

MEMORANDUM

TO: ELECTIONS BOARD MEMBERS

FROM: GEORGE A. DUNST, LEGAL COUNSEL

MEETING DATE: DECEMBER 10, 2003

**SUBJECT: COMPLAINT OF RICHARD J. WILEY AGAINST
ALLAN FOECKLER ELBD CPT. 03-56**

FACTS

On July 14, 2003, the complainant Richard J. Wiley filed this complaint against Al Foeckler, a candidate for the office of Representative to the Assembly for the 21st Assembly District in a special election held on July 22, 2003, and against Friends of Al Foeckler, the candidate's personal campaign committee. The complaint alleges that the respondent failed to include the source identification required by s.11.30(1), Stats., in some of his campaign literature that was distributed publicly, and also alleges that candidate Foeckler did so intentionally and criminally in violation of s.11.61, Stats.:

4. *Foeckler and/or the Foeckler Committee distributed a printed advertisement in the form of a handbill (handbill). A true and accurate copy of said handbill is attached hereto as Exhibit A.*
5. *The handbill contained no attribution, disclaimer or other text indicating who or what had authorized or paid for the handbill.*
9. *Upon information and belief, the handbill constituted an anonymous disbursement or incurred obligation by the Foeckler Committee in violation of section 11.30(1) of the Statutes, making the Foeckler Committee liable for a forfeiture of up to \$500 pursuant to section 11.60(1) of the Statutes.*
10. *(Repeats paragraph number 9 except naming Foeckler individually.)*
11. *Upon information and belief, the handbill constituted an anonymous disbursement or incurred obligation by the Foeckler Committee, and as such constituted an intentional violation of section 11.30(1) of the Statutes, making the Foeckler Committee liable for a fine of up to \$10,000 under sections 11.61(1)(b) or (c) of the Statutes.*
12. *(Repeats paragraph number 11 except naming Foeckler individually.)*

The complaint also attempts to characterize the same absence of source identification (disclaimer) as a separate violation of ch.11, Stats., characterizing it as an anonymous disbursement.

On July 16, the Elections Board received the following communication from candidate Al Foeckler:

It has been brought to my attention that one of my pieces of campaign literature was inadvertently printed without the disclaimer indicating that my committee had paid for it.

This error has been addressed and the remaining copies of this particular piece have been returned to the printer for correction.

Thank you for your attention to this matter. Please inform me if any further action should be taken. ...

That candidate Foeckler's letter was a response to the complaint of complainant Wiley was not clear from the letter. The Board's counsel had requested a sworn response to the complaint, but counsel's letter would probably have been received by candidate Foeckler after Mr. Foeckler had sent his letter to the Board.

When the Board's counsel did not receive any further response to the complaint, the following letter was sent on or about October 3, 2003, to candidate Foeckler:

The timing and content of your letter indicate that it was not a formal response to the complaint filed by Richard J. Wiley. But we have not received from you any other response. If you do not intend the above July 15, 2003 letter to be your only response in this matter, please notify me within the next 7 days. If I do not hear from you within that time, I will assume that your July 15, 2003 letter is your only response and I will give the complainant an opportunity to respond to that letter.

Not hearing from candidate Foeckler, the Board's counsel gave the complainant an opportunity to reply to candidate Foeckler's initial response, but the complainant did not respond.

ISSUES

1. Whether candidate Al Foeckler failed to comply with s.11.30(2), Stats., by not including on publicly distributed campaign literature an identification of the source of that literature?

2. If candidate Foeckler failed to comply with s.11.30(2), Stats., by not including on publicly distributed campaign literature an identification of the source of that literature, what sanctions, if any, should be taken against his committee?

STATUTES

11.30 Identification of political contributions, disbursements and communications.

(1) No disbursement may be made or obligation incurred anonymously, and no contribution or disbursement may be made or obligation incurred in a fictitious name or by one person or organization in the name of another for any political purpose.

(2)(a) The source of every printed advertisement, billboard, handbill, sample ballot, television or radio advertisement or other communication which is paid for by or through any contribution, disbursement or incurred obligation shall clearly appear thereon. This paragraph does not apply to communications for which reporting is not required under [s. 11.06 \(2\)](#).

(b) Every such communication the cost of which is paid for or reimbursed by a committee or group, or for which a committee or group assumes responsibility, whether by the acceptance of a contribution or by the making of a disbursement, shall be identified by the words "Paid for by" followed by the name of the committee or group making the payment or reimbursement or assuming responsibility for the communication and the name of the treasurer or other authorized agent of such committee or group.

(c) Every such communication which is directly paid for or reimbursed by an individual, including a candidate without a personal campaign committee who is serving as his or her own treasurer, or for which an individual assumes responsibility, whether by the acceptance of a contribution or by the making of a disbursement, shall be identified by the words "Paid for by" followed by the name of the candidate or other individual making the payment or reimbursement or assuming responsibility for the communication. No abbreviation may be used in identifying the name of a committee or group under this paragraph.

(em) The source of each printed advertisement, billboard, handbill, paid television or radio advertisement or other communication made for the purpose of influencing the recall from or retention in office of an individual holding a state or local office shall clearly appear thereon in the manner prescribed in [pars. \(b\)](#) and [\(c\)](#).

(f) This subsection does not apply to the preparation and transmittal of personal correspondence or the production, wearing or display of a single personal item which is not reproduced or manufactured by machine or other equipment for sale or distribution to more than one individual.

(fm) This subsection does not apply to communications printed on pins, buttons, pens, balloons, nail files and similar small items on which the information required by this subsection cannot be conveniently printed. The board may, by rule, specify small items not mentioned in this paragraph to which this subsection shall not apply.

(h) Notwithstanding [par. \(a\)](#), the attributions required by this subsection in written communications shall be readable, legible and readily accessible.

(i) No person may publish or disseminate, or cause to be published or disseminated any

communication in violation of this subsection. A communications medium which in good faith relies on the representations of any person who places an advertisement with such medium as to the applicability of this subsection to such person does not violate this paragraph as a result of publication or dissemination of that advertisement based on such representations, provided that the representations are reasonable.

DISCUSSION (The discussion of the Foeckler and Honadel complaints found in each memorandum is identical because the complaints are virtually identical.)

The Honadel and Foeckler complaints are and ought to be discussed together because they are not just similar, but because they are identical: only the names, the addresses and the subject matter, (campaign literature versus campaign signs), have been changed. The two complaints have been reproduced side-by-side as an exhibit to this memorandum to demonstrate that they are, virtually verbatim, the same complaint with the Democratic Party merely having changed the respondent from Al Foeckler, the Democratic Party's candidate for the 21st Assembly District seat in the special election to Mark Honadel, the Republican Party's candidate for the 21st Assembly District, in the special election on July 22, 2003.

Complainant Warkentin's point in reproducing the Republican Party's complaint appears to be not only that people in glass houses ought not throw stones, but, also, that anyone can find a source identification (disclaimer) violation in almost any or every campaign, and, most importantly, that disciplinary action, if any, against the Foeckler campaign should be matched with equivalent disciplinary action against the Honadel campaign. The respondent's real message is probably that enforcement action should not be taken against either campaign.

What the two complaints establish is that during the course of a campaign for elective office, mistakes are made and, perhaps, the most commonly occurring mistake is the omitted source identification (commonly misnamed: "disclaimer" and more accurately referred to as "attribution"). Whether the omission occurs on a flyer or handbill or occurs on a yard sign or bumper sticker, source identifications (attributions) are omitted in many more campaigns than are ever the subject of a complaint to the Elections Board. In most or many cases in which this omission occurs, the campaign that has omitted the disclaimer contacts our office before anyone files a complaint and informs our office of the violation (as appears to almost have been the case with Mr. Foeckler). The Board's staff recommends the appropriate corrective action depending on what type of communication is involved and what may be done to add the attribution. The campaign follows the staff's recommendation and that ends the matter.

Most of the complaints that the Board's staff receives about omitted attributions are not in the form of a verified complaint that would require Board action. Most of such complaints are in the form of a telephone call complaining about campaign signs which appear to be missing a source identification. The Board's staff's usual protocol, when receiving such complaints, is to inform the complainant that they should contact the campaign and give the campaign a reasonable period of time to take corrective action. If

the campaign fails to correct the problem, the complainant may call us back and we will intervene with the campaign. After the second call, the staff will obtain information establishing the location of the offending signs and then contact the responsible campaign to require it to take corrective action. This protocol has been relatively effective.

Where the omission has occurred in campaign literature that has been distributed, corrective action is, effectively, limited to any remaining literature that has not been distributed. Under those circumstances, the staff does advise the campaign to send the Board a letter acknowledging the error and describing whatever corrective action was taken. That letter is placed in the candidate's file, but no further action is taken. This protocol has also worked very well.

In each of the two complaints herein, the candidate took whatever corrective action he could after becoming informed of the problem – candidate Foeckler said that *“This error has been addressed and the remaining copies of this particular piece have been returned to the printer for correction”* and candidate Honadel said *“I did a review of our larger 4 foot square plywood signs and discovered that two of the sixteen signs had disclaimers that were either missing or had worn off. Disclaimers were immediately written on those signs with a marker and the situation was rectified.”*

The question for the Board is whether, given the described circumstances, any enforcement action ought to be taken against either or both of the campaigns. If enforcement action is taken against the campaigns, that raises a question about the Board's staff's protocol when receiving telephone complaints about campaign signs with alleged omitted source identifications.