

**LETTER OPINION
2004-L-39**

May 27, 2004

Honorable Michael Polovitz
State Senator
2529 9th Avenue North
Grand Forks, ND 58203-2278

Dear Senator Polovitz:

Thank you for your letter asking several questions about the applicability of federal law¹ regarding disclaimers² on political ads you may run in your campaign for reelection to the state Senate. While this office cannot give private legal advice, your questions do address issues that have a general statewide impact. Consequently, while I cannot give advice on your specific advertisement, in the interest of clarifying the law for state and legislative office candidates, I will address the questions that have a general statewide impact.

You ask whether the federal disclaimers must be recited in a campaign commercial appearing on a television, radio, or print advertisement mentioning only candidates for state office. For the reasons discussed below, it is my opinion that the federal rules governing the requirements for disclaimers accompanying radio, television, print, and other campaign communications do not generally apply to political advertisements for candidates for state office, and that the ads featuring only candidates for state office and which do not refer to clearly identified federal candidates would not be required to contain the federal disclaimers.

You also ask whether federally mandated disclaimer requirements would apply to a television ad containing an endorsement by a federal candidate or officeholder if the state candidate's campaign committee pays for the ad. For the reasons discussed below, it is my opinion that a television campaign commercial promoting election to state office containing an endorsement by a federal candidate or officeholder would not constitute an

¹ The Federal Election Commission recently issued final regulations implementing provisions of the Bipartisan Campaign Reform Act of 2002. See 11 C.F.R. §110.11 (implementing provisions of 2 U.S.C. § 441d).

² State statutory requirements for disclaimers on certain political advertisements are contained in N.D.C.C. § 16.1-10-04.1.

electioneering communication requiring a federal disclaimer so long as the ad does not promote or support an identified candidate for federal office or attack or oppose a candidate for that federal office and the ad is paid for by the candidate for election to state office.

ANALYSIS

The federal regulations implementing the Bipartisan Campaign Reform Act of 2002 ("BCRA") regarding disclaimers for radio, television, print, and other campaign communications apply generally to candidates for federal office. See generally 11 C.F.R. § 110.11 (implementing 2 U.S.C. § 441d). The regulations apply for elections for candidates for federal office. "Election" is defined as "the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office." 11 C.F.R. § 100.2. The term "candidate" is defined as "an individual who seeks nomination for election, or election, to federal office." 11 C.F.R. § 100.3. "Federal office" is defined as "the office of President or Vice President of the United States, Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States." 11 C.F.R. § 100.4.

The regulations contain specific requirements for radio and television ads authorized by candidates which, among other things, must include a statement that identifies the candidate and states that the candidate has approved the communication. See 11 C.F.R. § 110.11(c)(3). Since candidates for state office are not candidates for a federal office, the disclaimer requirements are not generally applicable to such television, radio, or print ads. Consequently, it is my opinion that the federal rules governing the requirements for disclaimers accompanying radio, television, print, and other campaign communications do not generally apply to political advertisements for candidates for state office, and that the ads featuring only candidates for state office and which do not refer to any clearly identified federal candidates³ would not be required to contain the federal disclaimers.

You also ask whether a disclaimer is needed if a television ad includes an endorsement by a federal candidate or by a federal officeholder who is not currently a candidate, if the state candidate's campaign committee pays for the ad.

The federal regulation dealing with the scope of disclaimers on advertising is contained in 11 C.F.R. § 110.11(a) which provides as follows:

³ See discussion below concerning electioneering communications.

§ 110.11 Communications; advertising; disclaimers (2 U.S.C 441d).

(a) *Scope.* This section applies only to public communications, defined for this section to include the communications at 11 CFR 100.26 plus unsolicited electronic mail of more than 500 substantially similar communications and Internet websites of political committees available to the general public, and electioneering communications as defined in 11 CFR 100.29. The following types of such communications must include disclaimers, as specified in this section:

- (1) All public communications for which a political committee makes a disbursement.
- (2) All public communications by any person that expressly advocate the election or defeat of a clearly identified candidate.
- (3) All public communications by any person that solicit any contribution.
- (4) All electioneering communications by any person.

“Public communication” is defined in the regulations to mean a “communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. The term public communication shall not include communications over the Internet.” 11 C.F.R. § 100.26.

Thus, there are four general types of communications which are described in the rule. The first type of public communication is one in which a political committee makes a disbursement. The term “political committee” is defined in 11 C.F.R. § 100.5. In your question you state that the television ad would be paid for by a state candidate’s campaign committee. Thus, it is necessary to determine whether the campaign committee would constitute a political committee within the meaning of the regulations. Both the definition of “political committee” and the examples cited in this regulation are tied to either the defined terms “candidate,” meaning federal candidate, or “contribution” or “expenditure,” which again are tied to contributions or expenditures related to influencing an election for federal office. See 11 C.F.R. §§ 100.52 and 100.111. Further, a state candidate’s campaign committee would not constitute a political party committee within the meaning of the regulations if it is not representing a political party or part of the official party structure at a national, state, or local level. See 11 C.F.R. § 100.5(e)(4). Accordingly, the first type of “public communication” would not apply in this situation.

The second type of public communication listed in 11 C.F.R. § 110.11 also is inapplicable if the television ad does not expressly advocate the election or defeat of a clearly identified federal candidate. See 11 C.F.R. § 100.22. Likewise, the third type of public communication would not be applicable if the television ad was not soliciting contributions for any federal candidate.

The fourth type of public communication, that of an “electioneering communication by any person,” is more problematic. The description of what constitutes an “electioneering communication” is set out in 11 C.F.R. § 100.29. That provision is too long to be reproduced in this letter, but it is attached for your information. It essentially covers any communication by any broadcast, cable, or satellite means which refers to a clearly identified candidate for federal office and is distributed in certain time frames before a general or primary election and which is targeted to the relevant electorate. There is one pertinent exception contained in the regulation: an electioneering communication does not include any communication that “[i]s not described in 2 U.S.C. 431(20)(A)(iii) and is paid for by a candidate for State or local office in connection with an election to State or local office.” 11 C.F.R. § 100.29(c)(5). 2 U.S.C. § 431(20)(A)(iii) provides that in general the term “federal election activity” means:

a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate);

Thus, a television ad would not constitute an electioneering communication requiring a federal disclosure if the ad does not promote or support a clearly identified candidate for the federal office or attack or oppose a candidate for that office and the ad is paid for by the candidate for state or local office in connection with an election to state or local office. You did not indicate in your letter what the content of the ad or any endorsement would be and whether the ad would promote or support a federal candidate’s candidacy for office or attack or oppose his opponent for federal office. In any event, whether an ad promotes or supports a candidate for federal office or attacks or opposes the other federal candidate would be a factual matter which cannot be determined in an Attorney General’s opinion. See, e.g., N.D.A.G. 2000-F-17.

Based on the foregoing, it is my opinion that a television campaign commercial promoting election to state office containing an endorsement by a federal candidate or officeholder would not constitute an electioneering communication requiring a federal disclaimer, so

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long as the ad did not promote or support an identified candidate for federal office or attack or oppose a candidate for that federal office and the ad is paid for by the candidate for state office in connection with a state election.

Sincerely,

Wayne Stenehjem
Attorney General

jff/pg
Enclosure

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).