

SBM STATE BAR OF MICHIGAN

p 517-346-6300 September 11, 2013

p 800-968-1442 The Honorable Ruth Johnson

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Executive Office

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48933-2012

Re: Declaratory Ruling Request Concerning Practical and Ethical Implications for Michigan Judicial Candidates of a 2004 Interpretive Statement by the Secretary of State in the wake of three U.S. Supreme Court decisions—*Federal Election Commission v Wisconsin Right to Life*, *Caperton v Massey Coal Company*, and *Citizens United v Federal Election Commission*

Dear Secretary Johnson:

As provided in Section 15(1)(e) and (2) of the Michigan Campaign Finance Act, PA 388 of 1976 (“the MCFA”), as amended, MCL 169.201, *et seq.* and in Rule 169.6 of the Michigan Administrative Code, we write to request a declaratory ruling as to the applicability of the MCFA in light of three recent U.S. Supreme Court decisions. We note that Section 15(2) indicates that if the Department of State does not issue a declaratory ruling, it must provide an informational response to the questions presented within the same time limitations applicable to a declaratory ruling. For reasons stated below, we believe that a ruling is urgently required.

Statement of Facts

1. The State Bar of Michigan is a public body corporate comprised of all persons licensed to practice law in the state of Michigan, including the judges of the state’s trial and appellate courts.
2. The members of the State Bar of Michigan are interested parties whose course of action in upcoming judicial elections and in subsequent disqualification decisions would be affected by a declaratory ruling as to the applicability of the MCFA and recent case law to electioneering communications concerning judicial candidates.
3. Although Michigan law generally requires those making political “expenditures” to disclose the source of funding for such expenditures, the Department of State advised in an interpretive statement dated April 20, 2004 (attached) that payments for issue advocacy advertisements fall outside of the MCFA’s definition of “expenditure.” As a result, Michigan voters and even the candidates themselves do not necessarily know the source of funding for issue advocacy advertisements. Notably, in judicial elections since 2004, a steadily growing percentage of campaign ads has been funded by undisclosed sources, to the point that three-quarters of the spending in the 2012 race for the Oakland County Circuit Court and in the 2012 Supreme Court races came from undisclosed sources.
4. The Department of State’s 2004 interpretive statement did not distinguish between political advertisements concerning executive and legislative candidates and those concerning judicial candidates. The State Bar believes that three U.S. Supreme Court cases decided after the 2004 interpretive ruling—*Federal Election Commission v Wisconsin Right to Life* (2007), *Caperton v Massey Coal Company* (2009), and *Citizens United v FEC* (2010)—necessitate clarifying that ruling to exempt advertisements concerning judicial candidates from its scope so that such communications fall within the definition of “expenditure” for purposes of MCFA disclosure requirements. *Federal Election Commission v Wisconsin Right to Life* described authentic issue advocacy as an effort to motivate viewers to contact a public

The Honorable Ruth Johnson
September 11, 2013
Page 2 of 3

official to act on a matter of policy. Such advocacy does not apply to judicial candidates. *Caperton v Massey Coal Company* established that a judge who rules in cases involving the judge's major campaign finance supporter deprives the opposing party of his or her due process right to an impartial court hearing. When the source of judicial campaign electioneering expenditures is hidden from the public, parties cannot know whether their due process rights are compromised by their opponents' campaign support for the judge hearing their case. Finally, *Citizens United v Federal Election Commission*, at the same time that it expanded the role of corporations and unions in election funding, explicitly recognized that disclosure of the source of the funding allows citizens to react to the speech in a "proper way."

5. As lawyers and judges, members of the State Bar of Michigan are affected by the 2004 interpretive statement only as it relates to judicial campaigns. The State Bar does not seek clarification beyond judicial campaigns, or anything other than prospective clarification.

Discussion

MCFA defines "expenditure" to include any "payment of money or anything of ascertainable monetary value...in assistance of, or in opposition to, the nomination or election of a candidate" and requires that such expenditures be disclosed to the public. The statute, however, contains an exception to the definition of "expenditure" "for communication on a subject or issue if the communication does not support or oppose a ballot question or candidate by name or clear inference." The Department of State explained in its 2004 interpretive statement that this exception to the definition of "expenditure" applies to "all non-express advocacy communications." The Department of State detailed and applied the long-running distinction in campaign finance law between express candidate advocacy on one hand and issue advocacy on the other, and interpreted the MCFA definition of "expenditure" as encompassing the former, but not the latter.

More recently, however, the U.S. Supreme Court's 2007 decision in *Federal Election Commission v Wisconsin Right to Life* further clarified the legal line between express advocacy and issue advocacy. Under *Wisconsin Right to Life*, a political ad is considered express advocacy or its "functional equivalent" if it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

What other purpose might someone have to make expenditures concerning candidates during a campaign than to urge their election or defeat? Under the *Wisconsin Right to Life* standard, the answer can be that someone might be attempting to educate the public about an issue on which an officeholder who happens to be running for reelection will soon be voting. The Court in *Wisconsin Right to Life* explained that "genuine issue ad[s]" "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter." The standard formula for this type of ad is one that describes a public policy or position, such as support for legislation on education, and then concludes with "Tell Rep. X to stand up for Michigan's children by supporting the Educate MI Act."

The Supreme Court's explanation of issue ads—which are exempt from the MCFA definition of "expenditure" under the 2004 interpretive statement—makes clear that no ads identifying candidates for judicial office can fairly be described as issue ads. A judicial candidate, unlike other candidates for elective public office, is not in a position to be lobbied on issues. A judge's decisions must be driven solely by the facts of the case before the court and by the law as it applies to those facts. If our system of justice is to have integrity and the confidence of the public, the only issue advocacy directed at a judge must take place within the courtroom. Because a judge may not constitutionally be influenced by public advocacy, it is not reasonable to interpret "issue ads" as efforts to influence judicial behavior rather than voter behavior. For these reasons, payments for advertising related to judicial candidates do fall within the scope of the MCFA definition of "expenditure" and can never constitute issue advocacy exempt from that definition.

There is another related and equally serious reason why advertising in judicial campaigns must not be exempted from disclosure, and that is the shadow that secret judicial electioneering casts on the appearance of judicial impartiality. In *Caperton v Massey Coal Company*, the U.S. Supreme Court recognized that "there is a serious risk of actual bias when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." To determine whether a campaign expenditure rises to the level where the candidate-beneficiary ought to be disqualified in a future case, the candidate and the public must know where the funds for the expenditure came from, what percentage of the total expenditures for the candidate they constituted, and whether the funder had a case or cases pending in the court for which the candidate seeks a seat. Unless disclosure is required in judicial campaigns, the public's ignorance

The Honorable Ruth Johnson
September 11, 2013
Page 3 of 3

about the expenditures is complete: no one knows the answers to any of these questions. A Michigan court rule, MCR 2.003, makes the judges' obligations under *Caperton* clear and shows why it is important that the source of judicial expenditures be disclosed:

Rule 2.003 Disqualification of Judge

- (A) Applicability. This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply only to judges of a certain court. The word "judge" includes a justice of the Michigan Supreme Court.
- (B) Who May Raise. A party may raise the issue of a judge's disqualification by motion or the judge may raise it.
- (C) Grounds.
- (1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:
- (a) The judge is biased or prejudiced for or against a party or attorney.
- (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, US ___ ; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct....

As *Caperton* notes, codes of conduct like this serve to maintain the integrity of the judiciary and the rule of law. In the absence of disclosure, however, a judge who has prevailed in a campaign in which there were significant undisclosed electioneering expenses may not be able to determine whether grounds for disqualification under this rule exist, or to defend himself or herself against suspicions of bias or favor. Nor can parties appearing before a judge and the lawyers who represent them determine whether they have grounds to make a motion under MCR 2.003(B)(c)(1)(b).

There is no First Amendment impediment to the clarification we seek. For the reasons stated above, we believe that all advertising in judicial campaigns is the functional equivalent of express advocacy for purposes of MCFA. Even if that were not so, *Citizens United* made clear that disclosure requirements do not have to be limited to express advocacy and its functional equivalent, and that disclosure is the less restrictive, and hence preferable, alternative to more comprehensive speech regulations. *Citizens United* says further that the public has an interest in knowing who is speaking about a candidate shortly before an election.

The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Polling throughout this state and the nation has consistently shown that the public overwhelmingly and emphatically agrees with this conclusion.

Question

In light of *Federal Election Commission v Wisconsin Right to Life* (2007), *Caperton v Massey Coal Company* (2009), and *Citizens United v FEC* (2010), must all payments for communications referring to judicial candidates be considered "expenditures" for purposes of the MCFA, and thus reportable to the Secretary of State, regardless of whether such payments entail express advocacy or its functional equivalent?

For the reasons stated above, the State Bar strongly believes the answer to that question should be "Yes." Thank you for your consideration of our request. 2014 will be the beginning of a new judicial election cycle. It is vital that the next cycle be one in which the public knows who is providing funding for judicial campaign advertising. Please feel free to contact us at (517) 346-6327 if you have questions or seek additional information.

Sincerely,
The State Bar of Michigan



Bruce A. Courtade
President



Janet K. Welch
Executive Director