SBM STATE BAR OF MICHIGAN

p 517-346-6300
p 800-968-1442
f 517-482-6248
www.michbar.org

306 Townsend Street
Michael Franck Building
Lansing, MI
48933-2012

September 11, 2013

The Honorable Ruth Johnson
Secretary of State
Executive Office
Richard H. Austin Building
430 W. Allegan Street
Lansing, MI 48918

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, P.A. 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

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 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 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 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

STATE OF MICHIGAN
TERRI LYNN LAND, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

April 20, 2004

Robert S. LaBrant
Michigan Chamber of Commerce
600 South Walnut Street
Lansing, Michigan 48933-2200

Dear Mr. LaBrant:

This is a response to your request for a declaratory ruling under the Michigan Campaign Finance Act (MCFA), 1976 P.A. 388, as amended.

FACTS

The Michigan Chamber of Commerce ("chamber"), a non-profit corporation, intends to use its treasury funds to finance issue advocacy advertisements that, for the purposes of this request, you define as "ads that discuss issues without expressly advocating the election or defeat of the candidate who is featured in that 'issue ad'." The chamber intends to hold meetings with the candidates and exercise exclusive direction, control, and decision-making authority over the content, timing, location, mode, intended audience, volume of distribution, and frequency of placement of the ads. No candidate shall be allowed to organize, supervise, or create, review, accept, or modify any of the ads. The chamber may request photographs or other information from a candidate in order to produce an ad.

QUESTIONS PRESENTED

In light of the United States Supreme Court's *McConnell* decision, does the MCFA apply to any of the chamber's intended issue advocacy activities?

ANSWER

No. The MCFA governs "contributions" and "expenditures". Section 4 of the MCFA defines "contribution", in relevant part, as "[A] payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage or defeat of a ballot question."

Section 6 of the MCFA defines "expenditure" as "[A] payment, donation, loan, or promise of payment or anything of ascertainable monetary value for goods, materials, services, or facilities

in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. Expenditure includes ... A contribution or transfer of anything of ascertainable monetary value for purposes of influencing the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question." Section 6(2)(b) excludes from the definition of expenditure those communications that do not support a candidate or ballot question by name or clear inference.

The department has not interpreted the definitions of contribution and expenditure literally with regard to communications. In 1976, the United States Supreme Court interpreted several sections of the Federal Election Campaign Act (FECA) in *Buckley v Valeo*, 424 US 1 (1976). FECA defined "expenditure" as "the use of money or other assets for the purpose of influencing a federal election." The Supreme Court, finding the definition vague and overbroad, created the "express advocacy" test for determining which communications were considered expenditures under FECA and which were issue ads, exempt from FECA's reach. The court held that only those communications that contained words of express advocacy—"vote for", "vote against", "elect", "defeat", etc.—could be deemed expenditures under the FECA.

The MCFA's definition of expenditure was similar to FECA's overbroad and vague definition of expenditure. Moreover, unlike the latter definition, the MCFA's definition of expenditure did not (and still does not) require that a person intend to influence an election. In order to meet the constitutional concerns discussed in *Buckley*, the department interpreted section 6(2)(b)—which excluded from the definition of expenditure those communications that do not support or oppose a candidate or ballot question by name or clear inference—to apply to all non-express advocacy communications.

The department eventually attempted to address *Buckley's* constitutional barriers by promulgating an "issue ad" administrative rule in 1998. This rule (1999 AC, R 169.39b) prohibited section 54 entities (corporations, unions, and domestic dependent sovereigns) from running any advertisement that contained a candidate's name or likeness 45 days before an election. The rules were declared unconstitutional in *Right to Life of Michigan v Miller*, 23 F Supp 2d 766 (1998) and *Planned Parenthood of Michigan v Miller*, 21 F Supp 2d 740 (1998).

The department received a declaratory ruling request from a Mr. Norman Witte in August 2002. Mr. Witte asked the department for clarification regarding the regulation of issue ads. The department, believing itself constitutionally compelled by *Buckley*, *Right to Life*, and *Planned Parenthood*, officially adopted the express advocacy standard for all election-related communications.

MCCONNELL V FEC

The U.S. Supreme Court decided *McConnell v FEC (cite pending)*, in December 2003. *McConnell* upheld several provisions of the Bi-Partisan Campaign Reform Act of 2002 ("BCRA"), including the new restrictions on "electioneering communications." BCRA defines an electioneering communication as any broadcast, cable, or satellite communication that:

I. Refers to a clearly identified candidate for federal office;

II. Is made within—
(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

III. In the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate. 2 U.S.C.A. §434(f)(3)(A)(i)

A communication is "targeted to the relevant electorate" if it "can be received by 50,000 or more persons in the district or state the candidate seeks to represent." 2 U.S.C.A. §434(f)(3)(c)

Congress adopted this new "electioneering communication" standard to prevent corporations and unions from influencing elections and avoiding disclosure by running issue ads in the weeks before an election. Congress created the electioneering communication standard to address the *Buckley* court's concern for vagueness and overbreadth. Specifically, by regulating only certain communications (broadcast, cable, and satellite), the content of the communications (those that refer to a clearly identified candidate for federal office), and the timing of the communications (30 days before a primary election, 60 days before a general election), Congress believed it had removed the ambiguity and uncertainty that necessitated the express advocacy test.

The Supreme Court upheld BCRA's definition of electioneering communication. Further, it held that the express advocacy test was not a constitutional requirement but rather an interpretation of a vague and overbroad statute. By removing the vagueness and overbreath in the definition of electioneering communication, Congress had dispensed with the need for the courts to apply the express advocacy test.

The *McConnell* court addressed the *Buckley* court's reasoning regarding express advocacy:

> In *Buckley*, the Supreme Court considered FECA's definition of "expenditure" to include the use of money or other assets "for the purpose of...influencing" a federal election. Finding the ambiguous phrase to pose constitutional problems, the court attempted to interpret the statute in order to avoid an unconstitutionally vague interpretation. To do this, the court construed "expenditure".... to reach only funds used for communications that expressly advocated the election or defeat of a clearly identified candidate...In short, the concept of express advocacy [was] born of an effort to avoid constitutional infirmities...Our [decision] in *Buckley* [was] specific to the statutory language before us; [it] in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech. *(McConnell, p 84-85)*

APPLICATION TO MCFA

McConnell indicates that the "express advocacy" standard is not a constitutional requirement. Presumably, the Michigan legislature could enact FECA's "electioneering communication" standards. Yet, *McConnell* unambiguously requires the express advocacy test for any statutory definition of expenditure that employs vague, broad language. The vagueness and over-breadth discussed in *Buckley* and clarified in *McConnell* still lurk in the MCFA's definitions of contribution and expenditure. For that reason, we are compelled to apply the express advocacy test to all communications.

The 6th Circuit Court of Appeals in *Anderson v Spear, 356 F.3d 651 (2004)*, recently confirmed the constitutional requirement to apply the express advocacy test to vague and broad definitions of expenditures. *Anderson* concerned Kentucky's interpretation of its election statute, which prohibited "electioneering" within 500 feet of the entrance of a polling place. Kentucky interpreted "electioneering" to prohibit persons from providing instructions to voters regarding how to "write-in" a candidate's name on the ballot. Anderson, a candidate for governor whose name was not on the ballot, challenged Kentucky's interpretation of its statute.

The court, finding the Kentucky statute vague and overbroad, opined:

> In eschewing the express advocacy distinction, the Court also relied upon substantial evidence that the line between express and issue advocacy had become "functionally meaningless" as applied to the [FECA]. Accordingly, while the *McConnell* Court disavowed the theory that "the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy," it nonetheless left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest. And *McConnell* in no way alters the basic principle that the government may not regulate a broader class of speech than is necessary to achieve its significant interest. *(Anderson, p 11)*

The department must take its guidance from *McConnell* and *Anderson*. The MCFA's definitions of contribution and expenditure, if interpreted literally, would criminalize even private correspondence. We also note that the definition of expenditure does not include an intent element. In the absence of more definite standards, we must administer the statute in such a way as to avoid the constitutional problems of vagueness and overbreadth. The department will continue to apply the express advocacy standard in determining which communications are regulated by the MCFA.

APPLICATION TO CONTRIBUTIONS AND EXPENDITURES

Both *Buckley* and *McConnell* dealt with the express advocacy test as it concerned expenditures; it did not require such a standard for contributions. The court believed that the possibility of corruption or the appearance of corruption was more likely to occur in a contribution to a

candidate than in an expenditure on behalf of the candidate. The court's distinction was premised on the FEC's ability to distinguish between contributions and expenditures.

The department, in its Witte interpretive statement, explained that it did not have the same tools, such as subpoena power or the ability to create a factual record, possessed and often deployed by the FEC. Without the ability to create a record, or even compel a person to testify, the department would have to speculate as to the degree of control exercised by a candidate over a communication produced on his or her behalf. Such speculation hardly accords with any concept of equal protection or due process. In order to avoid an arbitrary application of the law, the department must analyze a communication by its four corners to determine whether it can be regulated under the MCFA. If not, the department will not inquire further as to the circumstances behind the creation or production of the communication.

CONCLUSION

After a thorough review of the *McConnell* and *Anderson* cases, the department does not believe it has the authority to regulate issue ads. In determining which communications are subject to the MCFA, the department will continue to apply the express advocacy standard.

The only change from the Witte ruling is our rationale. In Witte, we premised our conclusion on the assumption that the express advocacy standard was a constitutional requirement. It is now clear that the express advocacy standard is required when the government relies on broad, ambiguous language to regulate election-related speech. Congress addressed that concern with its clear definitions of electioneering communications. In the absence of an amendment to the MCFA's definition of expenditure, the department must apply the express advocacy standard in order to avoid constitutional problems.

This in no way endorses some of the so-called issue ads, which are often more vicious than MCFA-regulated ads. Clearly, many if not most of these issue ads are campaign ads without words of express advocacy. Moreover, because they are not considered expenditures, relevant information, such as who paid for them, is often not disclosed.

Because your request does not include a statement of facts sufficient to form the basis for a declaratory ruling, this response is informational only and constitutes an interpretive statement with respect to your inquiries.

Sincerely,

Brian DeBano
Chief of Staff

BD/DM/kc