for recall constitutes "posting or distributing" as described in the statutes. First, no petitions were posted. This would be illegal under the recall statutes. Second, no documents of any sort were distributed.

I am extremely disturbed about the manner in which the rights of my members were violated. First, police were called. When they agreed that §12.035 was not being violated, an election official was brought in. When she also decided circulators were not in violation, the City of Milwaukee Attorney's office acted. Finally, the District Attorney's office, who I am led to believe was in consultation with the City Attorney's office used tortuous logic and overly-broad interpretations to limit the rights of citizens to petition their government rather than uphold them.

Accordingly, I am requesting your office provide a formal opinion pursuant to §5.05(6) as to whether citizens have the right to petition their government as allowed by state statutes within 100ft of polling locations. I would also like a separate opinion as to whether §12.035 was correctly interpreted based on the facts I have presented.

Your request implicates four separate, but related, statutes: §§5.35(5), 7.37(2), 12.03 and 12.035, Stats., governing conduct at or near a polling place on election day. Those statutes read as follows:

5.35 Polling place requirements.

(5) Activities restricted. No polling place may be situated so as to interfere with or distract election officials from carrying out their duties. **The municipal clerk and election inspectors shall prevent interference with and distraction of electors at polling places.**

7.37 Inspectors' duties.

(2) Preserve order. The inspectors shall possess full authority to maintain order and to enforce obedience to their lawful commands during the election and the canvass of the votes. They shall permit only one person in a voting booth at a time and shall prevent any person from taking notice of how another person has voted, except when assistance is given under s. 6.82 . **They shall enforce s. 5.35 (5) and prevent electioneering and distribution of election-related material from taking place in violation of ss. 12.03 and 12.035 . If any person refuses to obey the lawful commands of an inspector, or is disorderly in the presence or hearing of the inspectors, interrupts or disturbs the proceedings, they may order any law enforcement officer to remove the person from the voting area or to take the person into custody.**

12.03 Campaigning restricted. **(1)** No election official may engage in electioneering on election day. No municipal clerk or employee of the clerk may engage in electioneering in the clerk's office or at the alternate site under s. 6.855 during the hours that ballots may be cast at those locations.

(2)(a)1. No person may engage in electioneering during polling hours on election day at a polling place.

2. No person may engage in electioneering in the municipal clerk's office or at an alternate site under s. 6.855 during the hours that absentee ballots may be cast.

(b)1. No person may engage in electioneering during polling hours on any public property on election day within 100 feet of an entrance to a building containing a polling place.

2. No person may engage in electioneering during the hours that absentee ballots may be cast on any public property within 100 feet of an entrance to a building containing the municipal clerk's office or an alternate site under s. 6.855.

3. No person may engage in electioneering within 100 feet of an entrance to or within a nursing home or qualified retirement home or community-based residential facility while special voting deputies are present at the home or facility.

(d) This subsection does not apply to the placement of any material on the bumper of a motor vehicle that is parked or operated at a place and time where electioneering is prohibited under this subsection.

(3) A municipal clerk, election inspector or law enforcement officer may remove posters or other advertising which is placed in violation of this section.

(4) In this section, "electioneering" means any activity which is intended to influence voting at an election. (Emphasis supplied throughout)

12.035 Posting and distribution of election-related material.(1) In this section, "election-related material"

means any written matter which describes, or purports to describe, the rights or responsibilities of individuals voting or registering to vote at a polling place or voting an absentee ballot at the office of the municipal clerk or an alternate site under s. 6.855.

(2) The legislature finds that posting or distributing election-related material at the polling place, at locations where absentee ballots may be cast, or near the entrance to such locations when voting is taking place may mislead and confuse electors about their rights and responsibilities regarding the exercise of the franchise and tends to disrupt the flow of voting activities at such locations. The legislature finds that the restrictions imposed by this section on the posting or distribution of election-related material are necessary to protect the compelling governmental interest in orderly and fair elections.

(3)(a) No person may post or distribute any election-related material during polling hours on election day at a polling place.

(b) No person may post or distribute any election-related material during polling hours on any public property on election day within 100 feet of an entrance to a building containing a polling place.

(c) No person may post or distribute any election-related material at the office of the municipal clerk or at an alternate site under s. 6.855 during hours that absentee ballots may be cast.

(d) No person may post or distribute election-related material during the hours that absentee ballots may be cast on any public property within 100 feet of an entrance to a building containing the office of the municipal clerk or an alternate site under s. 6.855 .

(4) Subsection (3) does not apply to any of the following:

(a) The posting or distribution of election-related material posted or distributed by the municipal clerk or other election officials.

(b) The placement of any material on the bumper of a motor vehicle located on public property.

(5) A municipal clerk, election inspector, or law enforcement officer may remove election-related material posted in violation of sub. (3) and may confiscate election-related material distributed in violation of sub. (3).

As you may be aware, prosecution of violations of §§5.35(5), 7.37(2), 12.03 and 12.035, Stats., is conducted by the district attorney of the county in which the violation is alleged to have occurred. Consequently, any opinion expressed by the State Elections Board is informational only, because it is not binding on the district attorney who has the authority to conduct a prosecution.

All of these statutes involve regulation of conduct at a polling place, but the statutes may be divided into two categories: regulation of “electioneering” and regulation of interference with the orderly conduct of the election. Regulation of “electioneering” is the subject of §§12.03 and 12.035, Stats., and regulation of interference with the orderly conduct of the election is the subject of §§5.35(5) and 7.37(2), Stats.

“Electioneering” and “interference with the orderly conduct of the election” are two separate and different activities that require separate findings by the election officials or law enforcement officers administering conduct at the polling place. A person engaged in “electioneering” may or may not also be “interfering with the orderly conduct of the election” and a person “interfering with the orderly conduct of the election” may or may not also be engaged in “electioneering.” Persons engaged in either electioneering, or interference with the orderly conduct of the election, may be ordered to leave the area in which the polling place is located, or may be arrested and prosecuted by law enforcement authorities.

Mindful that interference with the orderly conduct of the election is a category of conduct wholly separate from “electioneering”, and that both interference and electioneering have to be evaluated, in the first instance, by the inspectors at the polling place, and then by law enforcement officers if they are summoned to the place where the conduct is occurring, this

opinion is addressed, and limited, to an interpretation of, “electioneering” under §12.03, Stats., as that statute applies to petitioning, and is not a comment or opinion on interference with the orderly conduct of the election.

The Elections Board finds that the solicitation of signatures, on a petition that is not related to the election at hand, without any attempt to influence that day’s vote of the voter solicited, is not, per se, “electioneering” within the meaning of §12.03, Stats., and, therefore, not a violation of that statute.

The Board also finds that petitioning inside the building containing the polling place is inherently disruptive and therefore falls within the prohibition of §5.35(5), Stats. Election officials will order persons petitioning inside the building containing the polling place to leave the building and will summon law enforcement if those persons disobey that order.

Finally, given s. 12.035, Stats.’ definition of “election-related material,” – any written matter which describes, or purports to describe, the rights or responsibilities of individuals voting or registering to vote at a polling place – circulating a petition within 100 feet of the entrance to a polling place, per se, would NOT constitute a violation of §12.035, Stats. Persons engaged in the activity of petitioning for an election, and nothing more, are not engaged in the display or distribution of literature relating to voting or registering to vote. Neither does the subject matter of petitions to a governing body describe, or purport to describe, the rights or responsibilities of individuals voting or registering to vote at a polling place. Such petitions – whether seeking the recall of an elected officeholder, the institution of direct legislation, the reduction in the size of a county board or one of the myriad other subjects of petitions to a governing body – seek to effect a change in the manner in which the petitioners are governed, and not to affect the rights or responsibilities of individuals voting or registering to vote at a polling place.