

analysis, p1

1999 SENATE BILL 181

June 1, 1999 - Introduced by Senators GEORGE, ERPENBACH, RISSER, ROSENZWEIG, DARLING, RUDE, MOEN and ROBSON, cosponsored by Representatives BOCK, RICHARDS, POCAN, TURNER, MILLER, PLOUFFE, J. LEHMAN, BERCEAU, COLON, COGGS and YOUNG. Referred to Committee on Agriculture, Environmental Resources and Campaign Finance Reform.

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AN ACT to amend 8.35 (4) (b), 11.12 (2), 11.16 (2) and (3), 11.26 (1) (a), 11.26 (2) (a), 11.26 (9) (a), 11.26 (9) (b), 11.26 (13), 11.31 (1) (d), 11.33 (1) (a) (intro.), 11.50 (1) (a) 1. and 11.50 (3) (b); and **to create** 11.26 (1) (am), 11.26 (2) (am), 11.26 (9) (ba), 11.33 (4), 11.501 to 11.522, 20.510 (1) (r), 20.585 (1) (q), 20.585 (1) (r), 20.855 (4) (bb), 25.17 (1) (cm) and 25.421 of the statutes; **relating to:** campaign financing with respect to the office of justice of the supreme court, making appropriations and providing penalties.

INS. ANALYSIS

removes candidates for the office of justice from eligibility for grants under

Analysis by the Legislative Reference Bureau

This bill makes numerous changes in the campaign finance law affecting campaigns for the office of justice of the supreme court. The bill ~~limits the application of the Wisconsin election campaign fund, under which eligible candidates for state offices (except district attorney, court of appeals judge, and circuit judge) may receive public grants from state general purpose revenues derived from designations made by individuals filing state income tax returns, to state offices other than the office of justice of the supreme court.~~ To finance elections for the office of justice of the supreme court, the bill creates a democracy trust fund, under which eligible candidates for this office may receive public grants derived from general purpose revenues ~~without regard to designations made by individuals filing state~~

income tax returns

grants from p. 2 of 3024/1

Under the bill, a candidate for the office of justice of the supreme court may qualify for public financing from the democracy trust fund to finance a campaign in

this

SENATE BILL 181

not less than \$5 nor more than \$100 residents of this

a primary or election by receiving a specified number of qualifying contributions of ~~five dollars~~, each made by electors of the state. A candidate who accepts public financing may accept "seed money" contributions in amounts of \$100 or less, subject to aggregate limitations, and may contribute personal funds in ~~specified amounts~~ during specified periods. A candidate who accepts public financing may not accept any contributions other than qualifying and seed money contributions and contributions from personal funds, subject to specified limitations. Public financing benefits for eligible candidates are \$100,000 in the primary election and \$300,000 in the general election. The benefits are subject to a biennial cost of living adjustment. A candidate who accepts more than a specified amount of qualifying or seed money contributions has the excess deducted from his or her public financing benefit. In addition, if a candidate's opponent declines to accept public financing and makes expenditures in a total amount that exceeds ~~by more than five percent~~ the amount permitted for a candidate who accepts public financing, the candidate who accepts public financing receives additional funding equivalent to the excess expenditures made by his or her opponent, but not more than three times the amount of the public financing benefit for the office that the candidate seeks. A candidate also receives additional public financing equivalent to ~~any~~ independent expenditures made against the candidate or in support of his or her opponents if those expenditures exceed 20% of the amount of the public financing benefit for the office that the candidate seeks (but not more than three times the amount of that benefit), as well as additional financing equivalent to the cost of certain mass mailings made by an incumbent opponent using state funds.

any aggregate amount not exceeding \$5,000

accepts contributions or

contributions accepted or disbursements

the initial public financing

Initial public

Disbursements

initial of the financing benefit

of Justice Under the bill, additional public benefits may not exceed

Currently, a candidate for the office of justice of the supreme court may qualify to receive a grant from the Wisconsin election campaign fund for use in an election campaign ~~only~~ no funding is provided for primary campaigns. ^{only} In order to qualify for a grant, a candidate must qualify to have his or her name appear on the spring election ballot and must have an opponent who qualifies to have his or her name appear on that ballot. The maximum amount of a grant that a candidate may receive is \$97,031. This amount is not subject to any cost of living adjustment. In addition, this amount is reduced by the total amount of contributions received by a candidate from special interest committees, and this amount may not be fully funded in a particular year if there are not sufficient moneys in the Wisconsin election campaign fund to provide full financing for all qualifying candidates. A candidate must agree to abide by spending and self-contribution limits in order to receive a grant, but this agreement does not apply if the candidate has an opponent who could have qualified for a grant but declines to do so and declines to file an affidavit of voluntary compliance with spending and self-contribution limits.

exceeding \$2,000 cumulatively for certain communications

more top. 1

Currently, individuals and committees making political contributions to candidates for the office of justice of the supreme court are subject to limitations on the amount or value of any contribution or contributions that may be made cumulatively to any candidate in a campaign. The limitations are \$10,000 in the case of an individual making a contribution to a candidate and \$8,625 in the case of a committee making a contribution to a candidate. This bill replaces these limitations with a contribution limitation of \$1,000 applicable to an individual or committee

Note: The funding is determined on the basis of information provided by candidates who decline to accept public financing benefits and who must file special reports with the elections board disclosing contributions accepted and disbursements made.

and \$5,000 applicable to a

SENATE BILL 181

Analysis, p 3

in any campaign @ = Under the bill, the limitations apply only to contributions made to a candidate

making any contribution or contributions cumulatively to any candidate for the office of justice of the supreme court who is eligible to qualify for a public financing benefit but who declines to accept one, per campaign, a public financing benefit

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 8.35 (4) (b) of the statutes is amended to read:

2 8.35 (4) (b) Notwithstanding par. (a), any unspent and unencumbered moneys

3 received by a candidate from the Wisconsin election campaign fund shall be

4 immediately transferred to any candidate who is appointed to replace such

5 candidate, upon filing of a proper application therefor under s. 11.50 (2). If there is

6 no candidate appointed or if no proper application is filed within 7 days of the date

7 on which the vacancy occurs, such moneys shall revert to the state as provided in s.

8 11.50 (8). Notwithstanding par. (a), any unspent and unencumbered moneys

9 received by a candidate from the democracy trust fund shall be immediately

10 transferred to any candidate who is appointed to replace such candidate. If there is

11 no candidate appointed, the moneys shall revert to the state.

12 **SECTION 2.** 11.12 (2) of the statutes is amended to read:

13 11.12 (2) Any No registrant, except a candidate who receives a public financing

14 benefit from the democracy trust fund, may accept an anonymous contribution

15 exceeding \$10 received by a campaign or committee treasurer or by an individual

16 under s. 11.06 (7) may not be used or expended. The, No candidate who receives a

17 public financing benefit from the democracy trust fund may accept an anonymous

18 contribution exceeding \$5. Any anonymous contribution that may not be accepted

2001-2002 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1551/lins
JTK & RJM.....

INSERT 5-23:

(1m) "Business day" means every day except Saturday, Sunday, and a holiday designated in s. 230.35 (4) (a).[√]

INSERT 6-21:

(10) "Independent expenditure" means an expenditure made for the purpose of making a communication that is made during the 30-day period preceding any spring primary for the office of justice and the date of the spring election, or if no primary is held, during the 60-day period preceding the spring election, that contains a reference to a clearly identified candidate for the office of justice at that election.

INSERT 11-20:

11.509 Disbursements from seed money and qualifying contributions; excess contributions. An eligible candidate may make disbursements not exceeding a total of \$25,000 from seed money and qualifying contributions received by the candidate at any time after the beginning of the exploratory period.

INSERT 12-10:

(2) The board shall process applications for public financing benefits in the order received.

(3) The board shall determine a candidate's eligibility to receive a public financing benefit for a spring primary no later than 3 business days after the time that the candidate files the list of qualifying contributions and ^{the} certification required under sub. (1).[√]

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(4) The board shall determine a candidate's eligibility to receive a public financing benefit for a spring election no later than 2 business days after the date of the spring primary, or if no spring primary is held, no later than the Friday after the 2nd Tuesday in January, or within the time prescribed under sub. (1), whichever is later.

(5) If the board determines that a candidate is eligible to receive a public financing benefit under sub. (3) or (4), the board shall immediately distribute to the candidate a line of credit equal to the initial public financing benefit for which the candidate qualifies.

INSERT 13-1:

NOA

If a candidate who receives a public financing benefit otherwise violates the requirements of ss. 11.502 to 11.522, the board shall require the candidate to repay a portion of the public funds received by the candidate to the board. The amount of any such repayment shall be commensurate with the severity of the violation.

INSERT 14-19:

NOA

In addition, a nonparticipating candidate who makes disbursements that equal or exceed 90% of the public financing benefit for the office of justice ^{for the primary election campaign period or for the election campaign period} shall, within 7 ^{for that period} days of making disbursements that equal or exceed that amount, file a report with the board containing an itemized statement of the total contributions received and disbursements made by the candidate.

INSERT 15-7:

(2) Upon receipt of any report indicating that a nonparticipating candidate has received contributions or made disbursements in excess of the public financing benefit for the office of justice applicable to the primary, if prior to the date that the

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spacing.*

Spring

~~Spring~~ primary for the office of justice is held or the date that the primary would be held if a primary were required, or applicable to the election, if on or after that date, the board shall immediately credit the ^C account of each eligible opposing candidate who qualifies to receive a public financing benefit with an additional line of credit. The amount of the additional line of credit shall equal the amount by which the total contributions received or the total disbursements made by the nonparticipating candidate, whichever is greater, exceed the amount of the initial public financing benefit for the office of justice applicable under this paragraph to the period during which the excess contributions are received or excess disbursements are made, but not ~~to exceed~~ ^{to exceed when combined with any amount received under s. 11.513(3)} ~~more than~~ ^{more than} 3 times the initial public financing benefit for that period.

INSERT 15-10:

11.513 Independent expenditures. (1) If any person makes one or more independent expenditures exceeding \$2,000 in the aggregate, that person shall file a report with the board. The report shall be filed whenever the total independent expenditures made by the person exceed \$2,000 in the aggregate and whenever the person makes one or more additional ^{exceeding \$2,000 in the aggregate} independent expenditures ~~that are not~~ ^{under this subsection} identified in a previous report ~~exceeding \$2,000 in the aggregate~~. The report shall be filed within 7 days after the date that the expenditure is made, or if the expenditure is made within 14 days of the date of a spring primary or election, within 48 hours after the date that the expenditure is made.

(2) Each report filed under sub. (1) shall contain the following information:

(a) The name of each candidate who is identified in each communication financed by an independent expenditure.

(b) A statement as to whether the communication is intended to support or oppose each candidate who is identified under par. (a).

(c) The total amount or value of the expenditure.

(3) When the sum of the aggregate independent expenditures reported made against an eligible candidate and the independent expenditures made for that candidate's opponent, as reported under sub. (2), exceed 20% of the public financing benefit for the office of justice in the primary or election for which the expenditures are made, the board shall promptly credit that candidate's account with an additional line of credit equivalent to the total such independent expenditures made, but not to exceed ¹ times the amount of the public financing benefit for that primary or election. The board shall distribute any additional line of credit under this subsection to be made within 42 days of the date of a spring election no later than 24 hours after the credit becomes due.

when combined with any amount received under s. 11.517(2), 3

initial

(4) If a person who makes an independent expenditure does not indicate whether an independent expenditure is made against an eligible candidate or for an eligible candidate's opponent, or if the report reasonably appears to be incorrect, the board may obtain a copy of the communication and, after examination, determine whether the expenditure was made against an eligible candidate ^{is opponent} or for an eligible candidate's opponent for purposes of sub. (3).

INSERT 15-13:

(3) An eligible candidate may utilize a line of credit to transfer any amount of money to his or her campaign depository account. No eligible candidate or agent of an eligible candidate may make any disbursement other than through the use of the fair election debit card or the campaign depository account. No eligible candidate or

agent of an eligible candidate may make a disbursement in the form of cash, but an eligible candidate or agent may make a disbursement in the form of cash in an amount not exceeding \$100 for the purpose of making disbursements in amounts not exceeding \$25. An eligible candidate shall maintain records of all cash disbursements and shall report such disbursements to the board in accordance with ss. 11.06 (1)[√] and 11.506.[√]

ANS 6-18

1 (7) "Exploratory period" means the period that begins after the date of a spring
2 election and ends on the first day of the public financing qualifying period for the next
3 election for justice.

4 (8) "Fair election debit card" means a debit card issued by the board in
5 accordance with s. 11.515 (2) entitling a candidate and agents of the candidate
6 designated by the candidate to draw money from an account maintained by the board
7 to make disbursements authorized by law.

8 (9) "Immediate family", when used with reference to a candidate, includes the
9 candidate's spouse and children.

10 (10) "Independent disbursement" means a disbursement by a person expressly
11 advocating the election or defeat of a clearly identified candidate which is made
12 without cooperation or consultation with a candidate, or any authorized committee
13 or agent of a candidate, and which is not made in concert with, or at the request or
14 suggestion of, any candidate, or any authorized committee or agent of a candidate.

15 (11) "Mass mailing" means a districtwide or statewide mailing of newsletters,
16 pamphlets, brochures or other similar items of more than 100 pieces in which the
17 content of the matter mailed is substantially identical. "Mass mailing" does not
18 include a mailing made in direct response to communications from persons to whom
19 the matter is mailed, a mailing to a federal, state or local government official or a
20 news release to communications media.

21 (12) "Noncomplying candidate" means a candidate for the office of justice who
22 does not apply for a public financing benefit or who otherwise is ineligible or fails to
23 qualify for a public financing benefit under ss. 11.502 to 11.522.

24 (13) "Personal funds" means funds contributed by a candidate or a member of
25 a candidate's immediate family.

SENATE BILL 181

INS 15-12

1 obligation to make such a disbursement. Any such person shall file reports of such
2 disbursements or obligations to make such disbursements on the 15th or last day of
3 the month that immediately follows the date of the disbursement or the obligation
4 to make the disbursement, whichever comes first, except that, within 6 weeks prior
5 to the date of the spring primary election, the person shall file such reports within
6 24 hours after each independent disbursement is made or obligated to be made. Any
7 such person shall file additional reports after each additional \$1,000 of
8 disbursements are made or obligated to be made.

9 (2) When the aggregate independent disbursements against an eligible
10 candidate for an office or for the opponents of that candidate exceed 20% of the public
11 financing benefit for that office in any campaign, the board shall immediately credit
12 that candidate's account with an additional line of credit equivalent to the total
13 disbursements made or obligated to be made, but not to exceed 3 times the public
14 financing benefit for the applicable office.

15 ~~11.515 Democracy trust fund.~~ (1) ~~The democracy trust fund shall be~~
16 ~~administered by the state treasurer.~~ The state treasurer shall contract with a debit
17 card issuer to permit eligible candidates and their agents to draw upon the fund
18 through an account with the issuer.

19 (2) Upon a determination of a candidate's eligibility for a public financing
20 benefit as provided for in s. 11.51 (1), the state treasurer shall issue to the eligible
21 candidate a ~~debit card, which shall be known as the~~ fair election debit card, ~~entitling~~
22 ~~the candidate and agents of the candidate designated by the candidate to draw~~
23 ~~money from an account to make disbursements on behalf of the candidate.~~

24 (3) ~~No eligible candidate or agent of an eligible candidate may make any~~
25 ~~disbursement by any other means other than through the use of the fair election~~

SENATE BILL 181

aws 17-10:1

1 correct the matter by informal methods within the time prescribed in sub. (3), the
2 board shall make a public finding of probable cause in the matter. After making a
3 public finding, the board shall bring an action in the circuit court for Dane County
4 to impose a forfeiture under sub. (1) or (2).

5 (5) If an elector believes that a candidate has violated ss. 11.502 to 11.522 and
6 the elector is entitled to vote for or against the candidate in the election in connection
7 with which the violation is alleged to occur, the elector may file a complaint with the
8 board requesting it to take remedial action. If the board refuses to take remedial
9 action or, within 30 days after the filing of such a complaint, fails to take remedial
10 action, the elector may commence a civil action in the appropriate circuit court under
11 sub. (4) requesting the court to impose a forfeiture under sub. (1) or (2).

12 (6) The board and courts shall expedite all proceedings under ss. 11.502 to
13 11.522 so that all complaints brought prior to an election are resolved, to the extent
14 possible, before the election is held.

15 (7) If a complaint brought under ss. 11.502 to 11.522 is resolved against the
16 complainant and is found to have been brought in bad faith and without reasonable
17 basis therefor, the board or court may assess costs, including reasonable attorney
18 fees, against the complainant.

19 **11.518 Prohibited acts.** (1) If a candidate or agent of a candidate knowingly
20 accepts more contributions than the candidate is entitled to receive, or makes
21 disbursements exceeding the amount of the public financing benefit received by the
22 candidate, the candidate or agent may be fined not more than \$25,000 or imprisoned
23 for not more than 5 years or both.

24 (2) If a candidate who receives a public financing benefit, or an agent of such
25 a candidate, knowingly makes a disbursement by means other than through use of

JWS 17-10:2

1 the fair election debit card, except as permitted under s. 11.515 (3), the candidate or
2 agent may be fined not more than \$25,000 or imprisoned for not more than 5 years
3 or both.

4 (3) If, in connection with the receipt or disbursement of a public financing
5 benefit for an election campaign, any person knowingly provides false information
6 to the board, or knowingly conceals or withholds information from the board, that
7 person may be fined not more than \$25,000 or imprisoned for not more than 5 years
8 or both.

9 **11.519 Mass mailings.** (1) No person may conduct any mass mailing using
10 state funds on behalf of any person who is a candidate for the office of justice at the
11 spring election during the period between December 1 preceding that election and
12 May 31 following that election.

13 (2) If any person uses state funds to conduct a mass mailing on behalf of any
14 person who is a candidate for the office of justice at the spring election during the
15 period between September 1 and November 30 preceding that election, the board
16 shall immediately credit the accounts of all other eligible candidates for justice on
17 behalf of whom the mailing is conducted with an additional line of credit equal to the
18 cost of printing and mailing of that mass mailing. The additional line of credit may
19 be used solely to fund a mailing promoting the candidacy of the candidate who
20 receives the credit.

21 (3) A candidate for justice at the spring election who plans to use state funds
22 for a mass mailing shall notify the board in writing of his or her intent to do so no later
23 than September 1 preceding the spring election, and shall complete the mailing no
24 later than the following November 30.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1551/1dn
JTK & RJM.....

WJ

Senator George:

In putting together this draft, we made several minor clarifications or policy judgments ^{of which} that you should be aware of. If the draft does not reflect your intent in any of the following cases, please let us know and we will revise it accordingly:

1. Concerning proposed ss. 11.501 and 11.502, this draft alters the instructions so that the certification and qualifying contributions are submitted under proposed s. 11.501, rather than proposed s. 11.502, prior to any primary election. Under the draft, within ⁷ ~~7~~ days after the date of any primary, a candidate must reapply for a public financing benefit for the election. The ^{second} ~~2nd~~ application need not contain any list of qualifying contributions. Under proposed s. 11.51 (4), per the instructions, if there is no primary election, the public financing benefit becomes available before the date that the primary would be held, if a primary were required.
2. This draft deletes proposed s. 11.505[✓] and part of proposed s. 11.51 (1)[✓], relating to agreements by candidates to comply with requirements, because we believe this is covered by proposed ss. 11.502 (1)[✓] and 11.503 (1)[✓] and the definition of "campaign" which is referenced in proposed s. 11.501 (2).[✓]
3. In the proposed revision of s. 11.51 (3) [^{STET} 11.51 (4) in this draft], we have substituted reference to the ^{Friday} after the 2nd Tuesday in January rather than ³ ~~3~~ days after the deadline for filing nomination papers because if there is a successful challenge to the papers of a candidate, the candidate would never be certified to have his or her name appear on the ballot. Normally, a challenge is resolved within ⁷ ~~7~~ ^{seven} days after the nomination paper filing deadline, which occurs on the first Tuesday in January, or the next day if Tuesday is January 1.
4. The instructions provided, and this draft specifies, in proposed s. 11.51 (4)[✓], that the elections board must determine a candidate's eligibility for a public financing benefit at the spring election no later than ² ~~2~~ ^{TWO} business days after the date of the spring primary. To harmonize with this change, this draft provides that a candidate must apply for a public financing benefit under proposed s. 11.503 (1)[✓] no later than the ^{day} after the primary, instead of the ^{7th} ~~7th~~ ^{seventh} day after the primary, as formerly provided. This procedure allows no time to sort out a close primary election result. A candidate may apply without knowing whether he or she has won the primary, but the board may not be able to act until it is certain of the primary result.

5. In proposed s. 11.51 (6), we have substituted the term "intentionally" for "knowingly and wilfully" because the term "intentionally" is defined in s. 11.01 (12), stats. Also, we have provided that any requirement to return public moneys shall be commensurate with the severity, rather than the scope, of the offense, because that is the current standard for determining whether to settle proposed civil forfeiture actions under s. 5.05 (1) (c), stats. We think the effect of this language is similar to the language in the instructions and is more consistent with current provisions.

6. Concerning proposed s. 11.512 (1), relating to reports by nonparticipating candidates, because the 60-day periods preceding the spring primary and the spring election, during which reporting frequency increases, overlap, this draft increases the reporting frequency 60 days before the date that the spring primary is held, or the date that the spring primary would be held if a primary were required to be held, and continues that reporting frequency through the date of the spring election.

7. The treatment by this draft of proposed s. 11.512 (2), relating to additional public financing benefits, attempts to address two issues that were not addressed in the instructions by providing that: a) the additional amount is based upon the total contributions received or the total disbursements made by the nonparticipating candidate, whichever amount is greater; and b) the maximum amount of the additional benefit is keyed to the amount of the public financing benefit for the primary, if the excess contributions are received or excess disbursements are made on or before the date that the primary is held or would be held if a primary were required, or for the election, if the contributions are received or the disbursements are made after that date.

8. Concerning the disclaimer that is required in communications by nonparticipating candidates under proposed s. 11.522 (2), the instructions did not specify whether to delete the 2nd sentence or delete the entire disclaimer. This draft deletes only the 2nd sentence so the disclaimer reads "This communication is paid for with money raised from private sources."

9. Because, under the instructions, the definition of "independent disbursement" is changed to sweep beyond what is currently considered a "disbursement" under s. 11.01 (7), stats., we are no longer able to use this term. We have used, instead, the term "independent expenditure". Concerning the language in the instructions to the effect that a non-independent disbursement is considered a contribution to the candidate who benefits from the disbursement, this is not specifically reflected in the draft because it reflects current law for all candidates. Section 11.06 (4) (d) and 11.12 (1) (a), stats.

See

10. Because this draft restores all language relating to lines of credit and the fair election debit card from the original 1999 SB-181, it also restores the prohibited act in proposed s. 11.518 (2), relating to making disbursements by means other than through use of the fair election debit card, with certain exceptions.

11. Concerning the need for a definition of "person", the L.R.B. does not include definitions of this term in drafts because we use the standard definition in s. 990.01 (26), stats, and the legally accepted definition of the term, which includes both natural persons (individuals) and unnatural persons.

12. For this draft, we have included two appropriations for administration but have specified "\$-0-" for expenditure in fiscal years 2001-02 and 2002-03. When you know the dollar amounts that you need to include in the proposal, contact us and we will either redraft the proposal or draft an amendment, whichever is appropriate.

In addition, we would like to briefly note the following legal issues:

Note In considering this issue, please be aware that the executive budget bill, if enacted after this bill, may eliminate any funding for these appropriations.

DN, p. 3

LRB-0311/3dn
JTK/RJM/MES/JK:kg:km

1.

ss. 11.501(10) and 11.513

10-7. 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 ^{that} 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

- 2 -

^{persons} committees that make certain ~~mass~~ communications ^{during certain periods} within ~~60 days of an election~~ containing a name or likeness of a candidate at that election, an office to be filled at that election or a 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*, 168F. 3d 705 (4th Cir. 1999), cert. denied, 120 S. Ct. 1156 (2000), in which the court voided North Carolina's attempt to regulate issue advocacy as inconsistent with *Buckley*.

reference to a candidate for the office of Justice



dmp 4
DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

-1551/ldn
LRB-3024/ldn

JTK/wlj:km

+ RJM

May 6, 1999

21
M. In *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1151 (1995), the U.S. Supreme Court found unconstitutional, under the First Amendment, a statute that prohibited publication or distribution of any material designed to promote the nomination or election of a candidate or the adoption or defeat of any issue or to influence the voters at any election without identification of the name and address of the person who publishes or distributes the material. The court, however, indicated that a state's interest in preventing fraud might justify a more limited disclosure requirement (115 S.Ct. at 1522). Further, the court indicated that it still approved of requirements to disclose independent expenditures, which it upheld in *Buckley v. Valeo*, et. al., 96 S.Ct. 612, 661-662 (1976), (*McIntyre*, 115 S.Ct. at 1523). In view of this opinion, the constitutionality of disclosure statutes such as proposed s. 11.522, relating to labeling of certain political communications by candidates for the office of justice of the supreme court who fail to qualify for a public financing benefit is not clear at this point. We will have to await further decisions from the court before we know the exact limits of a state's ability to regulate in this field.

3. 12. Proposed ss. 11.512 (2) and 11.513 (3), which increase the public financing benefit available to a candidate for the office of justice when independent disbursements are made against the candidate or for his or her opponents, or when the candidate's opponents make disbursements exceeding a specified level, may result in an abridgement of the First Amendment rights of the persons making the disbursements. See *Day v. Holahan*, 34 F.3d 1356 (8th Cir., 1994), in which a Minnesota law that included provisions similar to proposed ss. 11.512 (2) and 11.513 (2) 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.

4B. Proposed s. 11.512 (1), which imposes additional reporting requirements upon candidates for the office of justice of the supreme court who fail to qualify for a public financing benefit, may raise an equal protection issue under the 14th Amendment to the U.S. Constitution.

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-1551/1dn

LRB-03113dn

JMK:JAMES/K:kg:km

If you need further information or would like to make any changes based on the above information, please let us know.

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EWSD3A

LRB-0311/3dn
JTK/RJM/MES/JK:kg:km

NOIP

Although relevant case law has developed regarding this issue in the federal courts of appeal, there is no consensus among these courts on this issue. Due to the unsettled nature of the law in this area, it is not possible to predict how a court would rule if proposed s. ~~11.50(9)(b) or (ba)~~ were challenged.

11.512(2) ^{or} ~~or~~ 11.513(3)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1551/1dn
JTK&RJM:wlj:pg

January 18, 2001

Senator George:

In putting together this draft, we made several minor clarifications or policy judgments of which you should be aware. If the draft does not reflect your intent in any of the following cases, please let us know, and we will revise it accordingly:

1. Concerning proposed ss. 11.501 and 11.502, this draft alters the instructions so that the certification and qualifying contributions are submitted under proposed s. 11.501, rather than proposed s. 11.502, prior to any primary election. Under the draft, within seven days after the date of any primary, a candidate must reapply for a public financing benefit for the election. The second application need not contain any list of qualifying contributions. Under proposed s. 11.51 (4), per the instructions, if there is no primary election, the public financing benefit becomes available before the date that the primary would be held, if a primary were required.
2. This draft deletes proposed s. 11.505 and part of proposed s. 11.51 (1), relating to agreements by candidates to comply with requirements, because we believe this is covered by proposed ss. 11.502 (1) and 11.503 (1) and the definition of "campaign," which is referenced in proposed s. 11.501 (2).
3. In the proposed revision of s. 11.51 (3) [11.51 (4) in this draft], we have substituted reference to the "Friday after the 2nd Tuesday in January" rather than three days after the deadline for filing nomination papers because if there is a successful challenge to the papers of a candidate, the candidate would never be certified to have his or her name appear on the ballot. Normally, a challenge is resolved within seven days after the nomination paper filing deadline, which occurs on the first Tuesday in January, or the next day if Tuesday is January 1.
4. The instructions provided, and this draft specifies, in proposed s. 11.51 (4), that the elections board must determine a candidate's eligibility for a public financing benefit at the spring election no later than two business days after the date of the spring primary. To harmonize with this change, this draft provides that a candidate must apply for a public financing benefit under proposed s. 11.503 (1) no later than the *day after* the primary, instead of the seventh day after the primary, as formerly provided. This procedure allows no time to sort out a close primary election result. A candidate may apply without knowing whether he or she has won the primary, but the board may not be able to act until it is certain of the primary result.

5. In proposed s. 11.51 (6), we have substituted the term "intentionally" for "knowingly and willfully" because the term "intentionally" is defined in s. 11.01 (12), stats. Also, we have provided that any requirement to return public moneys shall be commensurate with the severity, rather than the scope, of the offense because that is the current standard for determining whether to settle proposed civil forfeiture actions under s. 5.05 (1) (c), stats. We think the effect of this language is similar to the language in the instructions and is more consistent with current provisions.

6. Concerning proposed s. 11.512, relating to reports by nonparticipating candidates, because the 60-day periods preceding the spring primary and the spring election, during which reporting frequency increases, overlap, this draft increases the reporting frequency to 60 days before the date that the spring primary is held, or the date that the spring primary would be held if a primary were required to be held, and continues that reporting frequency through the date of the spring election.

7. The treatment by this draft of proposed s. 11.512 (2), relating to additional public financing benefits, attempts to address two issues that were not addressed in the instructions by providing that: a) the additional amount is based upon the total contributions received *or* the total disbursements made by the nonparticipating candidate, whichever amount is greater; and b) the maximum amount of the additional benefit is keyed to the amount of the public financing benefit for the primary, if the ~~exccss~~ contributions are received or excess disbursements are made on or before the date that the primary is held or would be held if a primary were required, or for the election, if the contributions are received or the disbursements are made after that date.

8. Concerning the disclaimer that is required in communications by nonparticipating candidates under proposed s. 11.522 (2), the instructions did not specify whether to delete the second sentence or to delete the entire disclaimer. This draft deletes only the second sentence so the disclaimer reads "This communication is paid for with money raised from private sources."

9. Because, under the instructions, the definition of "independent disbursement" is changed to sweep beyond what is currently considered a "disbursement" under s. 11.01 (7), stats., we are no longer able to use this term. We have used, instead, the term "independent expenditure." Concerning the language in the instructions to the effect that a non-independent disbursement is considered a contribution to the candidate who benefits from the disbursement, this is not specifically reflected in the draft because it reflects current law for all candidates. See section 11.06 (4) (d) and 11.12 (1) (a), stats.

10. Because this draft restores all language relating to lines of credit and the fair election debit card from the original 1999 SB-181, it also restores the prohibited act in proposed s. 11.518 (2), relating to making disbursements by means other than through use of the fair election debit card, with certain exceptions.

11. Concerning the need for a definition of "person," the L.R.B. does not include definitions of this term in drafts because we use the standard definition in s. 990.01 (26), stats., and the legally accepted definition of the term, which includes both natural persons (individuals) and unnatural persons.

12. For this draft, we have included two appropriations for administration but have specified "\$-0-" for expenditure in fiscal years 2001-02 and 2002-03. When you know the dollar amounts that you need to include in the proposal, contact us and we will either redraft the proposal or draft an amendment, whichever is appropriate. In considering this issue, please be aware that the executive budget bill, if enacted after this bill, may eliminate any funding for these appropriations.

In addition, we would like to briefly note the following legal issues:

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 that 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 ss. 11.501 (10) and 11.513, which require reporting by persons that make certain communications during certain periods containing a reference to a candidate for the office of justice, appears to extend beyond the boundaries that 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*, 168F. 3d 705 (4th Cir. 1999), cert. denied, 120 S. Ct. 1156 (2000), in which the court voided North Carolina's attempt to regulate issue advocacy as inconsistent with *Buckley*.

2. In *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1151 (1995), the U.S. Supreme Court found unconstitutional, under the First Amendment, a statute that prohibited publication or distribution of any material designed to promote the nomination or election of a candidate or the adoption or defeat of any issue or to influence the voters at any election without identification of the name and address of the person who publishes or distributes the material. The court, however, indicated that a state's interest in preventing fraud might justify a more limited disclosure requirement (115 S.Ct. at 1522). Further, the court indicated that it still approved of requirements to disclose independent expenditures, which it upheld in *Buckley v. Valeo, et. al.*, 96 S.Ct. 612, 661-662 (1976), (*McIntyre*, 115 S.Ct. at 1523). In view of this opinion, the constitutionality of disclosure statutes such as proposed s. 11.522, relating to labeling of certain political communications by candidates for the office of justice of the supreme court who fail to qualify for a public financing benefit, is not clear at this point. We will have to await further decisions from the court before we know the exact limits of a state's ability to regulate in this field.

3. Proposed ss. 11.512 (2) and 11.513 (3), which increase the public financing benefit available to a candidate for the office of justice when independent expenditures are made against the candidate or for his or her opponents, or when the candidate's

opponents make disbursements exceeding a specified level, may result in an abridgement of the First Amendment rights of the persons making the expenditures or disbursements. Although relevant case law has developed regarding this issue in the federal courts of appeal, there is no consensus among these courts on this issue. Due to the unsettled nature of the law in this area, it is not possible to predict how a court would rule if proposed s. 11.512 (2) or 11.513 (3) were challenged.

4. Proposed s. 11.512 (1), which imposes additional reporting requirements upon candidates for the office of justice of the supreme court who fail to qualify for a public financing benefit, may raise an equal protection issue under the 14th Amendment to the U.S. Constitution.

If you need further information or would like to make any changes based on the above information, please let us know.

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Gretschmann, Karen

From: Gretschmann, Karen
Sent: Friday, January 19, 2001 10:58 AM
To: Engel, Katharine Mary
Subject: 01-1551/1



01-1551/1



01-1551/1dn

*Karen Gretschmann
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Notes from meeting 1/31/01 for redraft of LRB-1551:

1. Delete special disclaimer by nonparticipating candidates.
2. Nonparticipating candidates need report total amounts only – no itemization required.
3. Contribution limitations \$5,000 individuals and \$5,000 committees.
4. Effective date 7/1/01, or the day after publication, whichever is later.
5. Lawful contributions accepted by a participating candidate prior to the effective date may be retained and spent, but they are deductible from the public financing benefit received.
6. Reports of independent expenditures during the last ¹⁵ ~~14~~ days at 24 hour intervals.
7. No special reports by nonparticipating candidates are required if no candidate qualifies for and accepts a public financing benefit.
8. Nonseverability a. Matching supplements for communications by independent expenditure and issue advocacy may not be severed to permit supplementation of one but not the other.
b. If match for disbursements by nonparticipating candidates is found to be invalid, then entire act is invalid.
9. Qualifying contributions – minimum 500 individuals – no residency required – in amounts of \$10 to \$100.
10. Define “communication” to exclude polling, except persuasive polling.
11. If any ^{report concerning support or opposition in respect to an “issue advocacy” expenditure} ~~communication subject to match~~ contains a misstatement of fact, there is no legal consequence.
12. Delete requirement for ^{receipts +} ~~acknowledgements on~~ ^{page 9, sub. (4) +} page 11, sub. (7).
13. In addition to \$25,000 maximum, permit private contributions to be accepted by an eligible candidate if spent for legal expenses in connection with civil investigation or prosecution for violation of campaign finance law, payment of civil penalties, recount expenses or inaugural expenses.
14. Allow candidates to file applications for public financing benefits within 10 days of the nomination paper filing deadline. Allow any person to challenge within 3 business days of the application deadline. Permit candidates to supplement their qualifying contributions, within the overall limit, in a number not exceeding the number of qualifying contributions challenged, within 5 business days of the application deadline. ^{Board must decide within 24 hours. (May delay grant)}
15. For cost-of-living adjustment, apply voting age population as a 2nd factor, per Kettl Commission recommendations.
16. Permit match of independent expenditures for communications only.
17. Include legislative findings to be submitted.

Kuesel, Jeffery

From: Kuesel, Jeffery
Sent: Friday, February 02, 2001 1:49 PM
To: Rossmiller, Dan
Cc: Marchant, Robert
Subject: RE: Impartial Justice Questions

Dan,

I think your memo does a pretty good job of explaining the outstanding questions. Last night I managed to get through the other items, so once you get back with the answers and the findings language, it shouldn't take too much longer to produce a /2 draft. The changes are so pervasive and the level of concern with detail is so great, however, that I think you need to build in some "digestion" time for the /2 draft and potentially some time to go to a /3.

Jeff

-----Original Message-----

From: Rossmiller, Dan
Sent: Friday, February 02, 2001 12:00 PM
To: Kuesel, Jeffery
Subject: FW: Impartial Justice Questions

Jeff:

Here's a copy of the message I sent out to the interested parties. I may have missed the mark on item 3. I talked to Ron and he suggested the point of dispute is whether to allow contributions from non-residents to count as qualifying contributions. Let me know and I will repoll the participants.

Dear _____:

I received a call from Jeff Kuesel, the LRB drafting attorney. He had a series of questions on points he was unclear about either because they weren't addressed or because he was uncertain whether a consensus was reached. (All page and line references are to LRB 1551/1)

1. Reporting of Financial Activity by Non-participating Candidates (Newly created Section 11.512)

At page 16, line 4: Should we keep the reporting requirement at 48 hours?

(Question arose because we had changed the reporting in newly created s. 11.513 to conform it to existing law... i.e., 24 hours if made within 15 days of the date of the election)

2. Acknowledgement of Contributions by Participating Candidates (Newly created Section 11.502 (4))

At page 9, lines 17-23: Do we want to keep the language requiring acknowledgement? If not, what kind of documentation requirement do we want? Do we want to require some form of verification (i.e., require contributions to be made by check, require that photocopies of checks be made?)

(Question arose because we specifically agreed to delete the acknowledgement/ receipt requirement in newly created s. 11.506 (7) but did not address the language in newly created s. 11.502 (4).)

3. Residency Requirement for Qualifying Contributions (Newly created Section 11.502 (2))

At page 9, lines 9-13. There was considerable discussion about requiring a candidate to receive qualifying contributions from at least 500 Wisconsin residents in amounts equal to not less than \$10 nor more than \$100, but neither the drafter, Mr. Kuesel, nor Mr. Sklansky was certain that a consensus had been reached. There was some discussion about such a provision making the bill more politically salable. Do we want such language in the bill or not?

4. Exception for Makers of Independent Expenditures and Issue Advocacy From the Prohibition Against Making False Statements

There was some discussion about excepting the maker of an I.E. or and I.A. from any consequences if the communication contains a misstatement or an alleged falsehood.

(Question arose because this could involve amending a criminal statute, this might cause concern. From a political standpoint, do we want to say in this bill that "there is no consequence for making a false statement"?)

Please let me know what your people think. Thanks.

Dan

Dan Rossmiller
Chief of Staff
Office of Senator Gary R. George
608-266-2500
877-474-2000 (toll free)

Kuesel, Jeffery

From: Rossmiller, Dan
Sent: Wednesday, February 07, 2001 12:38 PM
To: Kuesel, Jeffery
Subject: RE: Impartial Justice

Jeff:

I agree with you on point #1.

On point #4, I think the latter approach may be preferable... as long as we can define the communications to which the exception applies narrowly. Perhaps it would allow those communications which would not be considered independent expenditures but for the new definition created in the bill. As a practical matter either approach would work.

Dan

I will forward the suggestions on legislative findings of fact language to you as I receive them. Do you have any sense as to when the present draft will be completed?

-----Original Message-----

From: Kuesel, Jeffery
Sent: Tuesday, February 06, 2001 9:05 PM
To: Rossmiller, Dan
Cc: Marchant, Robert
Subject: RE: Impartial Justice

Dan,

1. Re #1, I think you probably do not want a 15-day start date for the reports from the nonparticipating candidates. I thought this was only for independent spenders (page 17, line 4). For the nonparticipating candidates, my tentative markup calls for the reports to start 7 days after the board notifies a candidate that his or her opponent has qualified for a public financing benefit. There would be a potential hiatus between the date of the primary and the date that it is determined that one of the candidates has qualified for a benefit for the election. The reports would be due 24 hours after the contribution was received or disbursement made, if this change is inserted.

2. Re #4, I wonder if you want to ask the independent spenders whether they are supporting or opposing and then provide no penalty for falsifying the information, or you want to let them claim that they are neither supporting or opposing and let the board decide. The practical effect may be the same, because if there is no penalty, they may refuse to answer the question.

Jeff

-----Original Message-----

From: Rossmiller, Dan
Sent: Tuesday, February 06, 2001 8:47 PM
To: Kuesel, Jeffery
Subject: Impartial Justice

Here are some comments in response to my questions that I thought I would share with you:

RE: Question #1 Reporting of Financial Activity by Non-participating Candidates
(Newly created Section 11.512)

IT WAS AGREED THAT WE WILL CHANGE THE REPORTING TO MIRROR CURRENT REQUIREMENTS FOR I.E.'s, SO IT WILL BE 24 HOURS IF MADE WITHIN 15 DAYS OF THE ELECTION.

RE: Question #2 Acknowledgement of Contributions by Participating Candidates
(Newly created Section 11.502 (4))

MY UNDERSTANDING WAS THAT THE WRITTEN ACKNOWLEDGMENT REQUIREMENT WOULD BE REMOVED FROM BOTH SECTIONS, AS THE CONCERN WAS THE EXCESSIVE BURDEN ON THE CANDIDATE. MY NOTES REFLECT THAT A FINAL DECISION WAS NOT MADE ON PRECISELY WHAT RECORDS TO REQUIRE, BUT I THINK REQUIRING A CANDIDATE TO MAINTAIN A LIST OF THE CONTRIBUTORS, WITH ADDRESSES, WILL ALLOW THE BOARD TO AUDIT

COMPLIANCE UNDER PROPOSED 11.502(3) (page 9, lines 14-16).

RE: Question #3 Residency Requirement for Qualifying Contributions (Newly created Section 11.502 (2))

CONSENSUS WAS REACHED TO REQUIRE AT LEAST 500 CONTRIBUTIONS FROM WISCONSIN RESIDENTS. IT WAS AGREED THAT THERE WERE NO CONSTITUTIONAL CONCERNS AS LONG AS NON-RESIDENTS COULD STILL CONTRIBUTE SEED MONEY TO THE CANDIDATES.

RE: Question #4 Exception for Makers of Independent Expenditures and Issue Advocacy
>From the Prohibition Against Making False Statements

THERE NEEDS TO BE SOME LANGUAGE, PRESUMABLY IN 11.60 AND 11.61, EXEMPTING THE SPECIFIC REPORTING REQUIREMENT OF 11.513(2)(b) FROM ANY CIVIL OR CRIMINAL PENALTY. THE CONCERN ONLY RELATES TO THE REQUIREMENT THAT THE PARTY REPORT WHETHER THE COMMUNICATION IS INTENDED TO SUPPORT OR OPPOSE A SPECIFIED CANDIDATE. THERE SHOULD STILL BE A POTENTIAL PENALTY ATTACHED TO REPORTING A FALSE AMOUNT (11.513(2)(c)) OR FAILING TO FILE A REPORT AT ALL.

3 sweats only - may claim not to be supporting or opposing

Dan Rossmiller
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Kuesel, Jeffery

From: Rossmiller, Dan
Sent: Friday, February 02, 2001 6:49 PM
To: Kuesel, Jeffery
Subject: Comments on Proposed section 11.513 (4)

Jeff:

Thanks for all your good work.

Here are the comments regarding the subject of declaring whether an "issue ad" that would be an independent expenditure under the definition in the bill is in support of or opposition to a candidate:

"since we are asking the groups that are making issue ads to state their intended political victims, it seems to me that when the group says the ads do not support or oppose any candidate that there can be no possible charges even though the board disagrees. otherwise the board might be reluctant to disagree because of the possible penalty. (an unintended consequence) or the group might argue that they are required to make a statement which would bring them under the law of independent expenditure for fear of being prosecuted for a false statement even though the ad does not use any of the magic words and therefore the self reporting law is unconstitutional. what the board and the public needs is the financial information and the fact that ads are running. this is more important than whether the group properly describes their actions as for or against a candidate or is really an issue ad. "

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