

Overview and FAQ for *Utter v. BIAW*, and the Notice of Intent to Sue Dino Rossi

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Summary: On October 6, 2008, Former State Supreme Court Justices Robert F. Utter and Faith Ireland filed a citizen action lawsuit against the Building Industry Association of Washington (“BIAW”).¹ [\[EX A\]](#). They also served notice that at the end of a statutory waiting period they intend to add Dino Rossi as a defendant in their suit against the BIAW. [\[EX B\]](#).

The evidence and Rossi’s own admissions strongly suggest that in Spring and Summer of 2007, he improperly “encouraged” and “collaborated” with the BIAW’s political committee promoting his candidacy, and even assisted its fundraising efforts.

These facts, if proven, would have made Rossi a “candidate” for the purposes of the Fair Campaign Practices Act, RCW 42.17. *See* [WAC 390-05-200](#). This is true even if Rossi had not officially declared or made a final decision on his candidacy.

These facts also would disqualify the BIAW’s political committee as an “independent expenditure” committee and limit its legal expenditures in the 2008 governors’ race to \$2800. [RCW 42.17.640](#), [\[EX C\]](#). This political committee has already spent approximately two million dollars over that amount, and intends to spend another \$700,000 in the next month.

The lawsuit seeks to take depositions of key participants including Dino Rossi and officers of BIAW and the MBA, to confirm what really took place during this period. If discovery confirms the facts alleged in the complaint, we will seek to enjoin further illegal expenditures between now and the election. The Justices’ lawsuit claims that these over-limit expenditures are a gross violation of the law and should be immediately stopped.

The Fair Campaign Practices Act holds Dino Rossi equally responsible for these over-limit expenditures on his behalf, and it is that claim that the Justice plan to bring against Dino Rossi at the end of the statutory notice period unless the Attorney General files suit on that claim.

¹ As used herein, the term BIAW refers to the Building Industry Association of Washington and/or its subsidiary BIAW Member Services Corporation, which is consistent with these organizations’ use of this term.

Describe the lawsuit *Utter v. BIAW*.

The lawsuit is a citizen action brought pursuant to the State’s Fair Campaign Practices Act, RCW 42.17. *See* Justices Complaint. [EX A]. On July 25 and September 9th, 2008, the Justices gave statutorily required notice of their intent to bring suit against the BIAW for multiple claims, including that expenditures from the BIAW’s political committee do not qualify as “independent expenditures” because of improper coordination. *See* Justices 45 day notice letter at p. 8. This is a primary claim made in *Utter v. BIAW*.

The evidence and Rossi’s own admissions strongly suggest that in Spring of 2007, Rossi “encouraged” and “collaborated” with the BIAW’s political committee set up to promote his candidacy, and even assisted its fundraising efforts. These facts, if proven, would disqualify the BIAW’s committee from making independent expenditures in his race.

On September 30, Dino Rossi stated that it would have been “perfectly OK” for him to help BIAW’s fundraising effort because the events occurred before he declared himself a candidate. Is that correct? [EX D][EX E][EX F]

No. Dino Rossi became a “candidate” under our campaign laws when he knew of and consented to the BIAW’s fundraising campaign and resulting political committee. It did not matter that Rossi had not officially declared or made a final decision on his candidacy.

Under [WAC 390-05-200](#) and [PDC Declaratory Order No. 8](#), a person is deemed to be a candidate by “the existence of a political committee promoting the election of such individual for public office with the knowledge and consent of that individual.”

The BIAW’s political committee legally came into existence when pledges were first received, prior to April 30, 2007. [EX H] (MBA Bd. Minutes of 4/30/07 saying 11 pledges received); [RCW 42.17.020\(14\)\(a\)](#) (contribution includes pledge), [.020\(33\)](#) (political committee is one who expects to receive contribution or make expenditure). Sworn testimony of the Executive Director of the MBA and other evidence shows that this political committee was a “Fund for Rossi.” [EX I] [EX J]. The evidence shows that Rossi knew of this effort and consented to it, making him a candidate.

Didn’t the PDC decide Rossi was not a candidate prior to October 2007?

The PDC’s previous investigation had no information about the BIAW’s political committee. The PDC never specifically asked Dino Rossi about his 2007 fundraising or support for other’s fundraising. When the PDC interview of him came close, Dino Rossi suggested that he only had conversation about support for his candidacy when people urged him to run, and he claimed that mostly that happened beginning in September 2007. [EX K]. His testimony to the PDC threw the investigation off this track but is inconsistent with the facts.

Once Dino Rossi became a “candidate,” could he assist the BIAW’s political committee?

No. To be deemed “independent” and avoid campaign contribution limits, an organization must not have “**received the candidate’s encouragement or approval** to make the expenditure” or “**collaborated** [with the candidate] for the purpose of making the expenditure. [RCW 42.17.020\(24\)\(a\)\(i\)\(iv\)](#) (emphasis added).

What evidence is there that Rossi “encouraged” and “collaborated” with the BIAW’s “Fund for Rossi”?

- **MBA Meeting Minutes show that Rossi made calls to the three top MBA officers while they were considering BIAW’s request for a contribution.**

MBA minutes show that on April 30, BIAW President Daimon Doyle asked the MBA to make a contribution to the BIAW’s “Fund for Rossi.” [\[EX G\]](#) [\[EX H\]](#) [\[EX I\]](#). The Board decided to table the request until their next meeting. Three weeks later, the Board reconvened and began to discuss the request. The minutes show that the MBA’s three top officers had received calls from Dino Rossi:

Doug moved into discussion regarding the request from BIAW to use excess money from the ROII refund to fund the BIAW's war chest. ... So far, Pierce and King Snohomish Counties are the only associations who have not made a commitment. ... Doug, Joe, and John reported that they had received a call from Dino Rossi. John stated that he reiterated the Board's sentiment to Rossi, stating that it was too early, and the association had building issues that needed to be resolved. Doug indicated that he would call Daimon and let him know that the MBA has taken no action, though it doesn't mean that the board won't take action later. **September would be a good time to make a decision.**

[\[EX L\]](#).

The April 30 meeting minutes show that the “Board’s sentiment” that John Day “reiterated” to Rossi was the Board’s sentiment on BIAW’s solicitation, including concern about how early it was and other upcoming expenditures. [\[EX G\]](#) [\[EXH\]](#).

- **Dino Rossi invited the MBA officers to lunch.**

After the MBA Board again tabled the fundraising request until September, Dino Rossi asked the officers out to lunch at the Bellevue Club on June 25, 2007, to see what level of support he could count on. [\[EX M\]](#).

- **Dino Rossi gave the keynote speech at the BIAW meeting where the illegal fundraising transactions took place and were discussed.**

At the BIAW Summer 2007 Board Meeting, the BIAW’s political committee received major contributions and BIAW Board President Doyle gave a speech about the fundraising campaign. See Complaint [\[EX A\]](#). Dino Rossi gave the keynote address at this Board meeting. Immediately

after Rossi spoke, Doyle presented results from a statewide poll testing a Gregoire-Rossi matchup. These facts suggest Rossi's knowledge and participation.

Has Dino Rossi admitted that he “encouraged” and “collaborated” with the BIAW’s “Fund for Rossi?”

Rossi's September 30, 2008 statements to reporters seem to admit that he provided “encouragement” and “collaboration.” Certainly he did not deny such involvement.

- Rossi admitted to the Seattle P-I that he had made the calls to the MBA officers “**on behalf of the BIAW** to mediate a dispute between the two organizations.” [\[EX D\]](#).
- The P-I reported: “**Rossi did say he had inquired about political contributions in a general sense.** ‘Part of (the discussion) was participation but we never talked about dollar amounts and I never asked them to put money here are there. Part of it was them coming together with their political efforts,’ Rossi said.”
- The Associated Press described Rossi as stating “that **he called the county builders officials simply to smooth over a dispute** about political cooperation between the King and Snohomish Group and the statewide BIAW. **The schism included fundraising.**” [\[EX N\]](#).

The record suggests that the dispute that Rossi was trying to “mediate” involved whether or not the MBA would donate \$575,000 to BIAW’s “Fund for Rossi.”

Is it important to confirm the facts now, before the election, and if so how will you do that?

While the evidence and Rossi's admissions establish that Rossi spoke with officers of the BIAW and MBA about fundraising, it is very important to establish exactly what was said in these conversations and other communications. Plaintiffs seek to immediately begin taking depositions and subpoenaing documents. If discovery confirms the facts stated in the complaint, they will ask the Court to prohibit further over-limit and illegal expenditures.

Does it matter that Dino Rossi denied ever talking to the county builders about specifics regarding political spending?

No. This topic was the subject of a formal advisory opinion issued to the BIAW on June 15, 2004. The BIAW asked whether “a candidate may solicit funds for a political committee (PAC) that would make independent expenditures in support of that candidate” if the candidate had no involvement in the expenditures. The PDC advisory opinion concluded “the answer to the question is no. Not all of the elements of an Independent Expenditure as defined in RCW 42.17.020(24)(a) could be satisfied.” [\[EX C\]](#). The opinion stated:

One of the most fundamental ways a candidate could encourage a person to purchase political advertising supporting that candidate is to help make sure that person has sufficient funds to undertake an effective advertising effort. Assisting a PAC in fundraising fosters that committee's ability to make the political advertising expenditure benefiting the

candidate. As such, the PAC expenditure is not sufficiently removed from the candidate to qualify as an independent expenditure.

...

That collaboration disqualifies any resulting expenditure from the definition of independent expenditure.

The opinion concluded: “if a candidate assists a PAC in fundraising and the PAC then undertakes political advertising supporting that candidate or promoting the defeat of that candidate's opponent, that expenditure does not satisfy the definition of ‘independent expenditure.’” Public Disclosure Commission, Advisory Memorandum on Independent Expenditures, June 15, 2004, adopted by PDC on August 24, 2004

Does it matter that Dino Rossi claims he “never talked about dollar amounts” or specific contributions?

Making an explicit ask is not required for a candidate to “assist a PAC in fundraising” and disqualify the PAC from making independent expenditures. The BIAW’s question to the PDC was “may a candidate give the names of selected supporters to the PAC, or may the candidate make a phone call to a supporter to facilitate a meeting with PAC representatives.” [EX C]. The PDC said this was impermissible. *Id.* Prohibited “fundraising assistance” even includes “referring potential contributors to the PAC, and referencing the PAC on the candidate’s website or in his or her literature.” *Id.*

When a candidate makes phone calls to potential donors who are considering a contribution, or takes them to lunch, the candidate assists the fundraising. The candidate does not need to talk about money at all to help close the deal. We will show in our case that this is a recognized method of fundraising.

What does this matter to the 2008 election?

If the BIAW’s political committee is disqualified from making an “independent expenditure” then all of its campaign expenditures count as donations to the Dino Rossi campaign and are legally limited to \$2800. It has already spent approximately two million dollars more than was allowed. Further expenditures should be prohibited.

What did Rossi do wrong and will claims proceed against him?

The Utter vs. BIAW lawsuit currently makes no claims against Dino Rossi. However, the Justices also filed a notice stating their intent to add Dino Rossi to the suit as a defendant at the end of a statutory waiting period. [EX B]. The alleged violations of Dino Rossi are extremely serious. The Justices claim that he solicited and received over-limit expenditures in support of his race, and then failed to report them. In Washington State, a person violates the spirit and the letter of the law by soliciting a contribution exceeding \$2800 to promote his candidacy. It doesn’t matter whether the money is going the candidates own campaign committee or a third party’s political committee promoting his candidacy. In either even, the person’s participation makes him a candidate and makes the solicitation and subsequent contribution illegal.