

**STATE OF MINNESOTA
CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD**

Findings and Order in the Matter of the Complaint of Angela Berger regarding Intelligent Choices Minnesota and John Cashmore

The Allegations of the Complaint

On October 2, 2012, Angela Berger filed a complaint with the Campaign Finance and Public Disclosure Board regarding the actions of Intelligent Choices Minnesota (ICM) and John Cashmore. Ms. Berger later expanded her complaint to include the actions of Richard Novack, Representative-elect Ron Erhardt, and the Ron Erhardt Volunteer Committee. The Board considered the allegations of the expanded complaint but did not initiate an investigation of Mr. Novack, Mr. Erhardt, or the Erhardt committee pending its decision on the allegations related to ICM and Mr. Cashmore.

The complaint, as expanded, alleges that ICM filed as a 501(c)(4) nonprofit corporation with the Minnesota Secretary of State. The complaint states that ICM sent a mailing focused on influencing the election in House District 49A to Edina homes and also posted the information from the mailing on its website. The complaint argues that these actions require ICM to register with the Board as a political committee and to report its financial activities. Board records indicate that ICM was not registered with or reporting to the Board during the relevant time period.

The complaint further alleges that the ICM communications violated campaign finance laws because they were independent expenditures that lacked the required disclaimer.

Finally, the complaint states that Mr. Novack designed the ICM website and prepared the ICM mailing. The complaint also claims that Mr. Novack is a formal member of the Erhardt committee and has access to campaign strategy information. The complaint concludes that as a result of these relationships, the creation and distribution of the ICM website and mailing were coordinated with the Erhardt committee. If the statutory requirements for coordination were met, the ICM communications could constitute contributions to the Erhardt committee.

The Investigation

The sworn depositions of John Cashmore and Richard Novack were taken separately by Board staff on October 30, 2012. The following narrative is taken from their sworn testimony and from the exhibits submitted with the complaint.

In May 2012, after Bill Glahn was nominated by the Republican Party of Minnesota for the House of Representatives seat representing District 49A, Mr. Cashmore went online to research Mr. Glahn. He found and copied Mr. Glahn's blogs from the internet. Within about a week, Mr. Cashmore found that Mr. Glahn's blogs had been deleted from the internet. Mr. Cashmore

found Mr. Glahn's blog posts "troublesome" and thought they needed to be exposed to the public.

Mr. Cashmore knew that in a recent local election, Richard Novack had exposed blog posts that one of the candidates had written and then later removed. Mr. Cashmore contacted Mr. Novack for help in publishing the deleted blog posts. Initially, Mr. Novack directed Mr. Cashmore to the Board's Advisory Opinion 428, which was requested by a 501(c)(4) association. After reading this Opinion, Mr. Cashmore decided that "to do everything within the law," he should create a 501(c)(4) organization to publish the hidden blog posts. The Board notes that this was an inaccurate assessment of the meaning of Advisory Opinion 428 and of the requirements of Minnesota campaign finance law.

Mr. Novack runs a business that provides services, including website production, to committees. Mr. Novack is not a member of the Ron Erhardt Volunteer Committee and does not do any volunteer work for that committee. Mr. Novack, however, has been hired to do contract work for the Erhardt committee. Mr. Novack receives original invitations, letters, and other literature from the committee which he then prints, copies, and, occasionally, mails. The mailing lists that Mr. Novack uses come from the Erhardt committee. Mr. Novack's work does not extend to developing campaign literature for the Erhardt committee.

Mr. Novack is not a consultant to the Erhardt committee and has no authority with respect to the committee. Instead, he simply prints or copies whatever the committee gives to him. Mr. Novack also is the webmaster for the Erhardt committee. But his duties again are limited to posting the material given to him by the committee. Mr. Novack has "never discussed Intelligent Choices with a single member of [Mr. Erhardt's] people; his volunteer group." Mr. Novack was specifically asked about Complainant's allegation that he is "the lead person for lawn sign placement." Mr. Novack denied the allegation and identified another individual as the person responsible for the Erhardt committee's signs. Mr. Novack also explained that his son, who is an adult and does not reside with him, is an intern on the Erhardt committee.

On August 26, 2012, Mr. Cashmore met with Mr. Novack to discuss entering into a contract with him to publish the Glahn blog posts. Mr. Novack explained that he worked for several candidates and, therefore, he would not work on independent expenditures for the same candidate due to the risk that because of his relationships, the independent expenditure spending "could attach to the candidate's own campaign expenditures." The two men signed an agreement stating as follows:

John Cashmore will form a legal entity with the intended name of Intelligent Choices Minnesota and intends to explore making it a 501.c.4 non-profit for the purpose for disseminating information to one or more election contest areas. His intent is to "level the playing field" through information and comparison. He does not intend to advocate for or against any candidates in the meaning of the definitions provided by the Minnesota Campaign Finance Board and therefore intends to not be an Independent Expenditure fund or committee.

The agreement provided that Mr. Novack “will create materials and website with materials specified and provided by John Cashmore in the intended format and will submit them for approval.” The agreement was to be valid only after Mr. Cashmore had formed the 501(c)(4) organization and provided that this organization would pay Mr. Novack \$3,500 plus expenses after the election.

On September 12, 2012, Mr. Cashmore incorporated ICM. ICM has no officers or directors other than Mr. Cashmore. ICM has no employees. Mr. Cashmore authorized one other person to sign checks for ICM because Mr. Cashmore has health problems that he believed might make him too ill to do this task. The co-signer, however, has never actually signed a check for ICM and has no other role in the organization. ICM has not received any donations and Mr. Cashmore has personally paid all of the costs of the communications that are the subject of this investigation.

Pursuant to his agreement with Mr. Cashmore, Mr. Novack set up the website and prepared the design for two mailings. Mr. Cashmore reviewed the material and approved everything before it was posted or mailed. The second mailing was never actually sent and, instead, was posted on the website. The website and mailing compare the accessibility of the records of the two candidates running for the House District 49A seat. The communications also quote material from the deleted blog posts and direct readers to call that candidate and ask why he has hidden these posts. The communications do not use the words “vote for,” “vote against,” “elect,” “defeat,” or any similar phrases.

Board Analysis

The complaint first alleges, in essence, that ICM was formed solely for political purposes and therefore must register with the Board as a political committee. Minnesota Statutes section 10A.01, subdivision 27, defines a political committee as “an association whose major purpose is to influence the nomination or election of a candidate.” An association is defined as “a group of two or more persons, who are not all members of an immediate family, acting in concert.” Minn. Stat. § 10A.01, subd. 6.

Mr. Cashmore registered ICM as a nonprofit corporation with the Secretary of State. But ICM has no officers, directors, employees, or agents other than Mr. Cashmore. Although a second person is authorized to sign checks for ICM, this person has never acted because ICM has never issued any checks. Additionally, the record suggests that this person, should he act, would be acting at Mr. Cashmore’s direction rather than in concert with him. Similarly, Mr. Novack was acting as a service provider to Mr. Cashmore, not in concert with him as provided in section 10A.01, subdivision 6.

Further, Mr. Cashmore has not, either in his individual capacity or through ICM, received financial or in-kind donations from others acting in concert with him to support the efforts that are the subject of this investigation. To the contrary, Mr. Cashmore personally has paid all of

ICM's expenses. The record therefore does not support a finding that Mr. Cashmore acted in concert with anyone else, which is a prerequisite for a finding that there was an association that could be required to register as a political committee.

The complaint next alleges that ICM's website and mailing were independent expenditures that lacked the disclaimers required by Chapter 10A. Even though Mr. Cashmore acted in his individual capacity the independent expenditure disclaimer provisions of Chapter 10A apply. Minnesota Statutes section 10A.01, subdivision 18, defines an independent expenditure as "an expenditure expressly advocating the election or defeat of a clearly identified candidate." Minnesota Statutes section 10A.17, subdivision 4, requires a specific disclaimer on independent expenditure communications.

In Advisory Opinion 428, the Board reiterated its previous position that under the Board's current interpretation of Chapter 10A, express advocacy requires the use of specific words such as "vote for," "elect," "defeat," or other similar phrases. In the present case, the subject website and mailings did not use words such as "vote for," "elect," "defeat," or any similar terms. Because the website and mailings did not use words of express advocacy, these communications were not independent expenditures under Chapter 10A. The communications therefore were not required to include an independent expenditure disclaimer.

The complaint finally alleges that the subject website and mailings were "clearly focused on influencing the election in MN House race 49A", that Mr. Novack was involved with both those communications and the Erhardt campaign, and that the subject communications therefore were coordinated with the Erhardt committee. An approved expenditure is

an expenditure made on behalf of a candidate by an entity other than the principal campaign committee of the candidate, if the expenditure is made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of the candidate, the candidate's principal campaign committee, or the candidate's agent. An approved expenditure is a contribution to that candidate.

Minn. Stat. § 10A.01, subd. 4.

Contrary to the allegations of the complaint, the sworn testimony shows that Mr. Novack was not a member of the Erhardt campaign committee or a volunteer for that group. Although Mr. Novack did perform printing, mailing, and web publication services for the Erhardt committee, Mr. Novack did not provide any campaign consulting services to that committee and had no authority to act on behalf of the committee beyond the limited scope of his contract assignments. Nor was Mr. Novack involved in any decision-making for the Erhardt committee. Instead, the record here shows that Mr. Novack simply printed or posted whatever he was given by the committee. In other words, Mr. Novack was a service provider rather than a consultant or committee member.

The Board notes that the question of agency for the purposes of creating approved expenditures or defeating the independence of expenditures intended to be independent expenditures always requires a fact-based inquiry. Although this matter presents a close case, the Board concludes that there is insufficient evidence to find that Mr. Novack was the agent of the Erhardt committee for the purpose of the approved expenditure statute. The subject communications therefore were not coordinated with the Erhardt committee and do not constitute approved expenditures for that committee.

Based on the evidence before it and the above analysis the Board makes the following:

Findings Concerning Probable Cause

1. There is no probable cause to find that Intelligent Choices Minnesota or John Cashmore must register as a political committee.
2. There is no probable cause to find that Intelligent Choices Minnesota or John Cashmore made independent expenditures.
3. There is no probable cause to find that Intelligent Choices Minnesota or John Cashmore made approved expenditures for the Ron Erhardt Volunteer Committee.

Based on the above Findings, the Board issues the following:

ORDER

The Board investigation of this matter is concluded and hereby made a part of the public records of the Board pursuant to Minnesota Statutes section 10A.02, subdivision 11.

Dated: December 10, 2012

/s/ Greg McCullough

Greg McCullough, Chair
Campaign Finance and Public Disclosure Board

Relevant Statutes

Minn. Stat. § 10A.01, subd. 4. Approved expenditure. "Approved expenditure" means an expenditure made on behalf of a candidate by an entity other than the principal campaign committee of the candidate, if the expenditure is made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of the candidate, the candidate's principal campaign committee, or the candidate's agent. An approved expenditure is a contribution to that candidate.

....

Subd. 6. Association. "Association" means a group of two or more persons, who are not all members of an immediate family, acting in concert.

....

Subd. 18. Independent expenditure. "Independent expenditure" means an expenditure expressly advocating the election or defeat of a clearly identified candidate, if the expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent. An independent expenditure is not a contribution to that candidate. An independent expenditure does not include the act of announcing a formal public endorsement of a candidate for public office, unless the act is simultaneously accompanied by an expenditure that would otherwise qualify as an independent expenditure under this subdivision.

....

Subd. 27. Political committee. "Political committee" means an association whose major purpose is to influence the nomination or election of a candidate or to promote or defeat a ballot question, other than a principal campaign committee or a political party unit.

Minn. Stat. § 10A.14, subd. 1. First Registration. The treasurer of a political committee, political fund, principal campaign committee, or party unit must register with the board by filing a statement of organization no later than 14 days after the committee, fund, or party unit has made a contribution, received contributions, or made expenditures in excess of \$100, or by the end of the next business day after it has received a loan or contribution that must be reported under section 10A.20, subdivision 5, whichever is earlier.

Minn. Stat. § 10A.17, subd. 4. Independent expenditures. An individual, political committee, political fund, principal campaign committee, or party unit that independently solicits or accepts contributions or makes independent expenditures on behalf of a candidate must publicly disclose that the expenditure is an independent expenditure. All written communications with those from whom contributions are independently solicited or accepted or to whom independent

expenditures are made on behalf of a candidate must contain a statement in conspicuous type that the activity is an independent expenditure and is not approved by the candidate nor is the candidate responsible for it. Similar language must be included in all oral communications, in conspicuous type on the front page of all literature and advertisements published or posted, and at the end of all broadcast advertisements made by that individual, political committee, political fund, principal campaign committee, or party unit on the candidate's behalf.