DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB−1600/1dn
JTK:kjf:rs

January 20, 2009

Representative Hintz:

1. This draft includes two appropriations for which I have specified "$−0−" for expenditure in fiscal years 2009−10 and 2010−11. When you know the dollar amounts that you need to include in the proposal, contact me and I will either redraft the proposal or draft an amendment, whichever is appropriate. Because the biennial budget act repeals and recreates the appropriation schedule under s. 20.005 (3), stats., if the bill resulting from this draft becomes law before enactment of the budget act and the budget act does not include the funding provided in this draft, the effect will be to eliminate the funding provided in this draft. To preserve the funding of these positions, you may wish to seek inclusion of the funding in the biennial budget bill.

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. The lower federal courts have disagreed as to whether statutes such as proposed ss. 11.512 (2) and 11.513 (2), which increase the public financing benefit available to a candidate for the office of justice of the supreme court 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. See also *Daggett v. Comm. on Governmental Ethics and Election Practices*, 205 F. 3d 445, 463–65, 467–69 (1st Cir., 2000), in which a similar law in Maine was not found to abridge the First Amendment. The U.S. Supreme Court has not yet spoken on this issue.

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, will likely be found unenforceable as a result of a recent decision of the U.S. Supreme Court in *Davis v. F.E.C.*, 128 S. Ct. 2759 (2008), where the court held at p. 2767, that asymmetric disclosure requirements imposed by a statute upon two different candidates for the same office at the same election contravene the First Amendment because they impose a substantial burden upon the right of candidates to use personal funds [or implicitly, nonpublic funds] that is not justified by any compelling state interest.

Jeffery T. Kuesel
Managing Attorney
Phone: (608) 266–6778