



411 East Wisconsin Avenue  
Suite 2400  
Milwaukee, Wisconsin 53202-4428  
414.277.5000  
Fax 414.271.3552  
www.quarles.com

Attorneys at Law in  
Chicago  
Indianapolis  
Madison  
Milwaukee  
Minneapolis  
Naples  
Phoenix  
Tampa  
Tucson  
Washington, D.C.

July 28, 2022

**VIA EMAIL**

Ms. Erica J. Pickett  
Director of Business Services  
Stoughton Area School District  
320 North Street  
Stoughton, WI 53589

**Re: Stoughton Area School District - Referendum**

Dear Erica:

We appreciate the opportunity to work with you and the Stoughton Area School District (the "District") in connection with the District's proposed referendum election. As you prepare for the referendum, questions may arise regarding permissible campaign practices. This letter briefly overviews applicable law relevant to frequently asked questions. In particular, this letter discusses restrictions on the use of District funds to promote the referendum, the role of Board members and the administration with respect to the referendum, and the District's responsibilities regarding citizen groups formed in connection with the referendum.

**I. Use of District Funds for Referendum Materials**

**A. Prohibition Against Use of District Funds to Promote the Referendum**

The District is prohibited from using District funds to promote the referendum. The District has only those powers expressly provided by or implied from the Wisconsin Statutes. Although there is no Wisconsin court case that specifically addresses this issue, the generally held view is that there is no Wisconsin statutory provision that provides school districts, directly or by reasonable implication, the power to raise and spend money for political / promotional purposes. This view is consistent with court decisions from other states whose school district statutes resemble Wisconsin's. *See e.g., Stanson v. Mott*, 561 P.2d 1 (Cal. 1976); *Citizens to Protect Pub. Funds v. Bd. of Educ.*, 98 A.2d 673 (N.J. 1953).<sup>1</sup> It is also consistent with Wisconsin's "public purpose doctrine," which holds that expenditures may be made only for public purposes, as determined by the legislature and embodied in the statutes. *See, e.g., Town of Beloit v. Rock County*, 259 Wis. 2d 37 (2003) (general discussion of doctrine); *Davis v. Grover*, 166 Wis. 2d 501 (1992) (same).

---

<sup>1</sup> *See also Rees v. Carlisle*, 113 Haw. 446 (2007); *Carter v. City of Las Cruces*, 121 N.M. 280 (Ct. App. 1996); *Palm Beach County v. Hudspeth*, 540 So. 2d 147 (Fla. Dist. Ct. App. 1989); 2000 Ariz. AG 19; 1996; N.Y. Op. Att'y Gen. 34.

## **B. Permissible Use of District Funds for Informational Materials**

In contrast to promotional materials, Wisconsin school districts may spend district funds to prepare and disseminate informational materials that inform the electorate of pertinent facts. This rule is established by many of the same cases that prohibit spending district funds for promotional materials. *See, e.g., Citizens*, 98 A.2d at 676 (the statutes "plainly embrace making reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching an informed decision" with respect to a bond referendum); *see also Rees v. Carlisle*, 113 Haw. 446, 454 (2007) (same). In Wisconsin, a long-standing Attorney General opinion further supports the conclusion that school districts may use district funds to produce informational materials. *See Attorney General Opinion 60-79* (May 30, 1979).

## **C. Distinguishing Promotional Materials from Informational Materials**

Because informational materials are permissible, but political / promotional materials are not, it is important to understand where the line between the two exists. The distinction is made not by defining what is or is not informational, but by defining what is impermissibly political / promotional. In particular, the cases which hold that public bodies have exceeded their authority by creating and disseminating promotional materials limit what constitutes prohibited promotional materials to those containing "express advocacy."<sup>2</sup> Express advocacy is language containing specific words such as: "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject," or the equivalent. *See Buckley v. Valeo*, 424 U.S. 1, 44, fn. 52 (1976).

Wisconsin courts have adhered to *Buckley's* definition of express advocacy. In the leading case, *Government Accountability Board v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650 (1999), the Wisconsin Supreme Court stated that "any standard of express advocacy must be consistent with *Buckley* in order to avoid invalidation on grounds of vagueness or overbreadth." *Id.* at 670. An issue in *Wisconsin Manufacturers & Commerce* was whether express advocacy could be defined not just by the actual language used in a communication, but by the context in which the communication was made – including the proximity in time of the communication to an election, the underlying intent of the communication, the effect of the communication, the audience, and the geographical area in which the communication is disseminated.

The Court rejected this context-based approach in light of the pertinent Wisconsin Statutes and regulations because those statutes and regulations do not define express advocacy based on context. Instead, the pertinent law in Wisconsin mirrors *Buckley*. Just as in *Buckley*, the Wisconsin

---

<sup>2</sup> By defining the point at which public bodies' implied statutory authority ends as the point at which express advocacy begins, the courts have drawn from a long line of First Amendment campaign finance cases holding that only communications containing express advocacy may be restricted. *See Buckley v. Valeo*, 424 U.S. 1, 43 (1976). The *Buckley* Court explained: "[T]o clearly mark the boundary between permissible and impermissible speech," the scope of communications that may be regulated must be "limited to communications that include explicit words of advocacy of election or defeat . . ." *Id.*

Statutes limit the scope of regulated communications to those that expressly advocate and contain terms such as: "vote for," "elect," "support," "cast your ballot for," "Smith for (an elected office)," "vote against," "defeat," "reject," "cast your ballot against," or the equivalent. Wis. Stats. §11.0101(11).

## **II. Applicable Law Regarding the Role of Board Members and the Administration**

### **A. Board Members May Speak Freely in Favor of or Against the Referendum**

Although there is no specific law regarding the role of Board members, it is our view that they may speak freely in favor of or against the referendum. Board members may also form and participate in citizens committees and may engage in other activities to promote or oppose the referendum, so long as they follow the applicable laws (such as campaign finance laws or, if applicable, Wisconsin's Open Meetings Law) and do not spend district funds or use district resources.

Unlike administrators (discussed below), Board members are not district employees and hence do not use paid time when they speak in favor of or against the referendum. Further, because the Statutes require Board members to vote whether to call for the referendum, speaking in favor of or against a referendum is consistent with Board member's responsibilities. More generally, there is nothing associated with Board member service that would justify restricting Board members' First Amendment speech rights.

### **B. More Limited Role for District Administration**

As compared to the Board's role, the role of the administration is more limited. As employees who are paid with district funds, administrators should be careful not to engage in promotional activities during the course of the normal work day. Although there is no Wisconsin case on point, the general rule is supported by courts in other jurisdictions that have considered this issue. *See, e.g., Rees*, 113 Haw. 446, 453 fn. 5 (2007).

While administrators should not engage in promotional activities during working hours, they may serve as sources of information. Administrators may speak at civic meetings, provide informational materials, and answer questions about the referendum, whether or not during working hours. The cases that restrict administrators' promotional activities support this distinction. *See id.* at 454 (government official may publicly comment on referenda and provide information, but may not advocate using public support).<sup>3</sup>

---

<sup>3</sup> The *Rees* court made this distinction clear: "The problem in this case is that [the government official's] conduct went far beyond providing information to the public on how the [local government] can be improved; he became a partisan advocate leading a battle campaign using public funds and other resources to tell voters how to vote." *Id.*

### **III. District Interaction with Referendum "Committees"**

It has become more and more common for citizen groups to form in order to support or oppose referenda. These groups are commonly referred to as "Yes" groups and "No" groups. The Statutes define such a group as "an entity that satisfies all of the following:

- It either (i) has the major purpose of making expenditures to support or defeat a referendum as specified in the entity's organizational or governing documents, bylaws, resolutions or registration statements; or (ii) uses more than 50 percent of its total spending in a 12-month period on expenditures made to support or defeat a referendum.<sup>4</sup>
- It is organized by any person, other than an individual, or by any permanent or temporary combination of two or more persons unrelated by marriage.
- It does not receive contributions or make disbursements or contributions for the purpose of influencing or attempting to influence a candidate's nomination or election." Wis. Stats. § 11.0101(28).

#### **A. General Separation Between Referendum Committees and the District**

Referendum committees are separate from the District and the School Board. Although referendum committees must comply with the provisions of Chapter 11 of the Statutes governing campaign finance, the District is not responsible for advising such groups or ensuring their compliance. We encourage the District to direct referendum committees that raise questions to the Ethics Commission. The Ethics Commission provides useful resource materials, both in hard copy and on its web site.

#### **B. District's Responsibilities Regarding Referendum Committees**

Although the District is not responsible for advising referendum committees, it is responsible for collecting their registrations and disclosure reports, for making necessary forms available, and for keeping track of filings and delinquencies.

*District Clerk Acts as Filing Officer.* Under the Statutes, the District Clerk is designated to act as the "filing officer" for referenda. Wis. Stats. § 11.0102(1)(g). Referendum committees are required to file pertinent filings with the District Clerk. Those filings consist of a registration statement and, where applicable, ongoing disclosure reports. Hence, the District Clerk should be familiar with the basic registration and reporting rules set forth in the paragraphs that follow.

---

<sup>4</sup> Total spending for this purpose does not include a referendum committee's fundraising or administrative expenses.

Registration Statement. A referendum committee must register if it makes or accepts contributions, makes disbursements, or incurs obligations for the purpose of influencing a referendum vote in an aggregate amount in excess of \$10,000 in a calendar year. The registration must be filed within 10 business days of receipt of contributions in excess of \$10,000, and before making any disbursements or incurring any obligations exceeding that amount for the calendar year.

Ongoing Disclosure Reports. A referendum committee that accepts or makes contributions, makes disbursements, or incurs obligations in excess of \$10,000 is required to file ongoing disclosure reports.<sup>5</sup>

Other Related Duties of the District Clerk as Filing Officer. Section 11.0102(3) of the Statutes sets forth additional duties of the District Clerk as filing officer. In particular, the District Clerk is required to:

- (i) Obtain filing forms and manuals and furnish them without cost to those required to file (§§ 11.0102(3)(a), (c)) (as noted above, the proper forms are available from the Ethics Commission, and are posted at <http://ethics.wi.gov>);
- (ii) Develop a filing, coding and cross-indexing system, maintain an electronic system with a current list of all reports and statements received by or pertaining to the committee, and make filings available for public inspection and copying at cost and commencing not later than the end of the second day following the day during which each report or statement is received (§§ 11.0102(3)(b), (g), (h), (i));
- (iii) Provide copies of manuals and election laws to persons other than those listed in (i) above, at cost (§ 11.0102(3)(d));
- (iv) Determine whether each report or statement required to be filed has been filed in the form and by the time prescribed by law, and whether it conforms to the requirements of Chapter 11 of the Wisconsin Statutes. The Clerk shall immediately send to the committee, if it is delinquent in filing or was not filed in the proper form, a notice that the committee has failed to comply with Chapter 11 of the Wisconsin Statutes (§ 11.0102(3)(j));

---

<sup>5</sup> Registered committees that expect to not exceed \$2,000 in contributions, disbursements or obligations in a calendar year beyond the year of initial registration may file an amended registration statement, thereby suspending the requirement imposed upon the committee to file continuing reports. Wis. Stats. §§ 11.0802, 11.0804 and 11.0104.

Ms. Erica J. Pickett  
July 28, 2022  
Page 6

- (v) Notify the Ethics Commission, in writing, of any facts within the filing officer's knowledge or evidence in the officer's possession, including errors or discrepancies in reports or statements and delinquencies in filing which may be grounds for civil action or criminal prosecution (§ 11.0102(3)(e)) (note, however, that this provision does not imply that the District Clerk has the power or duty to affirmatively investigate); and
- (vi) Keep a list of delinquent filers and make it available for public inspection, and send delinquent filers notice when they fail to file or file improperly (§ 11.0102(3)(f)).

#### IV. Conclusion

We hope that this information is helpful to you. We understand that this background information will not address every question that may arise as you prepare for the referendum. If you have any questions, please do not hesitate to contact either Jeffrey D. Peelen, an attorney in our Public Finance Group who has extensive experience with campaign practices at (414) 277-5773 or me at (414) 277-5641 at any time.

Sincerely,

QUARLES & BRADY LLP



Allison M. Buchanan

AMB:TNA:ama  
#870136.00023

cc: Mr. Dan Keyser (via email)  
Mr. Luke Butz (via email)  
Ms. Cate Urbas (via email)  
Ms. Jenny McKenna (via email)  
Ms. Christin Mlsna (via email)  
Ms. Teresa Wadzinski (via email)  
Ms. Erika Freeman (via email)  
Mr. Andy Lyons (via email)  
Mr. Michel D. Clark (via email)  
Ms. Rebekah Freitag (via email)  
Mr. David Groose (via email)  
Ms. Taryn Alvin (via email)