

State of Minnesota
Campaign Finance & Public Disclosure Board
Suite 190, Centennial Building. 658 Cedar Street. St. Paul, MN 55155-1603

**THE FOLLOWING ADVISORY OPINION, ORIGINALLY ISSUED AS NON-PUBLIC DATA, HAS
BEEN RELEASED AS PUBLIC DATA PURSUANT TO A CONSENT FOR RELEASE OF
INFORMATION SIGNED BY THE REQUESTER**

**RE: Payment of Public Official's Expenses of Participation in Television or Radio
Messages**

ADVISORY OPINION 394

SUMMARY

The production and broadcast of a public service announcement or paid message featuring a public official does not constitute a contribution to the official's principal campaign committee where the purpose of the message is not to influence the nomination or election of the official. Payment by a lobbyist principal of transportation, meals, or lodging for an official to participate in the production of a television or radio announcement is a prohibited gift to the official unless consideration of equal or greater value is received by the lobbyist principal.

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THIS ADVISORY OPINION IS NONPUBLIC DATA
under Minn. Stat. § 10A.02, subd. 12(b)

Issued to: Karen Janisch, General Counsel to the Governor
Office of Governor Tim Pawlenty
130 State Capitol
75 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

RE: Public Official's Participation in Public Service Announcements

ADVISORY OPINION 394

SUMMARY

Where consideration of equal or greater value is received by a provider of services, those services do not constitute a gift to the recipient. The production and broadcast of a public service announcement or paid educational message featuring a public official does not constitute a contribution to the official's principal campaign committee where the purpose of the message is not to influence the nomination or election of the official.

FACTS

As the legal representative for Governor Tim Pawlenty, you ask the Campaign Finance and Public Disclosure Board (the "Board"), for an advisory opinion based on the following facts presented in the request or in subsequent communication with Board staff:

1. As a public official, the Governor receives requests to appear in public service announcements or other types of radio or television spots produced and aired by non-state entities.
2. These requests may ask the Governor to participate in a public service announcement related to a charitable cause or to appear in a television or radio spot promoting education or awareness about a matter of public concern or a public policy issue. The spots that are produced may be aired without charge as public service announcements or may require payment to the media outlet and air as paid messages. The messages produced are referred to hereinafter as "spots" or "production(s)" whether they are public service announcements or paid messages.
3. The requests for the Governor's participation are made to the Governor's official office. All activity related to the Governor's participation would be handled by the Governor's office without direction or control from the Governor's principal campaign committee.

4. The Governor's participation in these spots is in his capacity as Governor of Minnesota, not in his capacity as a private citizen.
5. If the Governor is required to travel to the location of the production, the Governor's office attempts to schedule the production at a time when the Governor will already be at the location on other business. However, it is possible that the Governor could accept a request to appear in a production that would require travel solely for that purpose.
6. It is the policy of the Governor's Office that the state not incur any expenses directly related to the Governor's appearance in a production. For that reason, if such expenses are incurred, the producer is required to pay them, either directly to the providers of the services or by means of reimbursement to the Office of the Governor.
7. The producers do not pay any expenses of the Governor not directly related to the Governor's appearance in the production.
8. No honoraria or appearance fee is paid either to the Governor or the state for the Governor's appearance in a production.

INTRODUCTION

You present three scenarios for Board consideration. With respect to each scenario, you ask the Board's opinion on the following questions:

1. Does any aspect of the transaction result in a contribution to the principal campaign committee of the Governor?
2. If the producer of the spot is a lobbyist or lobbyist principal, does the producer's payment of the Governor's expenses of participating in the production constitute a prohibited gift under Minnesota Statutes, Section 10A.071?
3. Does the described activity raise other issues or potential violations under Minnesota Statutes Chapter 10A?

SCENARIO ONE

Public Service Announcements for a Charitable Cause

The Governor receives requests from charitable non-profit groups asking that he appear in television or radio public service announcements. The Governor's reason for appearing in such spots would be to promote matters such as volunteerism, charitable actions, and public awareness or action relating to public issues. The decision to create the spot, its subject matter, and the airing of the spot would be determined by the charitable organization and the media outlets it uses.

If the Governor's office agrees to participate, the Governor would be made available to record the spot and approve or otherwise prepare the script for the spot. All production costs or costs related to airing the spot, if any, would be borne by the requesting entity and/or the media outlets airing the public service announcement.

SCENARIO TWO

Request to a National Organization to Have the Public Official Participate in Radio or Television Spots Providing Education on Public Policy Issues.

The Governor is the leader of a national organization of state officials. As part of his leadership duties he is pursuing a national initiative to promote clean energy actions across the states. A commercial cable television group has approached the national organization with a request that the Governor participate in a series of public service announcements that tie in with the Governor's initiative. For example, the announcements might include educational spots on clean energy options, energy conservation, or environmentally friendly lifestyle choices.

The commercial television channel will pay all production costs and the spots will be aired on the groups cable channels. The content will be determined by the producers, the national organization, and the Governor.

SCENARIO THREE

Request to Participate in an Environmental Public Policy Advertisement.

A national non-profit environmental group wishes to produce one or more television spots, each of which would feature governors of various states from both major political parties. These spots would not be public service announcements, but would be paid-for advertisements sponsored and paid for by the group. The spots would promote state level legislative action and federal legislative action on environmental issues, climate change, clean energy, alternative fuels, and similar subjects.

The group engages in federal lobbying but does not presently conduct any Minnesota lobbying, as defined in Minnesota Statutes Chapter 10A.

The national group would produce the spots and provide the content, subject to input from the participating governors, and would decide when and where the spots will run. The spots may be run in several states, including Minnesota and states not represented by the participating governors.

The Governor's intent in participating would be to promote the issues of public concern and raise awareness that state level actions can create positive changes for all states. It is possible that a spot might ask listeners to contact their legislators concerning legislative action supporting the subjects being promoted.

Introduction

The requestor presents three scenarios and asks three questions about each scenario, all as described above. Although the three scenarios present variations on the same theme, the Board does not find any differences in them that would result in a different legal conclusion under Minnesota Statutes Chapter 10A, the Ethics in Government Act, which the Board administers. Therefore, the Board considers the three scenarios together.

In each scenario, the Governor will participate in the production of a form of advocacy message that may involve charitable, environmental, or policy issues. In no case is the Governor's principal campaign committee involved.

For the purposes of this Opinion, the Board assumes the following to be true in each case:

- (1) the costs of reasonable travel, lodging, and meals for the Governor directly related to and required for his participation the production are paid by the producer, either directly to the providers or by reimbursement to the state;
- (2) the producer does not pay any expenses of the Governor beyond those reasonable expenses directly related to and required for his participation in the production; and
- (3) in no case does the state or the Governor receive any payment or honorarium for the Governor's participation in the production.

Issue One

Does any aspect of the transaction result in a contribution to the principal campaign committee of the Governor?

Services paid for by a third party that benefit a candidate may under certain circumstances be an "approved expenditure" under Minnesota Statutes Chapter 10A. An approved expenditure is a donation in kind to the candidate's principal campaign committee.

An "approved expenditure" is an expenditure made by a third party for the benefit of a candidate with the approval of the candidate. Minn. Stat. §10A.01, subd. 4. Because an approved expenditure is a specific type of "expenditure" or "campaign expenditure", it must meet the requirements of that definition as well.

Minnesota Statutes, Section 10A.01, subd. 9, defines "Campaign expenditure" or "expenditure" as a payment or purchase "made or incurred for the purpose of influencing the nomination or election of a candidate . . .".

The spots under consideration include those designed to promote charitable goals such as volunteerism or general charitable actions. They may involve educational messages or calls to action on matters such as the environment or energy issues. They may discuss public policy or public issues of the day and may advocate for those issues. They may even urge listeners to contact public officials in regard to these issues.

Nothing in the general or specific descriptions of the various spots, the production process, or the relationship of the parties suggests that the purpose of the spots is to influence the nomination or election of the Governor to any state office.

The Board recognizes that any positive public exposure may have some effect on an individual's chance of being elected. However, this possible collateral effect under the facts presented is not sufficient bring the productions within the scope of speech that is considered to be for the purpose of influencing the nomination or election of a candidate.

Issue Two

If the producer of the spot is a lobbyist or lobbyist principal, does the producer's payment of the Governor's expenses of participating in the production constitute a prohibited gift under Minnesota Statutes, Section 10A.071?

Opinion

Minnesota Statutes, Section 10A.071, generally prohibits gifts from lobbyists and lobbyist principals to Minnesota public officials, including the Governor. In determining whether any set of facts results in a prohibited gift to an official, the Board considers whether the item in question is a gift and, if so, whether any exceptions to the general prohibition of §10A.071, remove it from the prohibition.

In the scenarios under review, the gift, if there is one, is the provision of transportation, meals, and lodging required to enable the Governor to participate in production of public service announcements or paid informational announcements. Section 10A.071 includes “services” among the items that may be gifts. Minn. Rules, Chapter 4512, section 4512.0100, subp. 3, clarifies that meals may also be a gift. The Board concludes that the services of travel and lodging and the provision of meals are items which may be prohibited under Section 10A.071.

Items that may constitute gifts, nevertheless, are not gifts if the giver receives consideration of equal or greater value in return for the item.

Consideration and its value are often not subject to mathematical calculations and that holds true for the consideration in the scenarios presented in this opinion. Part of the consideration given by the official is the official’s time to travel to the location of the production rather than require the production team to come to the official’s location. Another part of the consideration is the value of the right, granted by the official to the producer, to use the official’s image, likeness, and voice in the production and, implicitly, to lend the official’s personal reputation in support of the message.

In a bona fide transaction (which application of this opinion requires) a non-profit or charitable organization is likely to weigh the benefit it expects to obtain – either in terms of public response or of accomplishing its mission – against the costs. If it does not expect the benefit of the official’s participation to outweigh the cost, the transaction is not likely to be completed.

Under the facts presented, and as further limited in the caveats discussed below, the Board concludes that sufficient consideration is provided by the Governor to remove the provision of transportation, lodging, and meals from the 10A.071 gift prohibition.

The Board recognizes that there is also an exception to the §10A.071 gift prohibition for services to assist a public official in the performance of his or her official duties. Having determined that the services described herein are removed from the definition of a gift by the transfer of consideration, the Board does not reach the question of whether the “official duties” exception would be applicable.

Issue Three

Do the transactions described in the scenarios, or the official’s participation in the resulting radio or television spots raise other issues or potential violations under Minnesota Statutes Chapter 10A?

Opinion

The Board typically limits its advisory opinions to questions of specific statutory compliance based on a given fact situation. The immediate opinion addresses compliance with the

Cited Statutes and Rules

10A.01 DEFINITIONS.

. . .

Subd. 4. **Approved expenditure.** "Approved expenditure" means an expenditure made on behalf of a candidate by an entity other than the principal campaign committee of the candidate, if the expenditure is made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of the candidate, the candidate's principal campaign committee, or the candidate's agent. An approved expenditure is a contribution to that candidate.

. . .

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.

. . .

10A.071 CERTAIN GIFTS BY LOBBYISTS AND PRINCIPALS PROHIBITED.

Subdivision 1. **Definitions.** (a) The definitions in this subdivision apply to this section.

(b) "Gift" means money, real or personal property, a service, a loan, a forbearance or forgiveness of indebtedness, or a promise of future employment, that is given and received without the giver receiving consideration of equal or greater value in return.

(c) "Official" means a public official, an employee of the legislature, or a local official of a metropolitan governmental unit.

Subd. 2. **Prohibition.** A lobbyist or principal may not give a gift or request another to give a gift to an official. An official may not accept a gift from a lobbyist or principal.

. . .

Chapter 4512.

4512.0010 SCOPE.

This chapter applies to the prohibition of certain gifts pursuant to Minnesota Statutes, section 10A.071.

4512.0100 DEFINITIONS.

Subpart 1. **Scope.** The definitions in this part apply to this chapter and Minnesota Statutes, section 10A.071. The definitions in chapter 4501 and in Minnesota Statutes, chapter 10A, apply to this chapter.

. . .

Subp. 3. **Gift.** In addition to those categories specified in Minnesota Statutes, section 10A.071, subdivision 1, the following are included within the definition of gift:

A. meals and entertainment;

. . .