

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0406/1dn
JTK:cmh:jf

March 14, 2000

1. 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. 11.01 (16) (a) 3., which requires registration and reporting by individuals who or committees that make certain communications within 60 days of an election containing the reference to a candidate at that election, an office to be filled at that election or political party, 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. In this connection, see also *North Carolina Right to Life Inc. v. Bartlett*, 67 U.S.L.W. 4148 (U.S.C.A., 4th Cir., 1999), in which the court voided North Carolina's attempt to regulate issue advocacy as inconsistent with *Buckley*.

2. Proposed s. 11.50 (9) (b) to (bc), which increase the public grants payable to certain candidates when independent disbursements are made against them or their opponents, or when their opponents raise more than a specified level of contributions from certain sources, or when special interest committees, including conduits, report that they intend to make or transfer contributions to their opponents, and proposed s. 11.31 (3p), which increases disbursement limitations by an amount equal to any grant received under proposed s. 11.50 (9) (b) to (bc), may result in an abridgement of the First Amendment rights of the persons making the disbursements or contributions. 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. While this case expressly involved only independent expenditures, since this case and other federal cases hold that the making of a contribution is a protected First Amendment right, the same issue could be raised in the context of contributions. It should be noted that there are 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.

3. Proposed s. 11.62, which permits a court to nullify an election if certain violations of the campaign finance law are sufficient to have affected the election result, raises legal issues that make it difficult to predict how it will be applied. In *State ex rel. La Follette v. Kohler*, 200 Wis. 518 (1930), the Wisconsin Supreme Court held that the legislature has the power to void the election of a candidate who procured his nomination by illegal means. However, this case did not apply to a legislative candidate. In the case of a legislative candidate, the result might be affected by article IV, section 7, of the Wisconsin Constitution, which makes each house the judge of the elections, returns and qualifications of its members. Additionally, under this draft, violations that result in nullification of a candidate's election may be committed by persons other than the candidate. Also, if a candidate takes office and must be removed, it is generally held that where a constitution prescribes methodology for removal of officeholders (as does the Wisconsin Constitution), that methodology is exclusive. See 67 C.J.S. Officers s. 120, p. 486.

4. I also want to note briefly that a few of the provisions of this draft are innovative, and we do not yet have, to my knowledge, specific guidance from the federal courts concerning the enforceability of provisions of these types. It is well possible that a court may find a rational basis for these provisions that would permit them to be upheld. However, because of the concerns expressed by the U.S. Supreme Court in *Buckley v. Valeo, et al.*, 96 S. Ct. 612 (1976), and certain other cases that attempts to regulate campaign financing activities may, in some instances, impermissibly intrude upon freedom of speech or association, or equal protection guarantees, it is possible that enforceability problems with these provisions may occur. In particular, those provisions concerning which we do not have specific guidance at this time are:

(a) Proposed s. 11.12 (6) (b) and (c), which impose a waiting period of up to 21 days before certain contributions may be transferred or accepted or before certain disbursements may be made or obligations to make disbursements may be incurred.

(b) Proposed s. 11.12 (7), which imposes additional reporting requirements upon candidates who decline to accept disbursement and contribution limitations and restrictions.

(c) Proposed s. 11.24 (1t), which prohibits certain candidates and their personal campaign committees from accepting contributions within 10 days of an election in which the candidates participate.

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