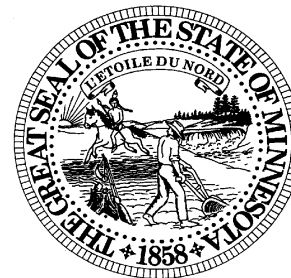


Minnesota

*Campaign Finance and
Public Disclosure Board*



**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)**

Advisory Opinion 410 – Revised

**This opinion replaces Advisory Opinion 410 issued August 3, 2010.
Question 8 did not appear in the earlier version of the Opinion.**

SUMMARY

An independent expenditure is an expenditure that 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. Communications with others that do not involve any candidate, candidate’s principal campaign committee, or agent, will not defeat the independence of an expenditure.

FACTS

1. As the attorney representing an organization, you ask the Board for an advisory opinion based on the following facts:
2. The Organization is a an association as defined in Minnesota Statutes Chapter 10A.
3. The Organization was formed with a primary purpose of accepting contributions and making independent expenditures to directly or indirectly influence the selection, nomination, election or appointment of individuals to public office.
4. The Organization intends to register with the Board as an Independent Expenditure Political Committee (“IEPC”) within fourteen (14) days after receiving more than \$100 in revenue or incurring \$100 in obligations.

The Organization requests the Board's opinion with respect to certain activities involving independent expenditures and agency relationships that could be created between an IEPC and other associations or candidates. Specifically, the Organization asks whether the "independence" of an independent expenditure by an IEPC is impermissibly compromised in any of the scenarios described below.

INTRODUCTION

The series of scenarios posed by the Organization are designed to clarify the limits of conduct that may be engaged in without jeopardizing the independence of an independent expenditure.

The concept of "independent expenditure" is defined in Minnesota Statutes Section 10A.01, subd. 18. First, the transaction must, in fact be an expenditure, which is a use of money or goods or services. For the purposes of this Advisory Opinion, the transactions described are defined by the facts as "expenditures". The expenditure must also expressly advocate the election or defeat of a clearly identified candidate. For the purposes of this Advisory Opinion, all transactions described in the scenarios will be assumed to meet the express advocacy requirement.

The final characteristic of an independent expenditure is that it must be 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." It is the scope of this requirement that this Advisory Opinion addresses.

QUESTIONS

1. The IEPC accepts a contribution from a corporation ("Corporation X") and the IEPC then makes an independent expenditure to support Candidate A and:
 - a. An employee of Corporation X serves on the IEPC Advisory Committee and also serves as a member of the candidates fundraising committee or as a paid or volunteer campaign worker for Candidate A.

Opinion: The Board assumes that the IEPC "Advisory Committee" provides input to the IEPC with respect to its independent expenditure spending decisions. While "campaign worker" and "committee member" are not terms that are defined in Minnesota Statutes Chapter 10A, the Board further assumes that most committees considers their campaign workers to be members of the campaign committee. The question, rephrased, is whether a campaign worker/committee member may participate in an independent expenditure political committee's decision making process in which the IEPC may decide to make an independent expenditure supporting the candidate. The Board concludes that under the facts described there is a strong presumption that the resulting expenditure would not be an independent expenditure.

It is not clear from the facts that the campaign worker represents the principal campaign committee or is an agent of the principal campaign committee. However, the fact that the committee would enter into an arrangement that resulted in an individual working for the committee and at the same time advising

an IEPC on its independent expenditure decisions that might affect the candidate suggests express or implied agency. Only an after-the-fact analysis of the evidence surrounding the arrangements would permit a definitive conclusion on whether the independence of the subject expenditure was destroyed. For this reason the Board strongly recommends against entering into situations such as the one described in this scenario.

- b. An employee of Corporation X does not serve on the IEPC Advisory Committee but serves as a member of the candidates fundraising committee or as a paid or volunteer campaign worker for Candidate A.

Opinion: In responding to this question, the Board assumes that not only does the employee not serve on the IEPC Advisory Committee, but that the employee has no involvement whatsoever with the IEPC and does not engage in activities intended to influence the decisions of the IEPC. Since the employee has no role or influence in the operation or decision-making process of the IEPC, the necessary link between the candidate and the IEPC that could destroy the independence of an expenditure does not exist.

- c. An employee of Corporation X serves on the IEPC Advisory Committee and hosts a fundraiser for Candidate A.

Opinion: The facts presented in this scenario do not suggest knowledge by the candidate of any intended independent expenditure by the IEPC. Thus, there is no opportunity for the actions described in the independent expenditure definition that would defeat the independence of the expenditure.

- d. An employee of Corporation X does not serve on the IEPC Advisory Committee but hosts a fundraiser for Candidate A at her personal residence.

Opinion: The result is the same as described in Question 1.c.

- e. An employee of Corporation X serves on the IEPC Advisory Committee and also holds a leadership position in the political party that supports Candidate X.

Opinion: The Board recognizes the separate identities of political parties and their candidates. While the Board understands that parties and their candidates have similar interests, the Board will not presume that a party acts for or on behalf of a candidate. Absent facts showing that the party, through its official, acted on behalf of the candidate or represented the candidate, the scenario does not describe the necessary link between the candidate and the IEPC that could destroy the independence of the expenditure.

- f. An employee of Corporation X does not serve on the IEPC Advisory Committee but holds a leadership position in the political party that supports Candidate X.

Opinion: The result is the same as described in Question 1.e.

2. The IEPC accepts a contribution from a corporation (“Corporation Y”) and makes an independent expenditure to support Candidate B and:

- a. An employee of Corporation Y serves on an IEPC Committee. At a social event, the employee tells Candidate B that the IEPC intends to take out an ad to support Candidate B prior to the election.

Opinion: The described conversation takes place prior to the independent expenditure being made. Although the IEPC representative is not asking for the candidate’s consent or authorization, the danger is that the candidate will nevertheless consent to the expenditure or implicitly approve of it. If the conversation goes beyond the employee’s statement, the independence of the expenditure could inadvertently be destroyed. Minnesota’s statute is very broad and its intent is clear that independent expenditure spenders and candidates should not engage in conversations about proposed independent expenditures. The IEPC’s staff should be strongly advised to avoid such conversations with candidates, their committee members, or others working on their campaigns.

- b. An employee of Corporation Y holds no official office on the IEPC. At a social event, the employee tells Candidate B that the IEPC intends to take out an ad to support Candidate B prior to the election.

Opinion: In responding to this question, the Board assumes that not only does the employee not hold an office on the IEPC, but that the employee has no involvement whatsoever with the operation or decision-making process of the IEPC and does not engage in activities intended to influence the decisions of the IEPC. Since the employee has no role or influence in the operation or decision-making process of the IEPC, the necessary link between the candidate and the IEPC that could destroy the independence of an expenditure does not exist. If the facts show that the employee somehow represents the IEPC, the result would be the same as in Question 2.a.

3. The Treasurer of the IEPC is also the treasurer of an unrelated state political committee or fund. The state political committee or fund contributes to Candidate C and the IEPC expends funds to independently support Candidate C.

Opinion: This scenario presents no link to the candidate that would destroy the independence of the IEPC’s expenditure.

4. The supporting organization for the IEPC has staff members that work on the IEPC and also make contributions for the supporting organization’s separate state political committee or fund.

Opinion: This scenario presents no link to the candidate that would destroy the independence of the IEPC’s expenditure.

5. A member of the IEPC Advisory Committee or employee also holds a position which allows him or her to direct political committee or fund contributions of an unrelated entity.

Opinion: There is no prohibition on the same people being involved in the operation of

multiple political committees or funds. This scenario presents no link to the candidate that would destroy the independence of the IEPC's expenditure.

6. An employee of Corporation Z volunteers to make fundraising calls and solicitations for the IEPC. Corporation Z makes a contribution to the IEPC. The employee holds no formal position with the IEPC. The IEPC makes an independent expenditure to support Candidate D. May the employee hold a fundraising event for Candidate D?

Opinion: The scenario presented does not disclose any facts to suggest that the subject of the IEPC's independent expenditure to support the candidate was discussed with the candidate or any agent. Therefore, the scenario does not present any opportunity for actions that would defeat the independence of the expenditure.

7. The chair of a political party or legislative caucus asks the IEPC to support "the party's or caucuses candidates" on the ballot this fall. The IEPC subsequently makes an independent expenditure to support one of the party's candidates.

Opinion: The Board assumes that political parties often ask both individuals and registered political committees or funds to support their candidates. The Board recognizes the separate identities of political parties and their candidates. While the Board understands that parties and their candidates have similar interests, the Board will not presume that a party acts for or on behalf of a candidate. Absent facts showing that the party, through its official, acted on behalf of the candidate or represented the candidate, the scenario does not describe the necessary link between the candidate and the IEPC that could destroy the independence of the expenditure.

8. The IEPC meets with representatives from a political party or legislative caucus and asks party leadership which specific candidates need support in the upcoming election. The IEPC subsequently makes independent expenditures based on the information received from caucus or party representatives.

Opinion. The Board does not presume that there is always coordination between a party unit and its candidates. However, the Board is aware that such coordination occurs in many circumstances. When coordination does occur, it is possible that the party unit may become an agent of the candidate with respect to transactions with third parties such as the subject IEPC.

Whether there is actual coordination is always a fact question that is not readily susceptible to presentation in a hypothetical situation. For example, if a candidate approaches a caucus and asks for help in the election, the conversation could constitute express or implied consent or a request that the party unit make expenditures on the candidate's behalf. As a result, any subsequent party unit expenditures could be approved expenditures rather than independent expenditures. If that same party unit, acting as a result of the candidate's request, solicits expenditures by a third party, the party unit may be acting as the agent of the candidate and, again, the resulting expenditures may not be independent expenditures.

The specific conversations and interactions that take place in real-world situations cannot be completely predicted in a hypothetical question. Thus, it is not possible to provide an unqualified opinion based on hypothetical situations. As with all independent

expenditure questions, the Board points out that a high wall of separation between the party unit and its candidates is required if the party unit's expenditures, or expenditures made at the request of the party unit are to be independent expenditures.

9. The IEPC hires a polling firm to conduct a poll and:

- a. the IEPC shares the cost of polling activities with another IEPC. Both IEPCs use the poll results in their respective advertising campaigns to oppose Candidate E.

Opinion: independent expenditure political committees or funds may donate to one another and, by extension, may pool resources and share costs. Depending on how the costs were allocated, an in-kind contribution from one IEPC to the other might result, which would have to be included in the next report filed with the Board.

- b. the IEPC shares the cost of polling activities with a political party or legislative caucus. The results of the poll are used by the IEPC and the political party or legislative caucus to make independent expenditures.

Opinion: Legislative caucuses are party units, so the question as stated applies to all party units. While the scenario as presented would not destroy the independence of resulting independent expenditures, it presents a different potential problem.

Independent expenditure political committees or funds are not permitted to make contributions to party units. The Board believes that polling results are not diminished in value by being shared between two entities, the value of the results to each entity is the same as either would have had to pay for the results on its own. Therefore, sharing costs of a poll as described would result in a prohibited contribution from the IEPC to the party unit.

10. The IEPC hires a consultant who:

- a. is also hired by another IEPC and provides both IEPC's with services to assist them in coordinating their message and / or media campaign in support of, or opposition to, a common candidate.

Opinion: Independent expenditure political committees or funds may coordinate their independent expenditures with one-another. The scenario does not present facts that would destroy the independence of resulting expenditures.

- b. also provides consulting services to a political party which supports the same candidate.

Opinion: The result is the same as in Question 10.a.

- c. also provides consulting services to the candidate which will benefit from the IEPC's independent expenditure.

Opinion: If a consultant providing services on messaging and timing of

independent expenditures for the IEPC also provides messaging and campaign services to a candidate, the independence of the IEPC's expenditures advocating the election of the candidate are not independent. The Board believes that it is not possible for a single individual to avoid coordination of effort between the two clients even if an attempt to do so is made. The Board has previously discussed the separation required in a consulting firm doing work for both an independent expenditure spender and a potentially affected candidate. See Advisory Opinions 338 and 400. It is not possible to maintain the required degree of separation when all of the work for both clients is handled by the same individual. An individual cannot maintain the required separation of effort.

Caveat

The questions posed in this advisory opinion include very specific and limited facts. The Board's opinions are based solely on the facts as specified. In the real world, the facts are not usually so clear. Any extension of the facts, such as a conversation continuing beyond the one specified, could result in a different opinion. Similarly, relevant facts that are omitted could cause the Board to reach a different conclusion had those facts been known. Any Board investigation or decision will be based on the facts of the specific matter under investigation.

Issued September 7, 2010

/s/ Bob Milbert
Bob Milbert, Chair
Campaign Finance and Public Disclosure Board

STATUTORY CITATION

10A.01 DEFINITIONS

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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.