

**STATE OF MINNESOTA
CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD**

**Findings and Order in the Matter of the Complaints
by Susan Rego and John Deitering regarding Billboards in Support of Senator Amy Koch**

Evidence Used in These Findings

On March 14, 2011, the Campaign Finance and Public Disclosure Board (the Board) received a complaint from John Deitering regarding Senator Amy Koch and a highway billboard located by State Highway 55 in Maple Lake, Minnesota. Mr. Deitering states in his complaint that "The billboard was a 'Vote For Amy Koch for Senate'. In smaller letters a message read "DONATED By _____FRANKLIN". The billboard belonged to Franklin Outdoor Advertising! In searching ...year end reports to CFB, I see no mention of a purchase or contribution of a billboard." Mr. Deitering stated in the complaint that he did not have a photograph of the sign but could provide other individuals who had seen the sign.

On March 15, 2011, the Board received a separate complaint from Susan Rego regarding Senator Koch or the Wright County Republican Party of Minnesota (RPM) and a highway billboard located by Interstate Highway 94 near Clearwater, Minnesota. Ms. Rego states in her complaint that "From October through December 2010, a billboard in support of Amy Koch for state senate was in place on the south side of I-94...The billboard's nameplate said 'Franklin'." Ms. Rego also states in her complaint that she could not find a report of an independent expenditure on behalf of Senator Koch, or any expenditure for the sign in the Amy Koch for Senate Committee's Year-end Report to the Board.

Ms. Rego further states in the complaint that the Wright County RPM listed on the party unit's Year-end Report of Receipts and Expenditures a \$2,400 expenditure to Franklin Outdoor Advertising for billboard signs. The complaint alleges that the disclosure of the expenditure failed to identify the purpose of the expenditure and that, if the expenditure was in support of a candidate, the expenditure was listed on the wrong schedule in the report.

With her complaint Ms. Rego submitted a photograph of the billboard sign located by Interstate Highway 94 and a photograph of a yard sign produced and paid for by the Amy Koch for Senate Committee in 2010. Although the quality of the billboard sign photograph is poor, it appears that the billboard sign and lawn sign have the same graphic design elements with the name "Amy Koch" in large letters at the top of the sign, and the words "State Senate" in smaller letters at the bottom of the sign. The lawn sign also has the words "Republican Endorsed" across the bottom of the sign.

Because of the similarities in the allegations the Board combined the two complaints for the purpose of investigation and the issuance of Findings and an Order. The Board's investigation was to determine whether the two billboard signs were independent expenditures, approved expenditures (which are a type of in-kind donation) to the Amy Koch for Senate Committee, or campaign expenditures by the Koch Committee. Depending on the proper expenditure classification for the billboards, the investigation would also determine if the cost of the signs exceeded contribution or expenditure limits for a state senate campaign. If the billboard signs were independent expenditures, the investigation would also determine whether the billboards contained the independent expenditure disclaimer required in Minnesota Statutes, section 10A.17, subdivision 4. In any case, the investigation would determine whether the costs of the billboard signs were properly reported.

The Board notified Keith Franklin, owner of Franklin Outdoor Advertising, Christina Vetruba, treasurer for the Wright County RPM, and Senator Koch of the complaints and of the Board investigation. All three individuals were asked specific questions and given an opportunity to provide their response to the complaints.

Senator Koch was asked for information she may have regarding the signs; specifically, she was asked whether the signs were contributions to her committee. On March 28, 2011, the Board received a response from R. Reid LeBeau II, legal counsel for Senator Koch. In reference to the billboard signs, Mr. LeBeau stated that "The signs posted by Franklin Outdoor Advertising were made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, Senator Koch or any agent of her principal campaign committee. For this reason, the value of the signs was not reported by Senator Koch as an in-kind contribution...."

Ms. Vetruba was asked for an explanation of the purpose of the billboard signs purchased from Franklin Outdoor Printing by the Wright County RPM. On March 30, 2011, Ms. Vetruba responded that the party unit had not paid for the billboards listed in the complaints; instead, the unit purchased billboard space from Franklin Outdoor Advertising in support of Tom Emmer for Governor. In her response, Ms. Vetruba provided the location of the signs rented from Franklin Outdoor Advertising. They were not the signs listed in the complaint.

Mr. Franklin provided a written response to a series of questions related to the billboards on April 13, 2011. Mr. Franklin acknowledged that Franklin Outdoor Advertising, which is a sole proprietorship owned by Mr. Franklin, provided the use of the billboard space and paid \$456 for the production of the signs placed on the billboards. Mr. Franklin stated that because the two billboards were unsold, they had a value of zero dollars. Mr. Franklin further explained that the sign located by Highway 55 was displayed from September 14, 2010 to November 19, 2010, and that the sign located by Interstate 94 was displayed from September 29, 2010 to December 15, 2010.

In response to a question about the similarity between the design of the lawn signs produced by the Amy Koch for Senate Committee and the billboards, Mr. Franklin answered that the design of the signs was obtained from a public source: a campaign handout. Mr. Franklin also stated that he confirmed with his attorney that material obtained from a public source may be used in an advertisement without compromising the independence of the expenditure.

In response to a question regarding the disclaimer provided on the billboard signs, Mr. Franklin stated that the disclaimer read "Donated by Keith Franklin". In response to a question regarding whether Mr. Franklin had any communication about the billboard signs with Senator Koch or members of her committee, Mr. Franklin stated, "I did not exchange any communication with the Amy Koch Campaign, specifically on topic of independent campaign expenditures."

With his response Mr. Franklin provided a copy of the display proof used for the billboard sign located by Highway 55 and a picture of the billboard sign located by Interstate 94. The text for the two signs was the same: the signs contain the name "Amy Koch" in large letters in the top half of the sign, the words "State Senate" in smaller letters in the bottom third of the sign, and the disclaimer "Donated by Keith Franklin" in the bottom-right corner of the sign.

Mr. Franklin supported his response with a copy of correspondence dated September 2, 2010, received by Mr. Franklin from his legal counsel. The correspondence reviewed the statutory and reporting requirements for independent expenditures. Mr. Franklin also provided a copy of a Report of Independent Expenditures that he had originally filed with the Board on October 21,

2010. The report disclosed an independent expenditure by Mr. Franklin of \$456 for the purpose of “vinyl printing” on behalf of Amy Koch for state senate.

Board Analysis of Allegations

In combination the Rego and Deitering complaints alleged improper activities by Keith Franklin (Franklin Outdoor Advertising), the Wright County RPM, and the Amy Koch for Senate Committee in reporting the expenditures for the two highway billboard signs. The Board reviewed the evidence against the three entities and concluded the following:

Amy Koch for Senate Committee

The lawn signs distributed by the Amy Koch for Senate Committee were very similar in design to the highway billboards erected by Mr. Franklin. In her complaint Mr. Rego implies that the similarity in design is evidence of cooperation between the Koch Committee and whoever was responsible for the billboard signs, and that the signs were therefore a contribution to Senator Koch’s campaign.

In his response, Mr. Franklin admits that he derived the graphics used on the billboards from campaign literature distributed by the Amy Koch for Senate Committee. The Board agrees with Mr. Franklin’s contention that an independent expenditure may include material originally produced by a candidate’s campaign, provided that the material was obtained from a public source. Mr. Franklin’s decision to model the design of the billboard signs on the lawn signs distributed by the Koch campaign did not compromise the independence of the expenditure. The Board has no reason to doubt that Franklin Outdoor Advertising would have the technical ability to develop the design of the billboards without assistance from Senator Koch or her committee.

The response from Mr. LeBeau on behalf of Senator Koch is unambiguous in stating that neither Senator Koch nor members of her committee had any knowledge of the billboards and that none of them cooperated in the production of the billboards.

Therefore, the Board finds no basis to view the cost of the billboards as approved expenditures on behalf of the Amy Koch for Senate Committee. The Amy Koch Committee is not required to report the cost of the billboard signs as either contributions to, or expenditures by, the Committee.

Wright County RPM

Ms. Rego correctly noted that the Wright County RPM did not properly report the purpose of the payment made to Franklin Outdoor Advertising. The payment should have been reported on the schedule for contributions to candidates (schedule B2-CAN) and identified as an in-kind contribution to the Tom Emmer for Governor Committee.

Because the expenditure was not accurately disclosed, Ms. Rego assumed that there might be a relation between the expenditure and the billboard listed in her complaint. The evidence provided by the Wright County RPM documents that the expenditure by the party unit and the billboard are unrelated.

The Wright County RPM submitted an amendment to its 2010 Year-end Report of Receipts and Expenditures on May 24, 2011 to correctly report the expenditure.

Keith Franklin, Franklin Outdoor Advertising

Mr. Franklin viewed the cost of producing the billboard signs as independent expenditures on behalf of the Amy Koch for Senate Committee. Based on this belief, Mr. Franklin duly reported the expenditures to the Board on October 21, 2010. The Board acknowledges Mr. Franklin's effort to disclose the cost of the signs in an effort to comply with Chapter 10A.

However, if the billboard signs were independent expenditures, then Minnesota Statutes, section 10A.17, subdivision 4 requires a disclaimer that states "...the activity is an independent expenditure and is not approved by the candidate nor is the candidate responsible for it." The disclaimer provided on the billboard signs, "Donated by Keith Franklin," does not satisfy this requirement. An individual who knowingly omits the required disclaimer is subject to a civil penalty of up to \$3,000. Before determining whether a violation of the disclaimer provision occurred, the Board examined more closely whether the billboard signs were in fact independent expenditures as defined in Chapter 10A.

An "independent expenditure" is defined for the purposes of Chapter 10A in Minnesota Statutes, section 10A.01, subdivision 18, which states:

"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. An independent expenditure does not include the act of announcing a formal public endorsement of a candidate for public office, unless the act is simultaneously accompanied by an expenditure that would otherwise qualify as an independent expenditure under this subdivision." (emphasis added)

The term "expressly advocating" has great significance in the regulation of campaign speech. In Buckley v. Valeo, 424 U.S. 1 (1976), the United States Supreme Court recognized the authority of government to regulate campaign speech in order to prevent corruption or the appearance of corruption. But the court was concerned that without a strong standard for defining campaign speech, any communication including a reference to an elected official or person seeking office might be subject to unwarranted regulation.

To resolve this problem, the Court held that when an individual or an association whose major purpose is something other than to influence elections issues a communication, the government may only regulate the communication as campaign speech if the communication contains express words of advocacy in support or opposition to a candidate. Sometimes referred to as the "magic words" standard, the court provided examples of express advocacy. Words such as "vote for," "elect," "support," "cast your ballot for," "Smith for Senate," "vote against," "defeat," "oppose," and "reject" are commonly cited as the type of words used in express advocacy. As a result, only communications that make use of such words are considered campaign speech and may be regulated.

The Minnesota Legislature was undoubtedly aware of the Buckley v. Valeo decision when it created the current definition of "independent expenditure" in 1978. Rules of statutory interpretation require the Board to assume that the inclusion of the term "expressly advocating" in the statute was deliberate. The Board further assumes that the inclusion of those specific words was intended to exclude communications that did not rise to the level of express advocacy as defined in the Buckley v. Valeo decision.

Supreme Court rulings subsequent to *Buckley v. Valeo* have acknowledged that there may be a “functional equivalent of express advocacy” that could be used to identify campaign communications that are subject to regulation. In *FEC v. Wisconsin Right to Life, Inc.* 551 U.S. 449 (2007), the Supreme Court provided that a communication is “the functional equivalent of express advocacy” only if it is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” The Minnesota legislature has not amended the definition of “independent expenditure” to include communications that are the functional equivalent of express advocacy.

For the purposes of this investigation, the two billboard signs are independent expenditures only if the wording of the signs expressly advocate for the election of Senator Koch. Mr. Deitering states in his complaint that the sign by Highway 55 read “Vote For Amy Koch for Senate”, which would be a communication expressly advocating for a candidate. However, the photograph provided with the complaint filed by Ms. Rego and the photograph and design proofs provided by Mr. Franklin with his response show that the billboard signs did not contain any of the express advocacy words needed to bring the signs within the definition of an “independent expenditure.” Rather, the only words on each billboard were “Amy Koch State Senate”.

Because the signs were not independent expenditures, the requirement to provide the independent expenditure disclaimer on the signs provided in Minnesota Statutes, section 10A.17, subdivision 4, did not apply.

Further, because the signs were not independent expenditures, the report Mr. Franklin filed with the Board disclosing the cost of the billboard signs was not required by Minnesota Statutes, section 10A.20, subdivision 6, or Minnesota Statutes, section 10A.20, subdivision 6a.

Board Informational Note

The Board cautions against reading these findings too broadly. Under both Supreme Court precedent, including *Buckley v. Valeo*, and under Chapter 10A all financial transactions of a principal campaign committee, party unit, or political committee are subject to disclosure. The requirement for words of express advocacy is relevant only when determining the registration and disclosure obligations of an individual using the person's own money or an association whose major purpose is something other than to influence the nomination or election of candidates.

If there is a “loophole” in the Chapter 10A disclosure requirements, observers should recognize that the ability of individuals and interest groups to tailor messages to avoid campaign finance disclosure is widely recognized and well understood by those who use it. During each election the Board sees many communications advising voters to “contact [insert name] and thank [him or her] for their support of [insert issue]” or “ask [him or her] about [insert topic]”. Voter guides and candidate comparisons created by interest groups usually avoid words of express advocacy and, thus, are outside the disclosure system established in Chapter 10A.

The Board considered this same issue in its investigation of the Complaint of Novack Regarding Minnesota Majority in 2008. In that matter, the respondent had published a “Heroes and Zeros” list of legislators and a series of candidate comparisons. Taken as a whole, it would have been reasonable to conclude that the materials were intended to influence nominations at party conventions or votes at elections. However, the materials did not expressly advocate for anyone's nomination or election.

In the Minnesota Majority matter, the Board said:

By statutory definition, an “independent expenditure” is “an expenditure expressly advocating the election or defeat of a clearly identified candidate . . . “. Express advocacy requires use of specific words such as “vote for”, “elect”, “defeat” or similar words. None of the material produced by Minnesota Majority expressly advocates the election or defeat of a candidate so as to constitute an independent expenditure.

Minnesota does not have a statute that regulates spending by an association on what federal statutes refer to as “electioneering communications”, which are communications identifying specific candidates, made during specified periods before an election, and targeted to the electorate, but which do not expressly advocate the candidate’s election or defeat. In the absence of such a statute, the Board has no authority to regulate this type of communication.

Minnesota still has no campaign finance statute regulating or requiring disclosure of these so-called electioneering communications when they are made by individuals or associations whose major purpose is something other than to influence the nomination or election of candidates.

Based on the above Summary of the Facts and the Relevant Statutes, the Board makes the following:

Findings Concerning Probable Cause

1. There is probable cause to find that the Wright County RPM failed to disclose the in-kind contributions of billboards to the Emmer for Governor Committee on the 2010 Year-End Report of Receipts and Expenditures as required by Minnesota Statutes, section 10A.20, subdivision 3 (g). There is probable cause to believe the reporting error has been amended as required by Minnesota Statutes, section 10A.025, subdivision 4.
2. There is no probable cause to find that Senator Koch, any member of the Amy Koch for Senate Committee, or any agent of Senator Koch communicated or cooperated with Keith Franklin in the production of the highway billboards listed in the evidence section of these findings. There is therefore no probable cause to believe that the cost of the highway signs was an approved expenditure on behalf of the Amy Koch for Senate Committee as defined in Minnesota Statutes, section 10A.01, subdivision 4.
3. There is no probable cause to believe that the text of the billboard signs examined in this investigation expressly advocates the election or defeat of any candidate. The signs are therefore not independent expenditures as defined in Minnesota Statutes, section 10A.01, subdivision 18.
4. There is no probable cause to belief that the billboard signs examined in this investigation were required to contain the independent expenditure disclaimer required in Minnesota Statutes, section 10A.17, subdivision 4.
5. There is no probable cause to believe that Keith Franklin was required to file a report and affidavit of independent expenditure as required in Minnesota Statues, section 10A.20, subdivision 6 and 6a.

Relevant Statutes

Minnesota Statutes, section 10A.01, 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.

Minnesota Statutes, section 10A.01, 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.

An expenditure is considered to be made in the year in which the candidate made the purchase of goods or services or incurred an obligation to pay for goods or services.

An expenditure made for the purpose of defeating a candidate is considered made for the purpose of influencing the nomination or election of that candidate or any opponent of that candidate.

Except as provided in clause (1), "expenditure" includes the dollar value of a donation in-kind.

"Expenditure" does not include:

- (1) noncampaign disbursements as defined in subdivision 26;
- (2) services provided without compensation by an individual volunteering personal time on behalf of a candidate, ballot question, political committee, political fund, principal campaign committee, or party unit;
- (3) the publishing or broadcasting of news items or editorial comments by the news media; or
- (4) an individual's unreimbursed personal use of an automobile owned by the individual and used by the individual while volunteering personal time.

Minnesota Statutes, section 10A.025, Subd. 4. Changes and corrections. Material changes in information previously submitted and corrections to a report or statement must be reported in writing to the board within ten days following the date of the event prompting the change or the date upon which the person filing became aware of the inaccuracy. The change or correction must identify the form and the paragraph containing the information to be changed or corrected.

Minnesota Statutes, section 10A.17, Subd. 4. Independent expenditures. An individual, political committee, political fund, principal campaign committee, or party unit that independently solicits or accepts contributions or makes independent expenditures on behalf of a candidate must publicly disclose that the expenditure is an independent expenditure. All written communications with those from whom contributions are independently solicited or accepted or to whom independent expenditures are made on behalf of a candidate must contain a statement in conspicuous type that the activity is an independent expenditure and is not approved by the candidate nor is the candidate responsible for it. Similar language must be included in all oral

communications, in conspicuous type on the front page of all literature and advertisements published or posted, and at the end of all broadcast advertisements made by that individual, political committee, political fund, principal campaign committee, or party unit on the candidate's behalf.

Minnesota Statutes, section 10A.20, Subd. 6. Report when no committee. A candidate who does not designate and cause to be formed a principal campaign committee and an individual who makes independent expenditures or expenditures expressly advocating the approval or defeat of a ballot question in aggregate in excess of \$100 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 on the dates on which reports by committees, funds, and party units are filed.