

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<sup>1</sup> (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).

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<sup>1</sup> 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.<sup>2</sup>

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."

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<sup>2</sup> 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.<sup>3</sup>

## 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?

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<sup>3</sup> 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

/s/ Deanna Wiener

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Deanna Wiener, Chair  
Campaign Finance and Public Disclosure Board