WISCONSIN LEGISLATIVE COUNCIL
AMENDMENT MEMO

2009 Senate Bill 43	Senate Substitute Amendment 1
Memo published: **September 18, 2009**	*Contact*: **Ronald Sklansky, Senior Staff Attorney (266-1946)**

Background

In 2002, the federal Bipartisan Campaign Reform Act of 2002 (BCRA) was enacted. Among other things, the new law regulated "electioneering communications." An "electioneering communication" was defined to mean a communication referring to a clearly identified candidate for a federal office that is made within 60 days before a general, special, or runoff election or 30 days before a primary or a preference selection, or a convention or a caucus of a political party that has authority to nominate a candidate. The law also provided that every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year must, within 24 hours of each disclosure date, file a statement. The statement must include names and addresses of all contributors who contributed at least $1,000 to the account during the preceding calendar year and ending on the disclosure date. Finally, BCRA provided that corporations and labor organizations may not make any direct or indirect payment for an electioneering communication. [See 2 U.S.C. ss. 434 (f) (1) to (3), and (5) and (g) (1) and 441b (a) and (b) (2).]

In *McConnell v. FEC,* 540 U.S. 93 (2003), the U.S. Supreme Court upheld the constitutionality of that provision of BCRA that prohibits a corporation or labor union from funding an electioneering communication. The constitutional attack on this provision of BCRA was a facial challenge rather than a challenge to the application of the law to a particular set of facts.

On June 25, 2007, the U.S. Supreme Court issued its decision in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007). The court held that the BCRA provision prohibiting a corporation or labor union from making contributions or expenditures for an electioneering communication was unconstitutional as applied to certain television and radio ads prepared for Wisconsin Right to Life, Inc., in July of 2004. The court stated that the government may only prohibit corporate and labor union express advocacy or its functional equivalent. With respect to the latter term, the court stated that "an ad is the functional equivalent of express advocacy only if the ad is susceptible

of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Using this standard, the court found that the ads in question were not express advocacy or its functional equivalent. The court found that the ads were consistent with genuine issue ads because the ads highlighted a legislative issue and advocated a position on the issue. Further, the ads did not mention an election, political party, candidacy, or challenger. The court did not make any holding with respect to BCRA's requirement that disbursements for an electioneering communications must be reported.

Senate Bill 43

Senate Bill 43 provides that a communication is made for a political purpose when it is made by means of one or more communications media during the period beginning on the 60th day preceding an election and ending on the date of that election and that includes a reference to a candidate whose name is certified to appear on the ballot at that election, a reference to an office to be filled at that election, or a reference to a political party. Because the communication is an act done for a political purpose, the normal reporting requirements of ch. 11, Stats., apply to such a communication.

The bill also provides that a communication is not made for a political purpose, and therefore not subject to reporting requirements under ch. 11, Stats., if it does all of the following:

1. Does not mention an election, candidacy, opposing candidate, political party, or voting by the general public.

2. Does not take a position on a candidate's or officeholder's character, qualifications, or fitness for office.

3. Does either of the following:

    a. Focuses on a legislative or executive matter or issue and urges a candidate to take a particular position or action with respect to the matter or issue or urges the public to contact a candidate with respect to the matter or issue; or

    b. Proposes a commercial transaction, such as the purchase of a book, video, or other product or service.

A communication that meets the conditions described above nevertheless will be considered to be made for a political purpose if the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a candidate for state or local office whose name is certified to appear on the ballot at the election.

Senate Substitute Amendment 1

The substitute amendment makes the following changes to Senate Bill 43:

1. The substitute amendment provides that a mass communication is made for a political purpose when it is made by means of one or more communications media during the period beginning on the 60th day preceding an election and ending on the date of that election and that includes a reference to a candidate whose name is certified to appear on the ballot at that election, a reference to an office to be filled at that election, or a reference to a political party. Because the communication is an act done for a political purpose, the normal reporting requirements of ch. 11, Stats., apply to such a communication. The term "mass communication" generally is defined to mean a message that is disseminated by means of one or more communications media, a mass electronic communication, a mass distribution, or a mass telephoning. In turn, a mass distribution, mass electronic communication, or mass telephoning occurs when 50 or more pieces of paper, electronic mail, or facsimile transmission, or telephone calls carry a substantially identical message. Current s. 11.01 (5), Stats., defines the term "communications media" to mean newspapers, periodicals, commercial billboards, and radio and televisions stations.

2. The substitute amendment restates the specific type of communication that is considered not to be made for a political purpose. Generally, a mass communication is not made for a political purpose when it either focuses on and takes a position on a legislative or executive issue and urges the public to adopt the position and to contact one or more public officials about the issue or proposes a commercial transaction and does not do any of the following:

a. Supports or opposes a candidate's record on an issue.

b. Mentions an election, a candidacy, an opposing candidate, a political party, or voting by the general public.

c. Takes a position on a candidate's character, qualifications, or fitness for office.

Again, the communication described above nevertheless will be considered to be made for a political purpose if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a candidate whose name is certified to appear on a ballot at an election.

3. The substitute amendment specifically treats mass communications made about judicial matters. The declaration of policy relating to ch. 11, Stats., is amended to state that the Legislature finds and declares that the function of judges and justices, who must independently apply the law, is fundamentally distinct from that of elective legislative and executive branch officials who take positions on issues that are influenced by, and represent the will of, their constituencies. The substitute amendment states that because it is improper for a mass communication to seek to persuade a judge or justice to take a position on an issue, any such communication should be deemed to have been made for a political purpose. Consequently, the substitute amendment specifically provides that a mass communication is made for a political purpose when it refers to a judicial office and either focuses on and takes a position for or against a judicial candidate's position on an issue or takes a position on that judicial candidate's character, qualifications, or fitness for office. Because this communication is made

for a political purpose, the normal reporting requirements of ch. 11, Stats., apply to such a communication.

Legislative History

On September 15, 2009, the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing adopted Senate Substitute Amendment 1 to Senate Bill 43 on a vote of Ayes, 4; Noes, 1, and recommended passage of the bill, as amended, on a vote of Ayes, 3; Noes, 2.

RS:jal