

## Legality of GAB proposal expected to be challenged

By: dmc-admin November 24, 2008 1:00 am

Although the Wisconsin Government Accountability Board (GAB) recently endorsed a  plan to hold interest groups accountable for their campaign advertisements, members acknowledged the legal challenges associated with the proposal.

"I advised the board members at every meeting that they will be sued and they said, 'We understand,'" said Jonathan Becker, administrator for the Division of Ethics and Accountability. "They were willing to take that chance."

Attorney Michael B. Wittenwyler, who represents a coalition of a dozen groups that support the existing rule, said the GAB has no statutory authority to alter it to regulate political free speech, and any efforts to reform campaign finance should be done through the state legislature.

"What the agency is doing is expanding on this rule in the face of the legislature's decision not to regulate certain forms of issue advocacy in Wisconsin," Wittenwyler said.

"Generally, I view this as outside the scope of the agency."

But Becker said that statute allows the GAB, as a state agency, to interpret statutes it administers, and recent Supreme Court decisions have provided guidance, though not necessarily support for stricter regulations.

### Held Accountable

The proposed amendment to Wis. Admin. Code GAB 1.28 would require producers of issue ads in political and non-partisan elections to register with the state, as well as disclose the source of their spending. The rule would also prohibit groups from accepting corporate donations.

Becker said the amendment, drafted by members of the Brennan Center for Justice in New York, is designed to "level the playing field" and subject advocacy groups to the same sort of regulation that candidates and committees adhere to during campaigns.

"Everyone else that runs ads that are intended to influence elections have certain restrictions as to sources of money, sizes of contributions and disclosure requirements," Becker said.

He cited several recent cases including the U.S. Supreme Court's 2007 decision in *FEC v. Wisconsin Right to Life* as indicators that the issue is being evaluated at the federal level.

Becker conceded the difficulty of drafting an amendment which will "pass constitutional muster" and serve as a meaningful regulatory tool.

"We will try and draft something that will withstand the legal challenges," Becker said. "But unless the Supreme Court changes its view, I think it will withstand the challenge."

But Wittenwyler said the *WRTL* ruling, if anything, proves the proposed amendment is unconstitutional.

"The amendment directly regulates ads, which identify a public official's position on public policy, and that's what the court in [*Wisconsin*] *Right to Life* said had you have to allow," Wittenwyler said.

### More Work to be Done

Even if the amendment passes legal scrutiny, Laura MacCleery, Deputy Director in the Democracy Program at the Brennan Center, said it will not eliminate issue ads in political or judicial elections.

MacCleery said the GAB, in its capacity as a regulatory agency, is limited in what it can do and at some point legislative action will be needed to sustain meaningful reform.

"It's impossible to catch everything, and carefully designed ads will still escape regulation," MacCleery said. "That's just the reality."

Becker said the GAB rule does not distinguish between judicial and political campaigns, although previous legislative proposals have specifically targeted judicial campaign reform.

While those efforts, as recently as last session, have failed, Whittenwyler suggested that analysis of the judicial selection process, and not regulation of the advertising, may be a more fruitful avenue for change.

"If people have difficulty with types of commercials aired that identify judges, who are public officials under state law, they need to look to at how we select our judges," Whittenwyler said. "They should not go about regulating speech improperly to get at a perceived problem that is not going to be addressed."

Becker said not to expect a resolution prior to the 2009 spring elections, which includes another race for state Supreme Court. Chief Justice Shirley S. Abrahamson will seek re-election to a fourth full term on the bench.

On Nov. 17, Jefferson County Circuit Court Judge Randy R. Koschnick announced his candidacy for the seat.

"We're hopeful we'll make some head-way during the next few months," Becker said.

