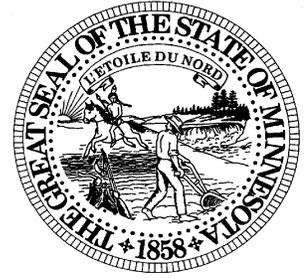


Minnesota

*Campaign Finance and  
Public Disclosure Board*

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**Date:** August 17, 2010

**To:** Advisory Opinion Files  
Opinion 398

**From:** Gary Goldsmith, Executive Director

**Telephone:** 651-296-1721

The analysis and opinions set forth in Advisory Opinion No. 398, regarding the interpretation of “express advocacy” and “independent expenditure”, were superseded by the Board’s subsequent decision in *Matter of the Complaint of Novack regarding Minnesota Majority*, which is available at:

[http://www.cfboard.state.mn.us/bdinfo/investigation/120208MN\\_Majority.pdf](http://www.cfboard.state.mn.us/bdinfo/investigation/120208MN_Majority.pdf)

Accordingly, the analysis and opinions in Advisory Opinion No. 398, regarding the interpretation of “express advocacy” and “independent expenditure”, are no longer effective.

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

**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:   Actions to influence the nomination or election of candidates; requirement to  
establish a political fund.**

**ADVISORY OPINION 398**

**Note concerning the public version of this opinion**

Information that would identify the requester of this opinion has been eliminated from this public version. Additionally, minor issues that might identify the requester and were not part of the main subject of the opinion have been omitted.

**SUMMARY**

Whether actions taken by an organization will trigger a requirement that the organization establish a political fund and report the costs of those actions to the Board through the fund depends on whether the actions are to influence the nomination or election of candidates. This determination is fact-based and can be made only with reference to the specific facts describing the subject actions of the organization. The request describes activities that would clearly not be considered to be for the purpose of influencing the nomination or election of candidates and others which would clearly be to influence the nomination or election of candidates. It also describes actions in more general terms for which a specific determination of purpose cannot be made based on the information available.

**FACTS**

As the representative for an association (“the Organization”) that is not registered with the Campaign Finance and Public Disclosure Board (“the Board”), you request an advisory opinion based on the following facts:

1. The Organization intends to form a working group of its members to monitor and comment on campaign conduct for the purposes of encouraging responsible campaign behavior, assisting voters in reaching informed decisions, and supporting appropriate conduct by individuals running for office.
2. The Organization plans to participate in several activities to educate the public on the importance of issues with which it is concerned and also to influence campaign conduct of candidates.

## **Introduction**

The Organization's advisory opinion request includes a number of scenarios describing possible activities in which the Organization might engage. The scenarios are presented as issues below, with the facts stated in each issue supplementing the general fact statement above.

Each issue scenario raises in a different way the question of whether the Organization's costs of the described actions constitute campaign expenditures (which include both independent expenditures and approved expenditures related to a candidate) or are of an informational or educational nature outside the regulation of Minnesota Statutes Chapter 10A.

The characterization of the expenditures is important because the Organization must register a political fund if it makes independent expenditures or approved expenditures of more than \$100.

A "campaign expenditure" or "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.

An "independent expenditure" is 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.

An "approved 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 that is made in with the cooperation or approval of the candidate.

## **Issue One**

Will the Organization be required to create a political fund if the Organization educates the public about candidate qualifications without naming any candidate specifically, and about issues in general and the importance of those issues by:

1. Holding symposiums with the general public to provide an informational overview of the topics?
2. Issuing a news release or holding of a press conference to disseminate information to the public about campaign conduct practices and the importance of the issues it advocates?
3. Making use of paid media sources to provide information to the general public about campaign practices and the importance of the issues it advocates?

## **Opinion**

The efforts described in this scenario do not involve mentioning a named candidate, which is the first threshold for both a campaign expenditure and an independent expenditure. Therefore, the efforts do not constitute the making of independent expenditures or expenditures to influence the nomination or election of a candidate.

Based on the fact that they do not constitute campaign expenditures or independent expenditures, the costs of the Organization's efforts for the described activities do not trigger a requirement that the Organization register a political fund with the Board.

### **Issue Two**

Will the Organization be required to create a political fund if the Organization educates the public about the qualifications and experience of various candidates for office by:

1. Holding symposiums with the general public to provide an informational overview of the qualifications of each of the candidates?
2. Issuing a news release or holding a press conference to disseminate information to the public about the various candidates for office?
3. Making use of paid media sources to provide information to the general public about the qualifications of the various candidates for office?

### **Opinion**

In this scenario, the Organization moves from the general discussions of Issue One to a more specific discussion of the qualifications and experience of named candidates.

If an organization spends more than \$100 to influence the nomination or election of candidates, the organization must register a political fund with the Board and make all of its campaign expenditures through that fund. Essentially, the Organization asks in this issue whether the described communications will be considered by the Board to be for the purpose of influencing the nomination or election of candidates.

Whether a symposium, news release, press conference or paid media advertisement is to influence the nomination or election of a candidate can only be determined by examination of the communication itself. Under the facts that are provided, no such examination is possible. Therefore, the Board can only state the general rule.

It is well established that a communication expressly advocating the nomination or election (or defeat) of a clearly identified candidate is a communication to influence the nomination or election of a candidate. However, when a communication clearly identifies a candidate, it is not necessary that the communication use specific words of express advocacy, such as "vote for", "elect", "support" or others for it to be for the purpose of influencing the nomination or election of a candidate. A communication that omits the specific words of express advocacy may, nevertheless, be found to be for the purpose of influencing to influence the nomination or election of a candidate based on an examination of the communication.

Without access to the actual communication, the Board is unable to render a more specific opinion.

### **Issue Three**

Will the Organization be required to create a political fund if the Organization (a) prepares and distributes a pledge relating to issues it believes are important (“the Pledge”); (b) asks all candidates to sign the Pledge; and (c) engages in any of the following activities:

1. Issues a news release or holds a press conference to disseminate information to the public about which candidates have or have not signed the Pledge?
2. Making use of paid media sources to provide information to the general public about which candidates have or have not signed the Pledge?
3. Monitors compliance with any Pledge signed by a candidate and makes public statements regarding the adherence to the Pledge by specific candidates?
4. If any of the foregoing activities trigger registration and reporting requirements, will the political fund be required to report the costs incurred in the preparation and distribution of the Pledge or only the costs incurred in conducting the activities listed above?

### **Opinion**

The Organization has developed a Pledge document (“the Pledge”). In the Pledge, the Organization lists a number of qualifying clauses, some of which state facts and some of which state the Organization’s positions. By signing the Pledge candidates affirm these clauses and agree to govern their conduct in accordance with the terms of the Pledge.

This Issue presents essentially the same question as Issue Two: Do the communications described in sections 1 through 3 of the Issue constitute actions to influence the nomination or election of a candidate? The answer, likewise is the same as that expressed in Issue Two and would require reference to the actual communications to be conclusive.

However, the statement of this issue includes more facts than the previous issue statements. In order to have a meaningful communication piece, the Organization will need to explain that it prepared and circulated the Pledge. This clarifies the Organization’s own position with regard to the issues covered by the Pledge. The Organization will also name specific candidates and indicate which of them signed the Pledge to abide by the Organization’s conditions and which did not.

Without the benefit of the actual communications pieces that may be produced in this scenario, it is not possible to definitively conclude whether they have some purpose other than to influence the nomination or election of candidates. However, given the facts that are known, it would appear that the cost of the described communications would be expenditures that would trigger a registration requirement.

Once an endeavor of an organization becomes an effort to influence the nomination or election of candidates, the entire cost of the endeavor is reportable. Thus, if the communications described in this Issue are to influence the nomination or election of candidates, then the cost of preparation and distribution of the Pledge are also reportable.

#### **Issue Four**

Will the Organization be required to create a political fund if the Organization recommends that individuals contact candidates and ask them to sign and abide by the Pledge if this recommendation is communicated through:

1. The issuance of a news release or holding of a press conference to make the recommendation?
2. Making use of paid media sources to communicate the recommendation?

#### **Opinion**

Communications that do not list any candidates but include a general call to contact all candidates regarding the Pledge would not constitute actions to influence the nomination or election of candidates. The same conclusion would likely be reached if the communication lists all candidates without any indication as to which have and which have not signed the Pledge, although the specific facts of the communications could change that result.

If the communications include a list only of those candidates who have not signed the Pledge, or the communications name one or more specific individual candidates who have not signed and urge individuals to contact these candidates, the communication could be an activity to influence the nomination or election of a candidate. As with the previous scenarios, a definitive answer cannot be given due to the lack of specific facts.

#### **Issue Five**

Will the Organization be required to create a political fund if the Organization recommends that voters not support candidates who do not abide by the Pledge if such recommendation is communicated through:

1. The issuance of a news release or holding of a press conference to make the recommendation?
2. Making use of paid media sources to communicate the recommendation?

#### **Opinion**

This scenario presents the clearest case of campaign spending: communications expressly advocating the election or defeat of clearly identified candidates. This conclusion assumes that the communication identifies those candidates who do not abide by the Pledge. If the total cost of the suggested communications exceeds \$100, registration of a political fund will be required.

#### **Issue Six**

Will the Organization be required to create a political fund if the Organization communicates with candidates about compliance with the Pledge or complaints received with respect to whether or not a candidate's actions are consistent with the Pledge by meeting with candidates, investigating complaints and communicating the results of such investigation through:

1. The issuance of a news release or holding of a press conference to report the findings?

2. Making use of paid media sources to communicate the findings;

### **Opinion**

Confidential communication with candidates about their lack of compliance or the investigation of complaints of non-compliance with the Pledge are not activities to influence the nomination or election of a candidate.

However, the publication of the results of an investigation would be subject to the same examination as described in the previous Issues to determine if the purpose of the communication is to influence the nomination or election of candidates. Without specific facts, the Board cannot issue a definitive opinion. However, for the reasons described in Issue three, it would appear that there is a strong potential that the described communications would be to influence the nomination or election of candidates.

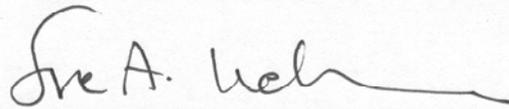
### **Issue Seven**

In the event that any of the foregoing activities related to the Pledge require registration as a political fund, will the distribution of the Pledge to the candidates, without more, destroy the "independent" status of the expenditure under Minnesota Statutes section 10A.01, subd. 18?

### **Opinion**

No. Mere distribution of the Pledge and follow-up to obtain the signed copies or the candidate's position not to sign the Pledge would not constitute the type of coordination necessary to make the associated costs an approved expenditure on behalf of the candidate.

Issued June 17, 2008



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Sven A. Wehrwein, Chair  
Campaign Finance and Public Disclosure Board

## Cited Statutes and Rules

### 10A.01 DEFINITIONS.

Subdivision 1. **Application.** For the purposes of this chapter, the terms defined in this section have the meanings given them unless the context clearly indicates otherwise.

. . .

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.

. . .

Subd. 18. **Independent expenditure.** "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. An independent expenditure is not a contribution to that candidate.

### 10A.12 POLITICAL FUNDS.

Subdivision 1. **When required.** An association other than a political committee or party unit may not contribute more than \$100 in aggregate in any one year to candidates, political committees, or party units or make any approved or independent expenditure or expenditure to promote or defeat a ballot question unless the contribution or expenditure is made from a political fund.