

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Stephen Wunderlich,

Complainant,

vs.

Jan Jude,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

The above-entitled Fair Campaign Practices Complaint is pending before the following Panel of three Administrative Law Judges: James E. LaFave (Presiding Judge), Barbara J. Case, and Cheryl LeClair Sommer.

The matter was submitted to the Panel based on the record created at the Probable Cause hearing and the underlying record, including the Complaint, the Prima Facie Determination, the Probable Cause Order, and written submissions from the parties. The OAH record closed on August 6, 2014.

STATEMENT OF THE ISSUES

Campaign material is required, under Minn. Stat. § 211B.04, to include a disclaimer identifying the name and address of the person or committee that prepared or disseminated the material. The Respondent's Facebook page, "Jan Jude for Mille Lacs County Attorney," did not include a disclaimer. The issues presented are:

1. Is the Respondent's Facebook page "campaign material" within the meaning of Minn. Stat. § 211B.01, subd. 2?
2. If yes, did the Respondent violate Minn. Stat. § 211B.04(b) by failing to include a disclaimer on campaign material substantially in the form required?
3. If so, what penalty is appropriate?

The Panel concludes that the Respondent's Facebook page is campaign material and that the Complainant has established by a preponderance of the evidence that Respondent failed to include a disclaimer on this campaign material substantially in the form required under Minn. Stat. § 211B.04(b). For this violation, the Panel concludes a civil penalty of \$100 is appropriate.

Based on the record and proceedings herein, the undersigned panel of Administrative Law Judges makes the following:

FINDINGS OF FACT

1. The Respondent, Jan Jude, is the current Mille Lacs County Attorney. Ms. Jude is seeking re-election to that position in the upcoming primary and general elections.

2. The Respondent maintains a Facebook page that is dedicated to her accomplishments as Mille Lacs County Attorney and her current campaign for re-election. The name of her Facebook account is "Jan Jude for Mille Lacs County Attorney" and the web address is: www.facebook.com/janjudeformillelacscounty.¹

3. Posted on Respondent's Facebook page are links to favorable newspaper articles regarding Ms. Jude's re-election bid and initiatives undertaken by the Mille Lacs County Attorney's Office to prevent and prosecute child abuse. The Facebook page also includes personal statements regarding Ms. Jude's commitment to the Mille Lacs County community, her 11 years of "dedicated service" as the Mille Lacs County Attorney, and her desire to continue to serve the County in the role of County Attorney.²

4. Prior to the initiation of this complaint, the Respondent's Facebook page did not include a disclaimer stating who or what organization prepared and paid for the site.³

5. The Respondent did include disclaimers on other campaign material she prepared and disseminated including banners, signs, brochures, and a campaign website.⁴

6. Mr. Wunderlich filed this complaint on June 16, 2014. The complaint alleged four separate violations of Minnesota Statutes § 211B.04. Only the allegation concerning Ms. Jude's Facebook page survived following the prima facie review and probable cause hearing.⁵

7. Sometime after the complaint was filed, Ms. Jude added the following disclaimer to her Facebook page: "Prepared and paid for by Jan Jude, 15203 140th St., Foreston, MN 56330."⁶

Based upon the foregoing Findings of Fact, the undersigned Panel of Administrative Law Judges makes the following:

¹ Complaint attachments (three screen shots of Respondent's Facebook page); Complainant's Ex. A.

² *Id.*

³ *Id.*

⁴ Respondent's Exs. 1 and 3; Complainant's Ex. B. See Notice of Determination of Prima Facie Violation, OAH 60-0325-31602 (June 19, 2014).

⁵ See Notice of Determination of Prima Facie Violation, OAH 60-0325-31602 (June 19, 2014), and Probable Cause Order, OAH 60-0325-31602 (July 2, 2014).

⁶ Respondent's Ex. 4.

CONCLUSIONS OF LAW

1. The Administrative Law Judge Panel is authorized to consider this matter pursuant to Minn. Stat. § 211B.35.

2. Minn. Stat. § 211B.01, subd. 2, defines “campaign material” to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.”

3. The Respondent’s Facebook page, “Jan Jude for Mille Lacs County Attorney,” is campaign material within the meaning of Minn. Stat. § 211B.01, subd. 2.

4. Minn. Stat. § 211B.04, as amended in 2010, provides in relevant part:

(a) A person who participates in the preparation or dissemination of campaign material other than as provided in section 211B.05, subdivision 1, that does not prominently include the name and address of the person or committee causing the material to be prepared or disseminated in a disclaimer substantially in the form provided in paragraph (b) or (c) is guilty of a misdemeanor.

(b) Except in cases covered by paragraph (c), the required form of disclaimer is: "Prepared and paid for by the committee,(address)" for material prepared and paid for by a principal campaign committee, or "Prepared and paid for by the committee,(address), in support of(insert name of candidate or ballot question)" for material prepared and paid for by a person or committee other than a principal campaign committee.

(c) In the case of broadcast media, the required form of disclaimer is: "Paid for by the committee."

5. The burden of proving the allegation in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.04 is a preponderance of the evidence.⁷

6. The Respondent’s Facebook page did not include a disclaimer substantially in the form required by Minn. Stat. 211B.04(b).

7. The Complainant has established by a preponderance of the evidence that the Respondent violated Minn. Stat. § 211B.04(b) by failing to include a disclaimer on her Facebook page located at www.facebook.com/janjudeformillelacscounty.

8. Based on the above violation, it is appropriate to impose a civil penalty in the amount of \$100.

⁷ Minn. Stat. § 211B.32, subd. 4.

9. The attached Memorandum explains the reasons for these Conclusions and is incorporated by reference.

Based on the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

ORDER

IT IS ORDERED:

That having been found to have violated Minn. Stat. § 211B.04, Respondent Jan Jude shall pay a civil penalty of \$100 by October 15, 2014.⁸

Dated: August 8, 2014

s/James E. LaFave

JAMES E. LAFAVE
Presiding Administrative Law Judge

s/Barbara Case

BARBARA CASE
Administrative Law Judge

s/Cheryl LeClair Sommer

CHERYL LE CLAIR SOMMER
Administrative Law Judge

⁸ The check should be made payable to "Treasurer, State of Minnesota" and sent to the Office of Administrative Hearings, P.O. Box 64620, St. Paul MN 55164-0620.

NOTICE

Pursuant to Minn. Stat. § 211B.36, subd. 5, this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

Campaign material is defined to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.”⁹ Campaign material is required, under Minn. Stat. § 211B.04(a) and (b), to include a disclaimer identifying the name and address of the person or committee that prepared or disseminated the material.

The Respondent asserts that her Facebook page should not be viewed as campaign material requiring a disclaimer. The Respondent contends that she uses her Facebook page simply as a “professional biography” rather than as a site to promote her candidacy. She notes, for example, that her Facebook page does not include a link to her campaign website and she contends that she did not solicit votes or donations for her re-election bid on the site. In addition, the Respondent argues that Facebook pages in general are more akin to blogs, which, according to the Respondent, do not require disclaimers under Federal Election Commission (FEC) rules governing internet communications. The Respondent suggests that the Panel should likewise view Facebook pages to be blogs and conclude they are not material requiring disclaimers.

In the event the Panel does conclude that her Facebook page is campaign material, the Respondent asserts that the Panel should find that she substantially complied with the disclaimer requirement. The Respondent maintains that since her name and photographs are prominently displayed on the site, the only reasonable conclusion a viewer could draw is that she is the person who prepared the Facebook page.

The Panel concludes that the Respondent’s Facebook page is comprised of material that was clearly disseminated for the purpose of influencing voting in the upcoming primary election for the office of Mille Lacs County Attorney. The name of Respondent’s Facebook account, “Jan Jude for Mille Lacs County Attorney,” which is prominently displayed on the site’s home page, and the postings and links to articles regarding her years of dedicated service as the Mille Lacs County Attorney and her campaign for re-election, render the Facebook page campaign material within the meaning of the Fair Campaign Practices Act. While Respondent may not have directly solicited votes on the site, she did use the site to promote her candidacy and her bid for

⁹ Minn. Stat. § 211B.01, subd. 2.

re-election. As a result, the Respondent's Facebook page falls within the definition of "campaign material" under the Act and, therefore was required to include a disclaimer substantially in the form provided in Minn. Stat. § 211B.04(a) and (b).¹⁰ The purpose of the disclaimer requirement is to "identify who or what committee prepared, disseminated and paid for the campaign material."¹¹

Respondent's claim that she substantially complied with the disclaimer requirement is not persuasive. In prior cases finding substantial compliance, the candidates prominently included contact information for the candidate or the candidate's campaign committee on the material at issue.¹² However, the Respondent in this case did not include any information indicating who or what organization prepared or paid for the Facebook site. Without such information, the reader is left to guess whether the candidate or some other group prepared and posted the material for dissemination.

The Panel also rejects Respondent's assertion that Facebook pages are akin to blogs and, in accordance with FEC rules, should be found to not require disclaimers. While federal election law may provide some guidance, there is no proper basis for concluding that FEC regulations control the interpretation of "campaign material" set forth in Minnesota statutes or preclude application of the definition to Respondent's Facebook page. Moreover, the Panel finds that Facebook pages are more akin to web sites than blogs, and FEC rules do require registered political committees to place disclaimers on their public web sites.¹³ In any event, Ms. Jude is not a candidate for federal office. This matter is governed by the Fair Campaign Practices Act, not FEC rules.

Finally, in her written submission, the Respondent again raises the argument that the disclaimer requirement is unconstitutional. As stated in the Probable Cause Order, neither an administrative law judge nor an administrative agency has authority to declare a statute unconstitutional on its face.¹⁴ The Panel notes only that while the disclosure requirements in Minn. Stat. § 211B.04 were found to be unconstitutional by the Minnesota Court of Appeals in *Riley v. Jankowski*,¹⁵ the U.S. Supreme Court rejected both facial and as-applied challenges to similar federal disclaimer requirements in *Citizens United v. FEC*,¹⁶ and held that such disclaimer provisions place no significant

¹⁰ See also, *Metsa v. Colangelo*, OAH 16-0320-30065 (Nov. 26, 2012) (candidate's web site found to be campaign material); *Mastrud v. Ellison*, OAH 12-0320-16153 (September 21, 2004) (candidate's web site found to be campaign material).

¹¹ *Hansen v. Stone*, OAH 4-6326-16911 (Oct. 28, 2005).

¹² See *Gadsen v. Kiffmeyer*, OAH 3-0320-21690 (Nov. 1, 2010); *Mastrud v. Ellison*, OAH 12-0320-16153 (September 21, 2004).

¹³ 11 CFR § 110.11(a) (all internet websites of political committees available to the general public must include disclaimers).

¹⁴ G. Beck, *Minnesota Administrative Procedure* § 11.5 (2d ed. 1998). See, e.g., *Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366, 368 (Minn. 1977); *Petterssen v. Commissioner of Employment Serv.*, 306 Minn. 542, 543, 236 N.W.2d 168, 169 (Minn. 1975); *Starkweather v. Blair*, 245 Minn. 371, 394-95, 71 N.W.2d 869, 884 (1955); *In the Matter of Rochester Ambulance Service*, 500 N.W.2d 495 (Minn. App. 1993).

¹⁵ 713 N.W.2d 379 (Minn. Ct. App.) review denied (Minn. 2006).

¹⁶ 558 U.S. 50 (2010).

burden on First Amendment rights. Following the *Citizens United* decision, the Minnesota Legislature amended Minn. Stat. § 211B.04 effective June 1, 2010, to apply to all campaign material prepared and disseminated on or after that date.¹⁷

The Panel concludes that the Complainant has established by a preponderance of the evidence that the Respondent violated Minn. Stat. 211B.04(b) by not including a disclaimer on her “Jan Jude for Mille Lacs County Attorney” Facebook page substantially in the form required by the statute. The Panel concludes further, however, that the violation was isolated because the Respondent had proper disclaimers on other campaign material, and that it had little, if any, adverse effect on the upcoming primary election. Moreover, once the complaint was filed and the Respondent was made aware of the alleged violation, she promptly added the appropriate disclaimer to her Facebook page.

The Panel finds that a civil penalty in the amount of \$100 is appropriate in this case.

J. E. L., B. J. C., C. L. S.

¹⁷ See Laws of Minnesota 2010 Chapter 397.