STATE OF MINNESOTA
CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD
. . . . . .
February 11, 2014
Room 220
Minnesota Judicial Center
. . . . . .

MINUTES

The meeting was called to order by Chair Wiener.

Members present: Beck, Oliver, Peterson, Sande, Wiener

Others present: Goldsmith, Sigurdson, Larson, Schroeder, Pope staff; Hartshorn, counsel

MINUTES (January 7, 2014)

Member Peterson's motion: To approve the January 7, 2014, minutes.

Vote on motion: Unanimously passed (Oliver absent).

CHAIR'S REPORT

Board meeting schedule

The next Board meeting is scheduled for Tuesday, March 4, 2014.

Member Wiener, Beck and Peterson informed members that they would have conflicts and would not be able to attend. Executive Director Goldsmith will poll members for an alternate date.

EXECUTIVE DIRECTOR'S TOPICS

Executive Director Goldsmith reported on recent Board office operations.

Hiring New Staff

Executive Director Goldsmith introduced members to Kyle Fisher. Mr. Fisher has been hired as the Board's new Management Analyst / Legal Analyst.

Reconciliation of Board Data

Mr. Sigurdson presented the Board with a memorandum which is attached to and made a part of these minutes.

Assistant Director Sigurdson informed members that the reconciliation progress for January was limited primarily to contributions reported in 2012. The focus on 2012 reflects the Board's direction at the January meeting to work more on the most recent year's reconciliation problems and less on large unreconciled contributions from prior years. In addition, January contained both lobbying and campaign finance reporting deadlines which limited the amount of time staff could spend on the reconciliation project.

The total amount of unreconciled transfers between registered committees dropped from $18,181,580 at the beginning of January to $12,663,413 at the beginning of February. The $5,518,580 change can be attributed to two developments.

First, the 2012 unreconciled transfer amount included many contributions that were made by donor committees at the end of 2012, but were not received by the recipient committee until the beginning of 2013.

Secondly, the database program used by staff to identify unreconciled transfers is now more sophisticated in distinguishing an individual contribution that does reconcile from the total amount of contributions between two committees that does not reconcile. This change had a dramatic affect in the amount of unreconciled transfers in 2010. By first removing the perfect matches the unreconciled total for 2010 was reduced from $4,791,084 to $496,093.

Website Redevelopment

Member Oliver arrived during discussion.

Mr. Goldsmith informed members that staff has had the opportunity to attend the four-hour in-depth evaluation of the software platform. Staff is pleased with the information and believes this will be a cost effective solution for the website platform. Mr. Goldsmith informed members that staff is waiting for the paperwork necessary from MN-IT to determine the scope and cost of the project.

Analysis of expenditures for which source of funds is not known

Mr. Goldsmith reported that no progress had been made on this item, which had been proposed as a staff activity by Member Beck. The effort would involve staff attempting to determine how much spending is done by associations, including nonprofit corporations, where there is no information on the actual sources of the money used for the spending.

Mr. Goldsmith explained electioneering communications and communications that do not meet the magic words test for express advocacy are not reported to the Board, so the only way to learn about such communications would be to reach out to other groups who monitor such communications.

Mr. Goldsmith said he would keep this item on the agenda for the next Board meeting and provide further advice at that time.

Correspondence received

Mr. Goldsmith presented the Board with a series of correspondence and gave a brief review of each letter received by staff regarding the Board investigation of complaints filed by the Republican Party of Minnesota.

BOARD MEMBER TOPICS

Disclosure Conference "Shining the Light on Money"

The campaign finance disclosure seminar will be held at the Humphrey Center for the Study of Governance and Politics, February 19, 2014, 9 a.m. to noon and will be free to attendees. The seminar examines the importance of disclosure and the areas in which Minnesota's campaign finance disclosure laws could be improved.

Member Beck informed members that registration is required, which can be done online.

After discussion the following motion was made:

Member Sande's motion:	To give the Executive Director the authority to publish this conference to the Board's mailing lists and on its website and to publish similar conferences of general interest on campaign finance law at his discretion.
Vote on motion:	Unanimously passed.

LEGISLATIVE RECOMMENDATIONS

Mr. Goldsmith presented the Board with a memorandum which is attached to and made a part of these minutes.

Mr. Goldsmith informed members that when he presented the legislative recommendation memo at the January meeting, he neglected to point out that the list no longer included the language exempting retired judges from the requirement to file economic interest statements. Staff removed the language from the list of recommendations because it proposed less disclosure of public officials' financial interests.

The Board of Directors of the Minnesota District Judges Association has passed a resolution asking that retired judges be exempted from the EIS requirement.

The Board listened to testimony from Judge Greg Johnson and Senior Judge Stephen Askew.

After discussion the following motion was made:

Member Peterson's motion:	To add the following language to the Board's technical legislative recommendations. Section 10A.09, subd. 1a. Exception; senior judges. Notwithstanding subdivision 1, a retired judge or justice appointed to serve as a senior judge or justice under section 2.724 is not required to comply with the provision of this section.
Vote on motion:	Unanimously passed.

ENFORCEMENT REPORT

Consent Item

Confirmation of the administrative termination of the following lobbyists at the request of the Lobbyist Association:

On January 14, 2014, Brandon Rettke, director of public affairs for Education Minnesota, submitted a request to have two lobbyist registrations administratively terminated: Lee Johansen, effective October 25, 2013, and Courtney Derwinski, effective August 27, 2013. Both lobbyists had authorized Mr. Rettke to report on their behalf. They are no longer employed at Education Minnesota.

After discussion the following motion was made:

Member Sande's motion:	To approve the consent item.
Vote on motion:	Unanimously passed.

Informational Items

A. Payment of a civil penalty for findings issued on December 17, 2013:

DFL Senate Caucus, $100,000

B. Deposit to the General Fund, State Elections Campaign Fund:

Friends of Minn Nurse Anesthetists, $50 (anonymous)
Chisago County RPM, $344.22, (anonymous, could not determine the source)

ADVISORY OPINIONS

Mr. Goldsmith presented the Board with a memorandum which is attached to and made a part of these minutes.

This request is non-public. The requestor is an attorney representing a candidate who has been asked to participate in the fundraising activities of an independent expenditure political committee that might wish to make independent expenditures to influence the election of that same candidate. The request asks if the candidate's participation in fundraising for the independent expenditure committee will destroy the independence of any expenditure made by that committee to expressly advocate for that candidate.

This request was originally considered at the Board's December meeting, at which a single version of the opinion was discussed. The matter was laid over to the January meeting, at which two versions of the opinion were presented. However, the Board did not consider the matter at its January meeting and it was laid over to the February meeting. Two versions of the opinion were presented. The first draft has not changed since members first reviewed it at the December meeting. The second version reaches the same result as the second version that was presented in January, but has significant changes to some passages.

The Board heard testimony from Mr. Asp of the Lockridge Grindal Nauen law firm.

Mr. Goldsmith suggested that a footnote be added to the second draft as footnote 1 to clarify that the opinion is limited in application to independent expenditure political committees. The suggested text was: " The requester of this opinion is an independent expenditure political committee, which is a specific type of association defined by statute and different from a political party unit or a general purpose political committee. Application of this opinion is limited to independent expenditure political committees."

Mr. Goldsmith also suggested that the opinion would be improved if the text of footnote 2 was incorporated into the text of the draft rather than being included as a footnote. Mr. Goldsmith also suggested that the Board may wish to consider deleting footnote 3, which makes a statement about hypothetical facts not before the Board in this request.

After discussion the following motion was made:

Member Beck's motion:	To adopt version two of Advisory Opinion 437 with the following amendments: add the new footnote 1 suggested by Mr. Goldsmith, incorporate the text of footnote 2 into the body of the opinion, delete the extraneous words "to those" at the end of the second to last line in the 3rd paragraph, and delete footnote 3.
Vote on motion:	Unanimously passed.

Advisory Opinion 438

Ms. Pope presented the Board with a memorandum which is made a part of these minutes by reference.

This request is non-public. The requester asks for the Board's guidance regarding the exploratory activities that will transform an individual thinking about running for office into a candidate under Chapter 10A. The request also asks for guidance regarding when an individual who self-funds the listed actions would be required to form and register a principal campaign committee and when the individual would be required to file reports with the Board. Finally, the request asks whether any results or products of the listed activities that were initially paid for by the individual could be purchased for fair market value by a principal campaign committee later formed by that individual.

The draft opinion discusses the various activities presented by the requester and provides guidance about when a particular activity would constitute an action made for the purpose of bringing about the individual's nomination or election to office. The draft opinion further discusses the registration and reporting requirements for an individual who is self-funding the listed activities. Finally, the draft opinion states that the individual can sell or donate the results or products of the listed activities to the individual's principal campaign committee for fair market value, which in this case would be the price that the individual paid to obtain the results or products.

After discussion the following motion was made:

Member Peterson's motion:	To adopt Advisory Opinion 438 as drafted.
Vote on motion:	Unanimously passed.

LEGAL COUNSEL'S REPORT

Board members reviewed a memo from Counsel Hartshorn outlining the status of cases that have been turned over to the Attorney General's office. The Legal Counsel's Report is made a part of these minutes by reference.

EXECUTIVE SESSION

The Chair recessed the regular session of the meeting and called to order the executive session. Upon completion of the executive session, the regular session of the meeting was called back to order and the chair had nothing to report into regular session:

OTHER BUSINESS

There being no other business, the meeting was adjourned by the Chair.

Respectfully submitted,

Gary Goldsmith
Executive Director

Attachments:
February 5, 2014, memorandum regarding an update on reconciliation of contributions between registered committees
February 4, 2014, memorandum regarding technical / noncontroversial legislative recommendations
February 4, 2014, memorandum regarding Advisory Opinion 437
Advisory Opinion 437 – version 2
February 4, 2014, memorandum regarding Advisory Opinion 438
Advisory Opinion 438

Campaign Finance and Public Disclosure Board

190 Centennial Building . 658 Cedar Street . St. Paul, MN 55155-1603

DATE: February 5, 2014

TO: Board Members

FROM: Jeff Sigurdson
Assistant Director

TELEPHONE: 651-539-1189

SUBJECT: Update on Reconciliation of Contributions between Registered Committees

In January work on the reconciliation of contributions between registered committees was limited primarily to contributions reported in 2012. The focus on 2012 reflects the Board's direction in January to work more on the most recent year's reconciliation problems and less on large unreconciled contributions from prior years. In addition, January contained both lobbying and campaign finance reporting deadlines which limited the amount of time staff could spend on the reconciliation project.

Nonetheless, the total amount of unreconciled transfers between registered committees dropped from $18,181,993 at the beginning of January to $12,663,413 at the beginning of February. The $5,518,580 change can be attributed to two developments.

First, the 2012 unreconciled transfer amount included many contributions that were made by donor committees at the end of 2012, but were not received by the recipient committee until the beginning of 2013. The receipt of contributions that cross over a year are correctly reported by the recipient committee in the year following the year in which the contribution was first reported to the Board. In other words, some transfers did not reconcile even though the contribution had been correctly reported by both the donor and recipient committees. By examining the 2013 year-end report staff was able to confirm that many 2012 unreconciled contributions were now reported by the recipient committee. The remaining amount of unreconciled contributions for 2012 is now $35,862.

Secondly, the database program used by staff to identify unreconciled transfers is now more sophisticated in distinguishing an individual contribution that does reconcile from the total amount of contributions between two committees that does not reconcile. For example, a donor committee reports making a total of $15,000 in contributions to a recipient committee in two separate contributions; $10,000 in February and another $5,000 in July. The recipient committee reports receiving only the $10,000 contribution. The program that identifies unreconciled transfers was set to compare the total amount of transfers between the two committees. Because there was more than a $100 difference in the total reported by the two committees the total transfer of $15,000 was considered unreconciled. Now, the program has been changed to first try a perfect match on individual contributions. If there is a perfect match, in this example the $10,000 contribution, that contribution is considered reconciled and removed from the total amount of contributions to compare. Using this example, the remaining unreconciled amount is now $5,000.

This change in the reconciliation program had a dramatic affect in the amount of unreconciled transfers in 2010. By first removing perfect matches the unreconciled total for 2010 was reduced from $4,791,084 to $496,043. The amount of unreconciled contributions was also reduced for all other years, but in relatively small amounts. The reductions in the amount of unreconciled contributions from November 2013 to the beginning of February 2014 by year is shown in the following table.

	November 2, 2013			January 3, 2014			February 4, 2014
Year	**Not Reconciled Difference Over $100**		**Year**	**Not Reconciled Difference Over $100**		**Year**	**Not Reconciled Difference Over $100**
2000	$2,842,098		2000	$2,842,098		2000	$2,795,078
2001	$470,640		2001	$374,140		2001	$373,140
2002	$6,241,753		2002	$1,906,587		2002	$1,856,315
2003	$372,648		2003	$367,448		2003	$351,598
2004	$2,335,382		2004	$2,335,382		2004	$2,305,950
2005	$248,193		2005	$248,193		2005	$185,817
2006	$483,346		2006	$476,846		2006	$416,821
2007	$615,574		2007	$615,574		2007	$512,529
2008	$2,686,354		2008	$2,686,354		2008	$2,675,880
2009	$351,235		2009	$351,235		2009	$284,354
2010	$4,791,084		2010	$4,791,084		2010	$496,043
2011	$500,960		2011	$453,060		2011	$374,026
2012	$4,326,600		2012	$733,993		2012	$35,862
Total	**$26,265,867**		**Total**	**$18,181,993**		**Total**	**$12,663,413**

Other Developments

As mentioned above the 2013 year-end Report of Receipts and Expenditures was due on January 31, 2014. As of the date of this memo 717 of 743 political committees, political funds, and party units have filed the report. Additionally, 647 of 695 candidate committee reports have been filed.

Board members will recall that 2013 will be the first report year that campaign expenditures, noncampaign disbursements, and ballot question expenditures will be entered into the Board's databases. The database tables that will be used to record campaign expenditures have been created. The forms used to data entry expenditures reported on a paper report have begun testing, but are not yet ready for staff use. I will update the status of the data entry screens at the Board meeting. There are 162 paper reports from candidates and 140 paper reports from political committees, funds, and political party units to data enter.

Minnesota

Campaign Finance and Public Disclosure Board

Date: February 4, 2014

To: Board members

From: Gary Goldsmith, Executive Director **Telephone:** 651-539-1190

Re: Technical / Noncontroversial legislative recommendations.

When I presented the language and memo regarding technical and noncontroversial legislative recommendations, I neglected to specifically point out that the list no longer included the language exempting retired judges from the requirement to file economic interest statements. This proposal had arisen from staff suggestions, not from a Board member or Board action. Staff removed the language from the list of recommendations because it proposed less disclosure of public officials' financial interests.

Since the last Board meeting, the Board of Directors of the Minnesota District Judges Association has passed a resolution asking that retired judges be exempted from the EIS requirement. The resolution is attached to this memo. The resolution contains several reasons for exempting retired judges from this requirement.

There are also administrative reasons that this exemption may be good policy. The address of a judge posted on the Board's website will be the judge's chambers address. Public officials are not required to disclose their home addresses. But retired judges have no chambers so we would have no address to use for contacts with judges as public officials. In considering this problem we have concluded that we may have to develop some sort of arrangement with the Office of the Court Administrator to be the official recipient for notices we need to send to retired judges.

If the Board wants to add a recommendation on this subject to its 2014 recommendations, the following language could be added to the Board's technical legislative recommendations:

> Exempt retired judges from the economic interest statement disclosure provisions of section 10A.09.

To implement the recommendation, a section could be added to Minnesota Statutes section 10A.09 Statements of Economic Interest

<u>Subd. 1a. Exception; senior judges. Notwithstanding subdivision 1, a retired judge or justice appointed to serve as a senior judge or justice under section 2.724 is not required to comply with the provisions of this section.</u>

Attachment
Resolution

Minnesota

Campaign Finance and Public Disclosure Board

Date: February 4, 2014

To: Board members

From: Gary Goldsmith, Executive Director **Telephone:** 651-539-1190

Re: Advisory Opinion 437

This opinion has been before the Board previously. It asks whether a candidate's fundraising for an independent expenditure political committee destroys the independence of an expenditure the committee makes to influence the nomination or election of that same candidate.

The request is nonpublic data, so the original request letter will not be made public. However, the requester, Mr. David Asp of the Lockridge Grindal Nauen law firm, has asked to address the Board. Thus, his identity is public although he has not, and is not required to, identify the client on whose behalf the request is made.

The original staff draft, watermarked "draft first version", was written based on a narrow statutory reading without considering the policy behind the statute and concluded that the proposed actions would not destroy the independence of resulting independent expenditures. Because the Board was not certain it wanted to adopt the original draft response, staff prepared an alternate version that was available with the January, 2014, meeting materials. This version was watermarked "draft second version." The matter was laid over in January at the request of Mr. Asp, who wanted to appear before the Board, but was unavailable for the January meeting.

The materials for the February meeting again include two versions of the opinion. The draft first version has not changed since members previously reviewed it. The current draft second version reaches the same result as the draft second version presented in January, but is significantly changed in some passages. Please study both of the current versions of the draft as you prepare for the meeting. Each is attached to this memorandum.

As noted previously, the original draft recognizes the proposed expenditure as an independent expenditure, the second draft concludes that the expenditure is not independent because of candidate cooperation and implied consent. The concept of implied consent is new to this revised draft of the second version.

The Board has received comments from the Institute for Justice, Minnesota Chapter, urging the Board to adopt the first version of the opinion. A copy of the Institute's comments is attached. I also anticipate receiving written comments from the requester and from the Campaign Legal Center, a public disclosure advocacy organization. They will be forwarded to members upon receipt.

The Institute for Justice argues that the federal case of *Colorado Republican Federal Campaign Committee v. FEC* (518 U.S. 604, 1996) is controlling. It is on the basis of this case that a

Minnesota district court judge ruled in *Republican Party of Minnesota v. Pauly* in 1999 that Minnesota's prohibition on independent expenditures by a party unit after the party had candidates on the ballot was unconstitutional. I have posted both cases in the legal materials section of the member website should you want to read them.

In *Colorado Republican*, the FEC sought to treat *all* party unit expenditures as being "coordinated" with the party unit's candidates. The result would be that all party unit expenditures constituted contributions and would be limited by the party unit limit on contributions to candidates. The law challenged in *RPM v. Pauly* codified that same concept, saying that a party unit expenditure once a party had candidates on the ballot could not be an independent expenditure. The result would be that he expenditure was considered a contribution to the candidate, subject to limits. Both the FEC interpretation of federal law and the Minnesota Statute amounted to a direct and absolute prohibition on independent expenditures by party units without regard to whether there was *any* participation by the subject candidate in *any* activity that supported the ultimate expenditure.

Unlike the FEC interpretation at issue in *Colorado Republican* and unlike Minnesota statues prior to *RPM v. Pauly*, neither Minnesota statutes nor Board advice imposes any limit on independent expenditures by either party units or political committees or funds.

In both *Colorado Republican* and *RPM v. Pauly* there was no dispute that the subject expenditure would be an independent expenditure but for the FEC interpretation and the Minnesota statute that precluded party unit independent expenditures. In other words, the issue of the candidate's participation in the expenditure process was not before the court in either case. In *RPM v. Pauly* it was noted that Republican candidates, in general, participated in party unit fundraising events. Participation by one gubernatorial candidate was specifically documented, but participation by the candidate for whom the party sought to make independent expenditures was not discussed.

The request, on the other hand, states as a given fact that there is candidate cooperation with the subject political committee and asks the Board to consider whether that level and type of cooperation destroys the independence of any resulting political committee expenditures on behalf of that candidate. Even if the Board adopts the second version of the opinion, the result is not to preclude or even limit an independent expenditure political committee's right to make unlimited independent expenditures for any candidate. The committee would lose that right only in the case where the committee solicits and receives candidate cooperation in the fundraising and promotional activities that support its ability to make expenditures.

A key state interest on which campaign finance regulation is based is the state's interest in preventing corruption or the appearance of corruption or undue influence based on the flow of money. Although limiting cooperation between spenders and candidates can help reduce the opportunities for corruption, even limitations on cooperation cannot necessarily eliminate such opportunities. In *Colorado Republican*, the Court said:

> When this Court considered, and held unconstitutional, limits that the FECA had set on certain independent expenditures by PACs, it reiterated *Buckley's* observation that "the absence of prearrangement and coordination" does not eliminate, but does help to "alleviate," any "danger" that a candidate will understand the expenditure as an effort to obtain a "*quid pro quo."*

In the matter before the Board, the absence of prearrangement or cooperation in the development of the subject communication itself is not sufficient to eliminate the danger that a

candidate or the public will understand a large corporate contribution, given at the candidate's request and used for the candidate's benefit, is part of an effort by the donor to obtain a *quid pro quo.*

If a candidate is permitted to directly solicit, in the name of an independent expenditure political committee, unlimited amounts of money from corporations which money can then be used to pay for communications intended to elect that candidate, the legislature's attempt to eliminate the threat or perception of undue influence or corruption is thwarted.

Minnesota is one of some 20 states that prohibit corporate contributions to candidates and party units. In order to facilitate the right of corporations to make unlimited independent expenditures using their corporate money, the Minnesota legislature enacted statutes in 2010 to define independent expenditure political committees and funds. In doing so, the legislature included provisions to ensure that independent expenditure political committees and funds were not used as a way to circumvent the prohibition on corporate contributions to candidates.

To allow a candidate to raise unlimited corporate money into a political committee or fund that will use that money to elect that same candidate would provide a convenient means of circumventing not only the prohibition on corporate contributions to candidates, but also the limit on the amount each donor may give a candidate, and the limit on campaign expenditures agreed to by most candidates. And the avoidance of all of these important provisions can be accomplished by virtue of the simple assertion by the partners-in-fundraising that the political committee acted independently of the candidate in making its expenditures.

The Board could conclude that the state's interest in avoiding circumvention of its campaign finance regulatory system and of the candidates' own contracts to limit their spending supports the adoption of the second version of the advisory opinion and justifies the minimal burden that results from candidates not being permitted to participate in promotion or fundraising for independent expenditure political committees or funds that will make expenditures to elect those same candidates.

Attachments:

Draft first version
Draft second version
Request letter
Comments from Institute for Justice

State of Minnesota

Campaign Finance & Public Disclosure Board

Suite 190, Centennial Building. 658 Cedar Street. St. Paul, MN 55155-1603

THIS ADVISORY OPINION IS PUBLIC DATA

THE FOLLOWING PUBLICATION DOES NOT IDENTIFY THE REQUESTER OF THE ADVISORY OPINION, WHICH IS NON PUBLIC DATA under Minn. Stat. § 10A.02, subd. 12(b)

RE: Candidate fundraising for independent expenditure political committee or fund

ADVISORY OPINION 437

SUMMARY

Participation by a candidate in the fundraising efforts or in the promotion of an independent expenditure political committee constitutes cooperation or implied consent that will destroy the independence of an expenditure later made by the independent expenditure political committee to influence the candidate's election.

FACTS

As the attorney for a Minnesota candidate (the Candidate), as defined in Minnesota Statutes Chapter 10A, you ask the Campaign Finance and Public Disclosure Board for an advisory opinion. Your request is based on the following assumed facts, which you have provided:

1. The Candidate has been approached by a group of individuals who intend to form an independent expenditure political committee[1] (IEPC). The group intends to register the IEPC with the Board as required by statute. The IEPC intends to accept unlimited contributions from individuals and corporations. It also intends to make expenditures expressly advocating the election or defeat of candidates for state office.

2. Neither the Candidate nor the Candidate's principal campaign committee or any agent of the Candidate has any knowledge regarding the content, timing, or volume of any of the IEPC's expenditures. The Candidate, the committee, and the Candidate's agents also have no knowledge about the location, mode, or intended audience of the IEPC's expenditures *(e.g.,* choice between online advertisements and television advertisements or choice between a message targeted at voters who identify with a political party and a message targeted at independent-leaning voters).

[1] The requester of this opinion is an independent expenditure political committee, which is a specific type of association defined by statute and different from a political party unit or a general purpose political committee. Application of this opinion is limited to independent expenditure political committees.

3. The group has asked the Candidate to assist the IEPC with fundraising, both by directly soliciting contributions for the IEPC and by appearing as a speaker at the IEPC's fundraising events.[2]

Based on the above facts, you ask for an advisory opinion addressing the following questions:

Question One

May the Candidate solicit unlimited contributions from individuals and corporations to the IEPC without giving "consent, authorization, or cooperation" for any subsequent expenditures in support of the Candidate?

Opinion

This question requires the Board to examine the definition of independent expenditure, which is quoted only in part in the question posed by the Candidate.

An independent expenditure is a special type of expenditure in Minnesota law because it can be made without financial limits and it may be made using unlimited contributions from any source of funding, including corporate money. Additionally, an independent expenditure does not constitute a contribution to a candidate who may benefit from the expenditure. Thus, it provides a means of supporting candidates without being bound by the financial limits applicable to contributions to candidates and without affecting the campaign expenditure limits for those candidates who have agreed to limits by signing a public subsidy agreement.

An "expenditure" in Minnesota campaign finance law is a "purchase or payment . . . for the purpose of influencing the nomination or election of a candidate. . .." Minn. Stat. § 10A.01, subd. 9.

An independent expenditure is a form of expenditure that is defined in terms of conduct that is *not* associated with the expenditure. The definition is as follows:

> "Independent expenditure" means an expenditure expressly advocating the election or defeat of a clearly identified candidate, if the expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent.

Minn. Stat. § 10A.01, subd. 18.

An independent expenditure is a type of "expenditure". Therefore, it is a "purchase or payment." However, the definition of independent expenditure also says that the purchase or payment must "expressly advocat[e] the election or defeat of a clearly identified candidate."

[2] The Board assumes that the fundraising is not undertaken in such a way that the fundraising itself would promote the Candidate's election. If the fundraising was conducted in such a way that it was deemed to be for the purpose of influencing the Candidate's election, costs of the fundraising activities themselves could constitute an in-kind contribution to the Candidate in the form of an approved expenditure.

The act of making a purchase or payment, in its most reduced form, is a financial transaction, not a communication. The purchase or payment transaction, itself, cannot advocate for or against anything. Thus, under the statute, an independent expenditure must include the communication that results from the payment or purchase because only the resulting communication can meet the advocacy requirement.

This interpretation is supported by section 10A.17, subdivision 4, which provides for a disclaimer by an association that makes independent expenditures. The disclaimer must be included on all communications, including literature, and must say that "the activity is an independent expenditure and is not approved by the candidate nor is the candidate responsible for it."

The definition of independent expenditure and the independent expenditure disclaimer requirement lead to the conclusion that an independent expenditure is not merely a spending decision or a payment transaction, but includes all of the activities needed to make the communication. Creating a communication requires fundraising, budgeting decisions, media design, acquisition or development of graphics and text, production, distribution of the final product, and other associated processes.

To be an independent expenditure, a communication and all of the processes or activities leading to its eventual publication must meet the requirements of the independent expenditure definition cited above.

The independent expenditure definition includes seven types of activities, communications, or relationships that will defeat the independence of an expenditure. Examined from the other perspective, the statute says that an expenditure is not an independent expenditure if any one of the following is true:

> the expenditure is made with the express consent of the candidate,
> the expenditure is made with the implied consent of the candidate,
> the expenditure is made with the authorization of the candidate,
> the expenditure is made with the cooperation of the candidate,
> the expenditure is made in concert with the candidate,
> the expenditure is made at the request of the candidate, or
> the expenditure is made at the suggestion of the candidate.

The Board assumes that the legislature, through the use of this comprehensive list of prohibited communications and relationships, intended to require the highest degree of separation between candidates and independent expenditure spenders that is constitutionally permitted. In fact, when the statute was enacted it included a clause that completely precluded recognition of independent expenditures made by political parties once they had candidates on the ballot. While that clause was stricken by the courts as unconstitutional, it is still instructive with respect to the concern the legislature had about maintaining separation between candidates and associations that could raise and spend money without statutory limits to influence the elections of those same candidates.

Because each of the activities, communications, or relationships listed in the statute is prohibited if the expenditure is to be classified as an independent expenditure, the existence of any one will defeat the independence of the expenditure. For that reason, it is not necessary in the present matter that the Board examines each of the seven factors.

In this matter, the Board focuses on the questions of whether the eventual communication hypothesized in the request is made "without the . . . cooperation of" and "without the . . . implied consent of" the candidate.

The phrase "without the cooperation" of the candidate suggests that there should be no participation of the candidate in any process that leads to the resulting independent expenditure. This advisory opinion request, however, raises the question of whether the prohibited cooperation extends to fundraising and promotion that directly results in generating money needed to make an independent expenditure.

As noted above, the broad language and the history of section 10A.01, subdivision 18, convinces the Board that the legislature intended the types of conduct that are prohibited in the independent expenditure context to be applied broadly to eliminate as much interaction between candidates and independent spenders as is constitutionally permitted.

Acting in cooperation with an association developing independent expenditure communications does not require coordination of efforts to reach an end result as acting “in concert with” or “in coordination with” the association might require. A candidate may be found to have cooperated with an association in the process of making expenditures intended to be independent expenditures even if the candidate has not coordinated the candidate's efforts with those of the association to reach a particular mutually beneficial result.

Applying section 10A.01, subdivision 18, based on the language of the provision and the legislative intent in enacting it, the Board concludes that acting in cooperation is established if it is shown that there was active participation by the candidate in at least one of the various processes or activities that are undertaken to make an expenditure.

The facts of the request suggest a close relationship between the Candidate and the IEPC. A candidate will not be approached by an independent expenditure political committee to engage in fundraising unless the candidate's expressed values and goals are consistent with those of the political committee. Conversely, a candidate would not consider engaging in fundraising for a political committee whose values and goals were contrary to those of the candidate. It is this very alignment of values and goals that makes it possible, perhaps likely, that the IEPC would decide to engage in independent expenditure communications to affect the Candidate's election. If the IEPC does engage in independent expenditure communications to affect the Candidate’s election, the Candidate’s cooperation in the IEPC's fundraising will have helped make those communications possible.

This point may give rise to an argument that the IEPC can establish two accounts so that it is not money raised by *this* candidate, but *other* money that is used to influence this candidate's nomination or election. This argument has been rejected by the Board in other contexts, as the Board has long declined to recognize the separation of general treasury money into segregated accounts for reporting or other purposes.

An independent expenditure political committee is a unique form of political committee in that it engages only in making independent expenditures to influence candidate elections. Thus, any cooperation with an independent expenditure political committee is an effort in support of those expenditures. Allowing a candidate to solicit contributions to an independent expenditure political committee therefore defeats the purpose of the independent expenditure statutes: to insure that independent expenditures are, in fact, completely independent of the candidate.

Similarly, permitting candidates to solicit contributions to an independent expenditure political committee that then makes expenditures for that same candidate would provide a way for contributors to circumvent the limits on contributions to a candidate and for candidates to circumvent the limits on campaign expenditures agreed to by most candidates.

An independent expenditure political committee is also unique in that it is the only type of association that is permitted, without restriction or limit, to accept corporate contributions to influence candidate elections. Corporations are not permitted to donate directly or indirectly to candidates and candidates are not permitted to accept contributions from corporations. Yet for some IEPCs, corporations are their largest source of money. To permit a candidate to solicit corporate contributions to an independent expenditure political committee that, in turn, makes an expenditure to influence the election of that same candidate would provide a simple mechanism for corporations to directly support candidates while avoiding the prohibition on direct or indirect contributions to candidates by making a technical claim of independence.

Based on the above analysis, the Board concludes that fundraising for, or promotion of, an IEPC constitutes cooperation that destroys the independence of any subsequent expenditures made by the IEPC to affect the Candidate's election. Thus, an IEPC is prohibited from making expenditures for a candidate who participates in fundraising for or promotion of that same IEPC.

The Board recognizes that implied consent by a candidate typically arises from the candidate's actions rather than from words. In the immediate matter, the candidate has entered into a partnership with a political committee to enable the political committee to raise money in order to make expenditures. By the act of participating in the political committee's operations through fundraising and/or promoting the political committee through participation at events the candidate is impliedly consenting to the political committee's actions. If those actions include making expenditures for that same candidate, the candidate's implied consent extends the making of those expenditures which, as a result, will not be independent expenditures.

The situation is quite different with party units. Candidates cannot raise money from corporations for party units because party units cannot accept corporate money. Thus, the ability to circumvent the prohibition on corporate contributions to candidates by directing the corporate money to another entity does not exist. Additionally, party units engage in a wide range of activities beyond making independent expenditures. And many of these activities are permitted by statute to be coordinated with candidates while still not counting as a contribution to the candidate. For example, party units can provide staff support to groups of candidates as a multi-candidate expenditure. They can also produce and distribute sample ballots and conduct fundraising for their candidates in cooperation with those same candidates without the activities constituting contributions to the affected candidates.

The differences between party units and independent expenditure political committees or funds are so significant that the Board does not conclude that fundraising for or promotion of a party unit by a candidate necessarily destroys the independence of an expenditure later made by the party unit promoting the election of that candidate. However, in individual specific situations not now before the Board, a different conclusion might be reached.

Question Two

May the Candidate participate in fundraising events where the IEPC solicits unlimited contributions from individuals and corporations?

Opinion

The Candidate may participate in fundraising events where the IEPC solicits unlimited contributions from individuals and corporations. However, as discussed in the opinion to Question One, if the Candidate has participated in fundraising for the IEPC, no expenditure made by the IEPC will be considered to be independent from the Candidate.[3]

Question Three

May the Candidate promote the IEPC to the Candidate's supporters without directly soliciting funds?

Opinion

The Candidate may promote the IEPC to the Candidate's supporters without directly soliciting funds. However, even assuming that the Candidate and the IEPC are able to design a promotion of the IEPC that is not the equivalent of a solicitation of funds (direct or indirect), the level of cooperation in such a relationship is still sufficient to defeat the independence of any subsequent expenditure to promote the election of the Candidate.

Questions Four and Five

Would it lessen the risk of a coordinated expenditure if the Candidate and the Candidate's campaign took the following actions?

(a) Avoid hiring employees, vendors, or consultants who have knowledge or decision-making authority regarding the IEPC's strategies or expenditures.

(b) Avoid sharing any non-public information with the IEPC about the campaign's plans, strategies, or needs.

(c) Avoid conversations with any person making decisions for the IEPC about the IEPC's proposed expenditures or the campaign's plans.

Are there any other actions the Candidate could take to lessen the risk of a coordinated expenditure with the IEPC?

[3] The request does not ask whether the Candidate may raise money for the IEPC *after* the IEPC has made expenditures to influence the nomination or election of the Candidate. The switching or timing of the fundraising and the expenditures will not protect the independence of the expenditures. To permit such an approach would open the door to making expenditures on credit or with front money for candidates who are later asked to raise money for the very organization that made the expenditures.

Opinion

This opinion is based on activities of the Candidate in promoting or participating in fundraising for the IEPC so as to enhance its ability to raise money to make expenditures. None of the factors mentioned in questions four and five will change the nature of the cooperation on which this opinion is based.

Dated: February 11, 2014

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Deanna Wiener, Chair
Campaign Finance and Public Disclosure Board

Minnesota

Campaign Finance and Public Disclosure Board

Date: February 4, 2014

To: Board Members

From: Jodi Pope
Management Analyst

Telephone: 651-539-1183

Re: Advisory Opinion 438

The request for this advisory opinion was received on January 2, 2014. The requester wishes to remain anonymous. Therefore, both a public and a nonpublic version of the opinion are attached for Board review. Because the request and the draft opinion are both generic, however, the public version is the same as the nonpublic version except that the requester's name and address have been removed.

The request asks for the Board's guidance regarding the exploratory activities that will transform an individual thinking about running for office into a candidate under Chapter 10A. The request also asks for guidance regarding when an individual who self-funds the listed actions would be required to form and register a principal campaign committee and when the individual would be required to file reports with the Board. Finally, the request asks whether any results or products of the listed activities that were initially paid for by the individual could be purchased for fair market value by a principal campaign committee later formed by that individual.

The draft opinion discusses the various activities presented by the requester and provides guidance about when a particular activity would constitute an action made for the purpose of bringing about the individual's nomination or election to office. The draft opinion further discusses the registration and reporting requirements for an individual who is self-funding the listed activities. Finally, the draft opinion states that the individual can sell or donate the results or products of the listed activities to the individual's principal campaign committee for fair market value, which in this case would be the price that the individual paid to obtain the results or products.

Attachments
Opinion Request
Draft Advisory Opinion 436 – Public Version
Draft Advisory Opinion 436 – Nonpublic Version

State of Minnesota

Campaign Finance & Public Disclosure Board

Suite 190, Centennial Building. 658 Cedar Street. St. Paul, MN 55155-1603

THIS ADVISORY OPINION IS PUBLIC DATA

THE FOLLOWING PUBLICATION DOES NOT IDENTIFY THE REQUESTER OF THE ADVISORY OPINION, WHICH IS NON PUBLIC DATA under Minn. Stat. § 10A.02, subd. 12(b)

RE: Expenditures for which an individual will be deemed a candidate

ADVISORY OPINION 438

SUMMARY

An individual is deemed a candidate under Chapter 10A when the individual self-funds activities (1) that cost more $100 and (2) that are made for the purpose of bringing about the individual's nomination or election to office. Certain very limited activities may be undertaken by an individual exploring a candidacy without making the individual a candidate. A candidate who has not formed a principal campaign committee still must file campaign finance reports if the candidate self-funds campaign expenditures in excess of $750.

FACTS

As the attorney for an individual who is exploring whether to seek nomination and election to a Minnesota constitutional office, you ask the Campaign Finance and Public Disclosure Board for an advisory opinion. Your request is based on the following assumed facts, which you have provided:

1. For question 1 below, assume that the individual is exploring whether to seek nomination and election for a constitutional office in 2014.

2. For question 1 below, assume that the individual has not decided whether to seek nomination and election for a constitutional office in 2014.

3. For question 1 below, assume the individual has not received contributions or made expenditures in excess of $100 for the purpose of bringing about the individual's nomination or election.

4. For question 1 below, assume the individual has not given implicit or explicit consent for any other person to receive contributions or make expenditures in excess of $100 for the purpose of bringing about the individual's nomination or election.

5. For question 1 below, assume the individual will spend only the individual's own money on the activities described in the question.

6. For question 2 below, assume that the individual has decided to seek nomination and election for a constitutional office in 2014.

7. For question 2 below, assume the individual will spend only the individual's own money on the campaign, or the individual will not accept contributions totaling more than $750 from other people and will not want or seek public funding for the campaign.

8. For all questions, assume the individual has not formed or registered a principal campaign committee.

9. For all questions, assume the individual has not taken the action necessary under the law of this state to qualify for nomination or election.

Question One

Must an individual file a campaign finance report under Minnesota Statutes section 10A.20, subdivision 6, if the individual takes one or more of the following actions:

1) self-funds background research about himself or herself as part of the exploratory process;
2) self-funds name-recognition polling or issue polling as part of the exploratory process;
3) self-funds name-recognition polling or issue polling as part of the exploratory process and the polling questions reference the upcoming election for the constitutional office being considered by the individual; or
4) self-funds focus group research as a means of further refining issue polling as part of the exploratory process.

If the individual takes any one of these actions, does the individual need to form and register a principal campaign committee? Similarly, by making such self-funded expenditures as part of the exploratory process, would the individual be deemed a "candidate" under Minnesota Statutes section 10A.01, subdivision 10?

Opinion

Minnesota Statutes section 10A.01, subdivision 10, provides as follows:

> "Candidate" means an individual who seeks nomination or election as a state constitutional officer, legislator, or judge. An individual is deemed to seek nomination or election if the individual has taken the action necessary under the law of this state to qualify for nomination or election, has received contributions or made expenditures in excess of $100, or has given implicit or explicit consent for any other person to receive contributions or make expenditures in excess of $100, for the purpose of bringing about the individual's nomination or election.

A candidate must form and register a principal campaign committee with the Board if the candidate accepts more than $750 in contributions or accepts public subsidy. Minn. Stat. § 10A.105, subd. 1. A candidate who is not required to form a principal campaign committee still must report to the Board if the candidate "makes campaign expenditures in aggregate in excess

of $750 in a year." Minn. Stat. § 10A.20, subd. 6.

According to the provided facts, the individual has not yet decided whether to seek office and has not yet taken the action necessary to qualify for nomination or election to office. Nor has the individual received contributions in excess of $100 or given consent for another person to receive contributions or make expenditures in excess of the $100 threshold. Consequently, the individual can be deemed a candidate under Minnesota Statutes section 10A.01, subdivision 10, only if the individual's own payments for one or more of the activities identified in the question exceed the $100 threshold and are made "for the purpose of bringing about the individual's nomination or election."

The first activity listed is the self-funding of background research on the individual that is undertaken before the individual has decided to seek office. Running a background check on oneself when deciding whether to run for office is sufficiently remote from the process of seeking nomination or election to office that it will not transform an individual into a candidate by operation of Minnesota Statutes section 10A.01, subdivision 10.

The second activity listed is name-recognition polling that again is undertaken before the individual has decided to seek office. Polling, however, involves contact with potential voters. A poll theoretically could be structured both to measure the name recognition of the individual and to also create a positive impression of the individual in a way that could help bring about the individual's nomination or election. Consequently, whether name-recognition polling is an activity that transforms an individual into a candidate by operation of Chapter 10A depends on the specific content of the poll.

If the questions in the poll simply ask voters whether they have heard of the individual or whether they have an impression of the individual, the potential influence on the voters would be minimal. When name-recognition polling can have only a minimal effect on voters, the Board will not consider the polling to be for the purpose of bringing about the individual's nomination or election and this activity will not transform an individual into a candidate under Chapter 10A.

Conversely, if the poll questions refer to the individual in a way that could change the voter's impression of the individual or the individual's potential opponents, the poll could help to bring about the individual's nomination or election to office. An individual who authorizes this type of polling would be deemed a candidate under Chapter 10A if the cost of the activity exceeds $100.

The final activities listed in question one are issue polling and focus group research. These activities are conducted to determine which issues are most important to potential voters and which messages best resonate with voters on those issues. This information then is used to develop a more effective campaign to nominate or elect an individual. Because the information gathered from issue polling and focus group research is so directly related to bringing about an individual's nomination or election, an individual who authorizes these activities would be deemed a candidate under Chapter 10A if their cost exceeds $100.

Under the facts presented for question one, the individual will not accept any contributions or public subsidy. Thus, even if the individual is deemed a candidate under Chapter 10A due to one of the activities discussed above, the individual would not be required to form or register a principal campaign committee with the Board. *See* Minn. Stat. § 10A.105, subd. 1 (candidate

must form and register principal campaign committee when candidate receives more than $750 in contributions or accepts public money).

Even without a campaign committee, however, a self-funded candidate still must disclose expenditures when those expenditures exceed $750 in a calendar year. *See* Minn. Stat. § 10A.20, subd. 6 (candidate who does not register principal campaign committee must file reports when expenditures exceed $750). An expenditure is "a purchase or payment of money or anything of value or an advance of credit, made or incurred for the purpose of influencing the nomination or election of a candidate." Minn. Stat. § 10A.01, subd. 9.

An activity that is undertaken for the purpose of bringing about the individual's nomination or election also would be an activity undertaken "for the purpose of influencing the nomination or election of a candidate." *Id.* Thus, if the cost of any of the activities undertaken for the purpose of bringing about the individual's nomination or election exceeds $750, alone or in aggregate, the individual must file campaign finance reports with the Board. The schedule for filing these reports is in Minnesota Statutes section 10A.20, subdivisions 2 and 6.

Question Two

Must an individual file a campaign finance report under Minnesota Statutes section 10A.20 if the individual, having decided to seek nomination and election for a constitutional office, takes one or more of the following actions:

1) self-funds communication development such as issue statements or media training;
2) self-funds creative work such as the development of a campaign website, introductory video, and logo; or
3) self-funds the purchase of mailing lists.

Does the individual need to form and register a principal campaign committee? Similarly, by making such self-funded expenditures, would the individual be deemed a "candidate" under Minnesota Statutes section 10A.01, subdivision 10?

Opinion

As stated above, a candidate is someone "who seeks nomination or election" to a state-level office or who is deemed to seek nomination or election to an office because the individual meets the criteria listed in Minnesota Statutes section 10A.01, subdivision 10. Under the facts presented for question two, the individual already has decided to seek nomination and election to an office when the individual undertakes the listed actions. Because the individual is someone "who seeks nomination or election" to office, the individual is a candidate under the Chapter 10A definition.

Under the facts presented for question two, the individual will not accept any contributions or public subsidy. Thus, even if the individual is a candidate under Chapter 10A, the individual would not be required to form or register a principal campaign committee with the Board. *See* Minn. Stat. § 10A.105, subd. 1 (candidate must form and register principal campaign committee when candidate receives more than $750 in contributions or accepts public money).

Even without a campaign committee, however, a self-funded candidate still must disclose

expenditures when those expenditures exceed $750 in a calendar year. *See* Minn. Stat. § 10A.20, subd. 6 (candidate who does not register principal campaign committee must file reports when expenditures exceed $750). As discussed above, an expenditure is an expense made or incurred to influence the nomination or election of a candidate. Minn. Stat. § 10A.01, subd. 9. Because the individual has decided to seek office, all of the activities listed in question two are undertaken to influence the individual's nomination or election to that office. The individual therefore must file campaign finance reports with the Board if the cost of the activities exceeds $750.

Question Three

If after the activities described in questions one and two above are taken, the individual later forms and registers a principal campaign committee, can that committee then purchase the results or products of those activities for fair market value from the individual and then report those purchases as expenditures?

Opinion

If the individual forms a principal campaign committee, nothing in Chapter 10A prevents the committee from purchasing the results or products of the activities listed in questions one and two from the individual for fair market value. The individual also could make an in-kind contribute of the results or products to the committee. The amount of this in-kind contribution would be the fair market value of the donated results or products. In both cases, the fair market value of the results or products would be the amount that the individual paid for those results or products. *See* Minn. R. 4503.0100, subpt. 3a (fair market value is the amount that individual would pay to buy same service or item in open market).

Dated: February 11, 2014

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Deanna Wiener, Chair
Campaign Finance and Public Disclosure Board

Relevant Statutes

Minn. Stat. § 10A.01 DEFINITIONS

Subd. 9. **Campaign expenditure.** "Campaign expenditure" or "expenditure" means a purchase or payment of money or anything of value, or an advance of credit, made or incurred for the purpose of influencing the nomination or election of a candidate or for the purpose of promoting or defeating a ballot question.

. . . .

Subd. 10. **Candidate.** "Candidate" means an individual who seeks nomination or election as a state constitutional officer, legislator, or judge. An individual is deemed to seek nomination or election if the individual has taken the action necessary under the law of this state to qualify for nomination or election, has received contributions or made expenditures in excess of $100, or has given implicit or explicit consent for any other person to receive contributions or make expenditures in excess of $100, for the purpose of bringing about the individual's nomination or election. A candidate remains a candidate until the candidate's principal campaign committee is dissolved as provided in section 10A.243.

Minn. Stat. § 10A.105 PRINCIPAL CAMPAIGN COMMITTEE.

Subdivision 1. **Single committee.** A candidate must not accept contributions from a source, other than self, in aggregate in excess of $750 or accept a public subsidy unless the candidate designates and causes to be formed a single principal campaign committee for each office sought. A candidate may not authorize, designate, or cause to be formed any other political committee bearing the candidate's name or title or otherwise operating under the direct or indirect control of the candidate. However, a candidate may be involved in the direct or indirect control of a party unit.

Minn. Stat. § 10A.20 CAMPAIGN REPORTS

Subd. 6. **Report when no committee.** (a) A candidate who does not designate and cause to be formed a principal campaign committee and who makes campaign expenditures in aggregate in excess of $750 in a year must file with the board a report containing the information required by subdivision 3. Reports required by this subdivision must be filed by the dates on which reports by principal campaign committees must be filed.