DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–1801/2dn
JTK:kmg:jf

March 23, 1999

1. I have attempted to distill the essence of the Common Cause language relating to bogus "issue" advertising in proposed s. 11.05 (14). Concerning that language:

a. I did not incorporate the examples of express advocacy in (1)(A) because it is well–established, I think, that this type of thing is currently subject to disclosure requirements under Wisconsin law and under *Buckley v. Valeo, et al.*, 96 S.Ct. 612 (1976). Also, we are reluctant to place examples in drafts because the courts may construe the examples to limit the application of the law, despite language to the effect that the examples are not intended to be limiting. See *Hatheway v. Gannett Satellite Network*, 57 Wis.2d 395 (Ct. App., 1990).

b. Although I understand the desire to limit the sweep of this provision, I think there is a problem with the $2,000 limitation in that the "issue–oriented" communications are defined in such a way as to include, in addition, traditional communications that utilize express advocacy, so the draft ends up suggesting, in a backhanded way, that traditional communications might not be reportable unless the $2,000 threshold is crossed.

c. With respect to (2) of the submitted language, we currently exclude internal communications from disclosure requirements under s. 11.29, stats. This statute reads a little differently than (2) (A) in that it excludes all communications by a corporation, cooperative or voluntary association to it members, shareholders or subscribers. Because I wasn't sure that you specifically intended to alter that provision, I left it alone. Also, we currently exclude the organized media from disclosure requirements under s. 11.30 (4), stats. Once again, this statute reads a little differently than your (2) (B), but I wasn't sure if you specifically intended to alter our current exclusion. Please let me know if this is not in accord with your intent.

d. Concerning the constitutionality of this provision, I know that the McCain–Feingold language has been looked at by respected constitutional scholars who convincingly argue that it passes constitutional muster; however, current state law is specifically molded to fit within the confines of the *Buckley* decision, whereas this language casts aside that decision and takes the stance that another mold should be acceptable. Once again, the U.S. supreme court will have to speak on this issue before we can be sure. There is also another issue with this language in that under the Fifth, Sixth and Fourteenth amendments, the state has the burden of proof in prosecutions. To the extent that this provision operates to shift that burden to the defendant under certain circumstances, it may be difficult to enforce.

2. Currently, it is possible to charge a committee or group with a violation of the campaign finance law. In addition, any members of a committee or group who participate in an offense may be charged. Under ss. 11.10 (1) and 11.20 (13), stats., a candidate bears civil liability for the filing and accuracy of each report submitted on his or her behalf, whether or not the candidate signs the report. Under the changes to s. 11.25 (2) (b), stats., and proposed s. 11.01 (16) (b) 2., as contained in this draft, it will no longer be possible to recover a forfeiture from the treasury of a committee or group. This may mean that, if a prosecutor cannot prove who was personally responsible for an offense, no one will be responsible even though a committee or group was obviously in violation. Is this consistent with your intent?

3. Concerning proposed s. 11.25 (4), which prohibits former candidates and their committees from making certain independent disbursements, the U.S. supreme court has held that limits may not be imposed on the spending of committees that wish to express their views independently of candidates. See *Buckley v. Valeo, et al.*, 96 S.Ct. 612, 644–650 (1976) and *F.E.C. v. N.C.P.A.C.*, 105 S.Ct. 1459, 1465–1471 (1985). However, the court has also held, in *Buckley*, that reasonable contribution limitations may be imposed upon committees. If one views this proposal simply as an attempt to restrict independent spending, it would likely not meet the court's current standard for passing constitutional muster. If one views this proposal as only a limited restriction designed to prevent evasion of contribution limitations and to protect contributors by ensuring that their contributions are not used for purposes they did not intend, the proposal may be viewed more favorably, and could be sustained.

4. Since under this draft there is no period during which a candidate may make disbursements that are not charged to a current, former or future campaign, this draft repeals s. 11.31 (7) (d), stats. Please let me know if this is not in accord with your intent.

5. Proposed s. 11.31 (9), relating to the cost–of–living escalator for disbursement limitations, should have been updated in the previous draft. In this draft, the disbursement limitations specified in the draft will apply for the 2000 general election. The first adjustment will be made for elections held in 2002. Please let me know if this is not in accord with your intent.

6. Concerning proposed s. 11.50 (1) (a) 2. (part of the definition of "eligible candidate"), this subdivision must be read in conjunction with s. 11.50 (1) (a) (intro.), stats., which is not affected by this draft.

7. Concerning the 3% deduction from the checkoff for administrative expenses, the previous draft transferred from the general fund to the general account and each political party account 97% of the amounts designated on taxpayer checkoffs. I thought this would be simpler than transferring 100% of the amounts designated on taxpayer checkoffs and then returning 3% to the general fund. See proposed s. 11.50 (2s) (a) and (b) and (2w) and the treatment of s. 20.855 (4) (b), stats. This draft makes no change in these provisions. Please note that the draft does not appropriate this 3% deduction to the department of revenue. The money is retained in the general fund, which under

current law is used to finance DOR's general program operations. Please let me know if this is not in accord with your intent.

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