

MEMORANDUM

TO: Thomas White, Executive Director, Michigan School Business Officials

FROM: Robert M. Thrun and David Olmstead, Thrun Law Firm, P.C.

DATE: September 8, 2006

RE: **Compliance with Michigan Campaign Finance Act: Bright Line and Safe Harbors**

Bright Line

Education leaders want clear guidance as to what they may do and may not do during an election campaign on ballot issues of concern to their school districts. Recent developments help provide this guidance.

Secretary of State Terri Lynn Land has recently adopted the "express advocacy"¹ test in judging election-related communications by public officials under §57 of the Michigan Campaign Finance Act ("MCFA"), quoted below. Express advocacy is the test articulated by the United States Supreme Court in *Buckley v Valeo*², the landmark case on the extent to which the federal government can regulate federal election activities.

"Express advocacy" means, in the opinion of the Supreme Court, the use of express words of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject,"³ or similar words urging or exhorting a vote for or against.

This is meant to be an objective standard. These are the words that education leaders may not use, at public expense, in election-related communications. Hopefully this is a line bright enough for education leaders to avoid crossing.

Until the "express advocacy" standard was adopted by the Secretary of State, the election campaign limitations on public officials were quite vague. The prior Michigan Secretary of State had used a "clear inference" test⁴ in judging election-related communications. In *Buckley*, the U.S. Supreme Court rejected the clear inference test:

In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation

puts the speaker in these circumstance wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions, it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

* * *

The constitutional deficiencies . . . can be avoided only by reading the federal election code as limited to communications that include explicit words of advocacy of election or defeat . . . We agree that in order to preserve the provision against invalidation on vagueness grounds, reading the federal election code must be construed to apply only to expenditures for communications that in express terms advocate . . . election or defeat. . . .⁵

Now the current Secretary of State has also abandoned the "clear inference" standard and applies the "express advocacy" standard. In reviewing the chart below, please note the significant usage of the term "express advocacy."

Safe Harbors

In addition to the "express advocacy" test, there are the "safe-harbor" exceptions, quoted below, to MCFA §57, to provide guidance to school officials on their election-related speech and activity.

THE LAW

PROHIBITED SPEECH AND ACTIVITY

PERMITTED SPEECH AND ACTIVITY

Section 57

General Campaign Activity

Section 57(1) of the Michigan Campaign Finance Act states as follows:

School officials or employees may not use school facilities or resources to conduct or participate in an election campaign, including campaign organization activities, distribution of yard signs, campaign buttons, brochures and other special publications, or the production or dissemination of "express advocacy" materials.

A public body or an individual acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies or other public resources to make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of contributions under section 4(3)(a).⁶



Both the courts and the Michigan Secretary of State have interpreted Section 57 to mean generally as follows:

A public body shall not use anything of ascertainable monetary value for the purpose of *express advocacy* for or against a ballot question or candidate.

Websites



What is express advocacy?



A public body is also precluded from using public resources to create and maintain links to web sites, organizations, commentary or editorials that expressly support or oppose candidates or ballot questions if the public body does so for the purpose of influencing the outcome of any election. The Secretary of State will apply an objective standard to assist in making this determination. If a public body creates and maintains one or more links that are used in a restrictive manner for the advocacy of one side of a ballot question, or if the links are to sites that are exclusively for, or exclusively against, a candidate, a slate of candidates or a ballot question, the department will presume that the public body is providing those links for the purpose of supporting or opposing that candidate or ballot question.⁷

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Express Advocacy is the bright line:

Avoid communications containing express words of advocacy of election or defeat, such as "vote for", "elect", "support", "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject,"³ or similar words of urging or exhorting a vote for or against.

The Safe Harbors

The following pertinent exceptions, quoted from MCFA, §57, constitute safe harbors protecting the speech or activity of public officials:

- (a) The express on of views by an elected or appointed public official who has policy making responsibilities.⁸

- (b) The production or dissemination of factual information concerning issues relevant to the function of the public body.¹²

General Prohibition of Express Advocacy

Avoid communications containing express words of advocacy of election or defeat, such as "vote for", "elect", "support", "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject," or similar words of urging or exhorting a vote for or against.

We recommend avoiding the use of slogans.

Expression of Policy - Maker's Views

A superintendent or board member may not use district facilities to send a mass e-mail or mailing that expressly advocates support or opposition for or against a ballot proposal.⁹

A superintendent or school board member may make "occasional, incidental use of public resources,"¹⁰ such as telephone, mailing, room, or school district clerical support or stationery to communicate with a constituent, the media, or business and community leaders, etc., to expressly advocate for or against a ballot proposal.

A board of education can adopt a resolution supporting or opposing a ballot proposal related to operation of the school district in the interests of public education in the school district. The resolution must be distributed or publicized by the regular provision of factual information regarding actions taken by the board of education.¹¹

Mailings: Factual Information Always Permitted

We recommend avoidance of "targeted" or mailings just to school parents or employees who might be expected to favor a school district ballot proposal.

Factual statements, but there is no requirement of "balanced," "objective" or "fair" presentations.

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Regular Publications or Broadcasts

- (c) The production or dissemination of debates, interviews, commentary or information by a broadcasting station, newspaper, magazine or other periodical or publication in the regular course of broadcasting or publication.¹³

Note the restriction to "the regular course of broadcasting or publication"

If a school district newsletter is published and circulated on a regular schedule and in a regular manner, it may include commentary (but not words of express advocacy) of the superintendent or board members as to why the project is necessary, why a bond issue is the best means of financing, why the proposal will promote or harm public education in the district, etc.

Commentary should be signed or attributable to the superintendent or a board member.

We recommend that commentary avoid going so far as express advocacy, i.e., "support Proposal A," "vote yes," etc.

Debate or interviews, presuming debaters or interviewees on both sides of an issue, may include express advocacy.

Use of School District Facilities

- (d) The use of a public facility owned or leased by, or on behalf of, a public body if any candidate or committee has an equal opportunity to use the public facility.¹⁴

This does not mean just the opposition to a proposal in a particular election. It means any candidate or committee in any future election. In other words, that public facility becomes an open forum.

The Superintendent's Time

- (f) An elected or appointed public official or an employee of a public body who, when not acting for a public body but on his or her own personal time, is expressing his or her own personal views, is expending his or her own personal funds, or is providing his or her own personal volunteer services.¹⁵

A superintendent, subject to school district policy, may provide her or his views on a ballot proposition during work time, as well as personal time, whether off or on school district premises.

¹ Secretary of State Interpretive Statement, Letter to David E. Murley, October 31, 2005
² 424 US 1 (1976)
³ 424 US at p 42, n 52
⁴ Murley letter, p 2
⁵ 424 US at p 42 (Emphasis added) (The words "federal election code" substituted for actual section members) (citations omitted)
⁶ MCFA, §57(1); MCL 169.257(1)
⁷ Quotation from Murley letter, p 5 (Emphasis added)
⁸ MCFA, §57(1)(a); MCL 164.257(1)(a)
⁹ Paraphrase from Murley letter, p 3
¹⁰ Murley letter, p 3
¹¹ Murley letter, p 3
¹² MCFA, §57(1)(b); MCL 169.257(1)(b)
¹³ MCFA, §57(1)(c); MCL 169.257(1)(c)
¹⁴ MCFA, §57(1)(d); MCL 169.257(1)(d)
¹⁵ MCFA, §57(1)(f); MCL 169.257(1)(f)