

Office of Sen. Judith Robson
Office of Rep. Glenn Grothman
Phone 608-266-2253
Phone 608-264-8486

**Joint Committee for
Review of
Administrative Rules**

**Report to the Legislature on
Clearinghouse Rule 99-150**

Produced pursuant to s. 227.19(6)(a), Stats.

Description of the Rule

Clearinghouse Rule 99-150 was written by the State Elections Board under the authority provided in s. 11.01(3), (6), (7) and (16), Stats. According to the Elections Board, the rule "attempts to define more specifically those communications that are to be considered express advocacy subject to regulation by ch. 11 of the Wisconsin Statutes." The rule was written by the Elections Board to implement the decision of the Wisconsin Supreme Court in Wisconsin Manufacturers & Commerce, et al. v. State of Wisconsin Elections Board, 227 Wis.2d 650, 597 N.W.2d 721 (1999). The proposed rule amends s. El Bd. 1.28(1)(intro.) and (2)(c) of the Wisconsin Administrative Code.

CR 99-150 was submitted to the Senate Committee on Economic Development, Housing and Government Operations on December 22, 1999 for standing committee review. A public hearing was held on February 9, 2000. The Senate Committee met in executive session February 14 and unanimously objected to the rule.

Simultaneously, the proposed rule was submitted to the Assembly Committee on Campaigns and Elections on December 30, 1999. A public hearing was held on

January 27. The proposed rule was unanimously objected to at an executive session held on February 16.

Because of the objections of the standing committees, CR 99-150 was referred to the Joint Committee for Review of Administrative Rules.

Action by the Joint Committee for Review of Administrative Rules

One of the statutory duties with which the Joint Committee for Review of Administrative Rules is charged is the review of partial or complete objections to Clearinghouse Rules by standing committees of the Assembly and Senate. Generally, the Joint Committee may take one of three executive actions in response to a standing committee objection:

- The Joint Committee may vote to concur in the objection of a standing committee. Should this occur, the Clearinghouse Rule will be suspended. The Joint Committee must then introduce bills into both houses of the Legislature to codify the objection.
- The Joint Committee may vote to nonconcur in the objection of a standing committee. In that event, the Clearinghouse Rule will go into effect.
- The Joint Committee may vote to request that the agency make modifications to the Clearinghouse Rule.

In this case, the Joint Committee held a public hearing and executive session on April 11, 2000 at which the objections of the Senate and Assembly Committees to

CR 99-150 were discussed. The Joint Committee voted unanimously to *concur in* the objections of both standing committees to Clearinghouse Rule 99-150.

On May 10, 2000, the Joint Committee voted to introduce 1999 LRB 4936 (or its 2001 equivalent, introduced here as 2001 LRB 1764) to uphold the Legislature's objection to CR 99-150. The Joint Committee vote was 8-2.

Arguments Presented For and Against the Proposed Rule

The Joint Committee upheld the objections of the standing committees to CR 99-150 after hearing the following arguments at the public hearing.

Arguments in Favor of Concurring in the Objection

- *The rule is not necessary.* The rule merely reiterates a list of words used by the U.S. Supreme Court in a footnote as examples of speech that constitute express advocacy. Because the rule does not create a new standard, it is redundant and therefore unnecessary.

- *The rule is not strong enough.* The rule should make it clear that the requirements of ch. 11 of the Wisconsin Statutes (governing campaign finance) apply to all political speech that advocates the election or defeat of a clearly identified candidate, regardless of whether specific words are used. Political speech may advocate a specific vote even if certain "magic" words are not used. Because the proposed rule uses specific words as the standard for determining whether a communication is subject to state campaign finance laws, the rule may not be able to regulate communications that avoid the use of specific words or phrases but nevertheless advocate for a particular electoral result.

Arguments Against Concurrence in the Objection

■ *The Elections Board lacks statutory authority to write a stronger rule.* The Elections Board testified that it did not have statutory authority to write a stronger rule and that such regulation must come directly from the Legislature.

■ *A stronger rule would violate the First Amendment.* The rule uses language taken directly from the U.S. Supreme Court's Decision in Buckley v. Valeo. Re-writing the court's definition of express advocacy would be a violation of First Amendment rights to freedom of speech.

■ *The proposed rule adequately defines express advocacy.* The proposed rule does not just list specific words, it also regulates "functional equivalents." Therefore, the rule is flexible enough to adequately regulate express advocacy in future situations.

Statutory Basis for the Joint Committee's Objection

The Joint Committee voted to concur in the objections of the standing committees to Clearinghouse Rule 99-150 pursuant to s. 227.19(5)(d), Stats, and for the reason enumerated in s. 227.19(4)(d)6, Stats., "arbitrariness and capriciousness, or imposition of an undue hardship."

The proposed rule is arbitrary and capricious because it regulates some speech and not other speech on the basis of specific words, even though the intent of both communications is the same – the election or defeat of a given candidate.