DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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October 7, 1999

1. Under current law in s. 11.01 (7) (a) 1. and (16), stats., expenditures are reportable when they are made "...for the purpose of influencing the election or nomination for election of any individual to state or local office...". This draft, in proposed s. 11.514 (1) (a), makes expenditures reportable, under a separate procedure, when they are made for the purpose of making a communication "that cannot reasonably be subject to any interpretation other than that the communication is made for the purpose of electioneering". In order to achieve your intent, a court must distinguish between these standards, because if they have the same meaning, the draft achieves nothing. I'm not sure the draft is clear concerning how these standards should be distinguished.

2. Currently, ch. 11., stats., generally requires disclosure of financial activity by individuals and committees seeking to influence the election or defeat of candidates for state or local office [see ss. 11.01 (6), (7), (11) and (16), 11.05 and 11.06, stats.], unless a disbursement is made or obligation incurred by an individual other than a candidate or by a committee which is not organized primarily for political purposes, the disbursement is not a contribution as defined in the law and the disbursement is not made to expressly advocate the election or defeat of a clearly identified candidate [see s. 11.06 (2), stats.]. This language pretty closely tracks the holding of the U.S. Supreme Court in *Buckley v. Valeo, et al.*, 96 S. Ct. 612, 656–664 (1976), which prescribes the boundaries of disclosure that may be constitutionally enforced (except as those requirements affect certain minor parties and independent candidates). Proposed s. 11.514, which requires registration and reporting by organizations that make certain communications within 30 days of a primary or 60 days of an election, appears to extend beyond the boundaries which the court permitted in 1976. As a result, its enforceability at the current time appears to rest upon a shift by the court in its stance on this issue.

3. Proposed ss. 11.512 (2), 11.513 (2), 11.514 (5) and 11.519 (2), which increase the public financing benefit payable to a candidate when excess disbursements are made by an opponent or when independent disbursements or "issue advocacy" expenditures are made against the candidate or for his or her opponents, may result in an abridgement of the First Amendment rights of the persons making the disbursements or expenditures. See *Day v. Holahan*, 34 F.3d 1356 (8th Cir., 1994), in which a Minnesota law that included provisions similar to proposed s. 11.31 (3p) was voided.

It should be noted that there are viable arguments to be made on both sides of this issue, this case is not binding in Wisconsin because it did not arise in the circuit that includes Wisconsin and the U.S. Supreme Court has not yet spoken on this issue.

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