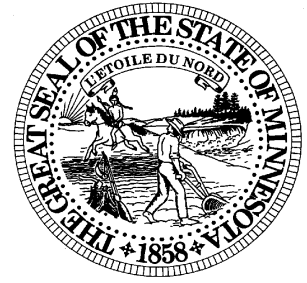


Minnesota

*Campaign Finance and
Public Disclosure Board*



Date: March 1, 2016

To: Advisory Opinion Files – Opinion 400

From: Gary Goldsmith, Executive Director

Telephone: 651-539-1190

Re: Amendment of Advisory Opinion 400

Advisory Opinion 400 was initially issued by the Board on July 22, 2008. On March 1, 2016, the Board amended the opinion by deleting the following sentence from the opinion provided in response to scenario two.

Use by one of a consultant's clients of material produced by the consultant for another client does not result in cooperation or coordination between the clients if the material has been published by the producer and the second client obtains the material from public sources.

For clarity, the sentence has been marked with strikethrough on page four of the opinion.

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: Independence of expenditures when a consultant performs services for both a candidate and a political entity intending to make independent expenditures for the same candidate.

ADVISORY OPINION 400
(As Amended by Board action on March 1, 2016)

SUMMARY

A consultant providing political services to a candidate may also provide political services to a political committee or fund or a party unit making independent expenditures affecting that same candidate if sufficient policies and procedures are in place to isolate the work being done for the candidate from that being done for the organization making independent expenditures.

FACTS

As the representative of a company that provides campaign consulting and other services to candidates and political organizations in Minnesota ("the Consultant"), you ask the Campaign Finance and Public Disclosure Board, ("the Board") for an advisory opinion based on the following hypothetical facts conveyed in your request and further clarified in communication with Board staff:

1. The Consultant is a political consulting company that provides services to candidates and to political committees, political funds, and party units as defined in Minnesota Statutes Chapter 10A. The latter three types of organizations are hereinafter referred to collectively as "political organizations".
2. During an election year, the Consultant expects to provide services to candidates related to the candidates' elections and also to political organizations related to independent expenditures to influence the election of those same candidates.
3. The Consultant, the candidates, and the political organizations want to be sure that the Consultant's provision of services to both a candidate and a political organization making expenditures to influence that candidate's election will not prevent the political organization's expenditures from being independent expenditures under Minnesota Statutes, Section 10A.01, subd. 18.

4. For the purpose of this advisory opinion the term “candidate” means a candidate as defined in Minnesota Statutes Chapter 10A and includes the candidate’s principal campaign committee.

Introduction

You state that you are aware of the Board’s opinion issued in Advisory Opinion 338 and seek to further clarify that opinion.

In Advisory Opinion 338, the Board indicated that a political organization may, under certain circumstances, make independent expenditures in support of a candidate even if one of the political organization’s consultants is also a political consultant to the candidate who would benefit from the expenditures.

The Board stated that in order to maintain the independence of the political organization’s expenditures the consultant must maintain an environment totally isolating the work for the candidate from the work on the independent expenditures.

You pose two scenarios and ask whether the conditions of each are sufficient to maintain the independence of an expenditure made by a political organization affecting a candidate to whom the Consultant is also providing services.

Scenario One

Would the independence of the political organization’s expenditures be maintained if (1) the Consultant is required to sign a confidentiality agreement with the candidate ensuring that work done for the candidate is not to be coordinated and/or communicated with any political organization and (2) the Consultant is required to sign a confidentiality agreement with the political organization ensuring that work done for the political organization is not to be coordinated and/or communicated with any candidate?

Opinion

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.”

The distinction of independent expenditures is that they may be made by political organizations without limit as to their total cost and they do not constitute contributions to the affected candidates. Thus, they do not apply to a candidate’s spending limits. For those reasons, it is necessary to ensure that such expenditures are truly independent from the affected candidates. Minnesota Statutes, Section 10A.01, subd. 18, quoted above, states the broad criteria for independence that an expenditure must meet to be considered an independent expenditure.

The stated facts make it clear that the Consultant is the candidate’s agent for the purpose of designing and preparing material to influence the candidate’s election. It is also clear that the Consultant intends to be the political organization’s agent for that same purpose.

Limited to the facts of this opinion, the restricting clause of §10A.01, subd. 18, could be re-stated as follows:

In order to be an independent expenditure, the political organization's expenditure must be made without the cooperation of, and not in concert with, any candidate's agent.

The Board stated in Advisory Opinion 338 that there may be situations in which a candidate and a political organization can use the same consultants without defeating the independence of expenditures made by the political organization. In that opinion, the Board referred to the need to maintain a "high wall of separation" in such a situation. Courts and other agencies have used the term "firewall" to convey the same meaning. Regardless of the term selected, the principle is that there must be a degree of separation between a consultant's work for the candidate and the same consultant's work for the political organization sufficient to ensure that the political organization's expenditures on behalf of the candidate are independent.

The confidentiality agreements proposed in Scenario One are not sufficient to provide the requisite degree of separation between the two components of the consultant's work. It is not possible for an individual, or a group of individuals working as a team, to do work that is not coordinated with themselves or in concert with themselves.

Where the same individual or consultant team works on both candidate materials and political organization materials, the political organization materials will not meet the requirements of an independent expenditure.

Scenario Two

Would the independence of the political organization's expenditures be maintained if the Consultant takes the steps listed below in situations where the consultant does work simultaneously for a candidate and a political organization doing independent expenditures for that candidate?

1. Creates a "candidate division" that will work only with candidates;
2. Creates a separate "political organization division" that will work only with political organizations;
3. Assigns separate employees to each division;
4. Establishes policies and procedures that prohibit communication between the employees of each division related to the work being done for the clients of each division;
5. Establishes policies and procedures for the maintenance of physically separate files, computer records, and documents for the two divisions, with employees of one division having no access to the files, records, or documents of the other division;
6. Establishes policies and procedures that preclude sharing of any client information between the two divisions.

Opinion

In this scenario the Consultant proposes to take steps that result, essentially, in the establishment of multiple organizations, each isolated from the other. Such an organizational structure, consistently maintained, would create the requisite separation between candidate work and political organization work required for the political organization work to retain its independent expenditure characterization. The structure proposed by the Consultant prevents information flow between individuals performing candidate work and those performing political organization work.

The requester limits the scope of Scenario Two to periods when the Consultant is simultaneously working on both candidate materials and political organization materials related to the same candidate. Limiting the proposed isolation measures to periods of simultaneous work is not sufficient to overcome the requirement that independent expenditures not be in coordination with or in concert with an agent of the candidate.

The period of time within which to examine whether there is sufficient isolation between the work being done for two clients begins when the work for the first client commences and ends at the later of (1) the date that the consultant's work for both clients ends or (2) the end date of the election cycle.

~~Use by one of a consultant's clients of material produced by the consultant for another client does not result in cooperation or coordination between the clients if the material has been published by the producer and the second client obtains the material from public sources.~~

In addition to the listed criteria, the employees of the two divisions should not be permitted to share client identities.

The Board also recommends that a consultant performing work as described in this opinion establish and follow retention policies for electronic and other records in order to better document compliance with its information isolation procedures.

Any policy implemented to prevent coordination of expenditures should be embodied in a written document that is distributed to all relevant employees, consultants, and clients affected by the policy, and strict adherence to the policy by all concerned should be enforced.

If the Consultant designs, implements, and adheres to written policies set forth in this opinion, and if the facts in the real world are not different from the hypothetical facts in any substantial way, the Consultant's work for the political organization will qualify for independent expenditure treatment.

Issued July 22, 2008

/s/ Sven A. Wehrwein
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. 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.