

**ALASKA LEGISLATURE**

**2425**

**HOUSE and SENATE FINANCE COMMITTEE FILES, 2001 - 2002**

# ALASKA STATE LEGISLATURE

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## SENATE RESOURCES COMMITTEE

### CS SB 360(RES)

### SECTIONAL ANALYSIS

#### General Provisions – Sections 1-3

#### **Section 1. Short Title.**

The Act is the "Alaska Natural Gas Project Act."

#### **Section 2. Findings Regarding Amendments To The Right-Of-Way Leasing Act.**

This section sets forth legislative findings regarding:

- (1) The various pipeline proposals;
- (2) The benefits to Alaska from in-state use of gas and from hiring Alaskans and contracting with Alaskan businesses to work on a pipeline; and
- (3) The need for competition in the upstream portion of the Alaska gas industry.

#### **Section 3. Findings Regarding Amendments To The Alaska Railroad Corporation Act.**

This section sets forth legislative findings regarding the appropriateness of the Alaska Railroad Corporation's issuance of financing to benefit an Alaska natural gas project.

#### Alaska Land Act Provisions (AS 38.05) – Section 4

#### **Section 4. Changes to Lease Provisions and Royalty Reduction.**

If an applicant/lessee obtains the certificates required by the AS 38.35.240, then DNR commissioner may negotiate to modify any provision in the oil and gas lease that impedes the project. Additionally, the commissioner may negotiate to

reduce the royalty with the applicant. The applicant must demonstrate by clear and convincing evidence that the project would not otherwise be economically feasible without a royalty reduction. If the DNR commissioner agrees that changes to the lease or royalty relief is appropriate, the DNR commissioner shall forward proposed terms to the DOR commissioner for inclusion in a contract developed under section 10. The commissioner may request necessary information and records from the applicant. The information and records must be kept confidential upon request of the applicant. The commissioner may only negotiate if the applicant was obtained all the certificates by June 30, 2005.

### Right-of-Way Leasing Act Provisions (AS 38.35) – Sections 5

#### **Section 5. Purpose of the Act, Required Plans and Agreements, and Special Provisions for an Approved Project**

This section adds several new sections to the Right-of-Way Leasing Act. First, AS 38.35.235 sets forth the Act's purposes. They are to:

- (1) Expedite a project consistent with ensuring that the people of Alaska get the maximum benefits possible;
- (2) Ensure access to the project by oil and gas companies that do not have an ownership interest in the project and to promote competition in the exploration and development of northern Alaska natural gas;
- (3) Ensure access to the state's royalty gas for Alaskans and Alaskan businesses; and
- (4) Ensure employment of Alaskans and the use of Alaska firms in connection with the project.

Second, AS 38.35.240 describes the actions that an applicant must take before the applicant is eligible for the benefits provided by the Act. If the applicants' actions met certain standards, then the applicable agency will issue a certificate of approval. To expedite the process, the agency must conduct a hearing and act within 90 days of receiving a request for a certificate. The required actions are:

- (1) The applicant must submit a plan showing how the applicant will use best efforts to train and employ state residents and, whenever feasible, will contract with firms in the state in connection with the project;
- (2) The applicant must study in-state demand and submit a plan showing how the plan will maximize the opportunities for access to state royalty gas transported in the project;
- (3) The applicant must study potential gas resources in northern Alaska and submit a plan showing how the applicant's plan and design of the project will maximize the opportunities for access to initial and expansion capacity on the project;

- (4) The applicant must update the demand and supply studies ten years after construction of the project starts;
- (5) The applicant must agree to lease stipulations that:
  - (a) The applicant will provide access to the state to ship the state's royalty gas for use within the state and will use best efforts to get appropriate authorizations to effectuate such shipments;
  - (b) The applicant must seek expansion of the pipeline from the appropriate federal agency if the Regulatory Commission of Alaska determines that expansion of the pipeline is in the best interests of the state and that other criteria are met.

AS 38.35.245 provides that if an applicant/lessee obtains the certificates required by AS 38.35.240, then the DNR commissioner may phase the Right-of-Way lease application process. It also contains a transition provision for entities that have a pending application.

AS 38.35.250 provides that if an applicant/lessee obtains the certificates required by AS 38.35.240, then all other agencies involved in the permitting of the project must give their full cooperation to the DNR commissioner. They must do this by:

- (1) Assembling and furnishing all requested information;
- (2) Issue necessary authorizations at the earliest practicable date, on an expedited basis, and, notwithstanding any other provision of law, with precedence over any like matter;
- (3) Amend any authorization as necessary except changing the basic nature or general route or otherwise impairing the expeditious construction of the project.

AS 38.35.255 provides that the governor may ask for a waiver of law if any applicable provision of law constitutes an obstacle to the expeditious construction of the project.

AS 38.35.257 provides that if an applicant/lessee has obtained the certificates required by AS 38.35.240, then judicial review of decisions made or actions taken under the Act is limited to claims that can be brought under AS 38.35.200 (b) and such claims must be brought within 60 days after the decision or act.

AS 38.35.259 defines various terms used throughout the Act. It uses an expansive definition of the phrase "Alaska North Slope natural gas project" to include either an Alaska Highway route through Canada or a route to southcentral Alaska.

## Alaska Railroad Corporation Provisions (AS 42.40) – Sec. 6 - 9

### **Section 6. Powers of the Alaska Railroad.**

This section amends the general powers of the Alaska Railroad Corporation to give it authority to provide financing for the project within and outside the state whether or not the Railroad owns the project.

### **Section 7. Public Purpose of Bonds.**

This section provides that bonds issued by the Railroad for the project are for an essential public and governmental purpose.

### **Section 8. Payment of Bonds.**

This section provides that before issuing bonds for the project, the Railroad must enter into an agreement to ensure that the bond's principal and interest will be timely paid, reserves will be sufficient for the required payments, and all costs relating to the bonds will be paid by an entity other than the corporation. The corporation may retain any excess consideration.

### **Section 9. Issuance of Bonds.**

This section provides that if an applicant/lessee obtains the certificates required by AS 38.35.240, then the Railroad may issue bonds to an applicant to finance the construction of the project and related facilities. The maximum amount of the bonds is \$18 billion and they may be issued in several issuances.

## **Oil and Gas Taxes Provisions (AS 43.56) – Section 10**

### **Section 10. Reduction of Taxes.**

AS 43.56.185 provides that if an applicant/lessee obtains the certificates required by AS 38.35.240, then the DOR commissioner may negotiate to develop a proposed contract that: (1) reduces property taxes levied by the state or a municipality; (2) includes any royalty reduction negotiated by the DNR commissioner under section 4; and (3) makes other terms and conditions that are necessary to protect the best interests of the state.

The DOR commissioner may develop a proposed contract only if:

1. The commissioner has consulted with any affected municipality, prepares a report on socioeconomic effects of

- the project on any affected municipality, and has considered whether other jurisdictions have granted incentives;
2. The commissioner has considered whether other jurisdictions have granted incentives;
  3. The applicant demonstrates by clear and convincing evidence that the project would not otherwise be economically feasible; and
  4. The applicant has agreed to a date certain to begin construction of the project; and
  5. The commissioner has incorporated any agreement that the DNR commissioner has made regarding royalties and the proposed contract includes a mechanism to provide the state with greater royalty and tax revenues if the price of gas is higher than expected.

If the DOR commissioner develops a proposed contract, the commissioner must:

1. make a preliminary finding and determination that the proposed contract is in the long-term fiscal interests of the state, furthers the purposes of this act, and is in the state's best interest;
2. give reasonable public notice, conduct a public hearing, and allow for public comment;
3. provide copies of the proposed contract, findings, and supporting information;
4. if the legislation is not in session, offer to appear before the Legislative Budget and Audit Committee;
5. within 30 days of the close of the public comment, prepare a final finding and final proposed contract; and
6. transmit the proposed contract to the governor, who may transmit it to the legislature.

The governor is not authorized to execute the contract unless the legislature approves it.

Any challenge to the law authorizing the contract must be brought within 120 days after the contract was executed. The commissioner may request necessary information and records from the applicant. The information and records must be kept confidential upon request of the applicant. The commissioner may only negotiate if the applicant was obtained all the certificates by June 30, 2005.

#### **Alaska Coastal Management Program Provision (AS 46.40) – Section 11**

##### **Section 11. Phasing under the Coastal Management Program.**

This section provides that if an applicant/lessee obtains the certificates required by AS 38.35.240, then any agency responsible for the consistency determination

for a project may phase review of the project. It also contains a transition provision for entities that have a pending application.

**Uncodified Provisions – Sections 12 – 14**

**Section 12. Limitation of Certain Actions.**

This section provides that constitutional challenges to this Act must be brought within 60 days after the Act's effective date.

**Section 13. Legislative Authorization and Approval.**

This section provides that, by passing this Act, the legislature is granting the approval required by AS 42.40.285 for the Railroad to issue bonds to the project.

**Section 14. Effective Date.**

The Act takes effect immediately.

**SENATE COMMITTEE REPORT  
First Committee of Referral**

DATE: 4/10/02

FURTHER: Finance

Date of 5-Day Notice: 4/11/02  
(in accordance with Uniform Rule 23)

DATE TURNED  
IN TO OFFICE: 4/17/02

Resources Committee considered      SENATE BILL NO. 360

NORTH SLOPE NATURAL GAS PROJECT & BONDS

and recommends:

- be replaced with CS SB-360 (RES)
- adopt previous CS (        )
- attached amendment(s)
- adopt Letter of Intent by          Committee
- further referral to          Committee

- Senate Bill:**  
 same title  
 new title  
**House Bill:**  
 same title  
 technical title  
 new: SCR #

**NEW FISCAL NOTE(S):**

| Department       | Date    | Fiscal | Zero | FN# |
|------------------|---------|--------|------|-----|
| Labour           | 4-12-02 | ✓      |      | 4   |
| DNR-O&GDvlprnt   | 4-12-02 | ✓      |      | 3   |
| DNR-Gas Pipeline | 4-15-02 | ✓      |      | 2   |
| Revenue          | 4-15-02 | ✓      |      | 1   |
|                  |         |        |      |     |

**PREVIOUS FISCAL NOTE(S):**

| Department | Date | Fiscal | Zero | FN# |
|------------|------|--------|------|-----|
|            |      |        |      |     |
|            |      |        |      |     |
|            |      |        |      |     |
|            |      |        |      |     |

APPROPRIATION - no fiscal note

| SIGNATURES AND RECOMMENDATIONS: | DO PASS | DO NOT PASS | NO REC | AMEND |
|---------------------------------|---------|-------------|--------|-------|
| <i>Rick Halford</i>             | ✓       |             |        |       |
| <i>Ben Stubb</i>                | ✓       |             |        |       |
| <i>Gary White</i>               | ✓       |             |        |       |
| <i>[Signature]</i>              | ✓       |             |        |       |
| <i>[Signature]</i>              |         |             | ✓      |       |
| CHAIR: <i>John Layton</i>       | ✓       |             |        |       |

**SB**

**363**

SFIN

FILE

# SENATE FINANCE COMMITTEE REPORT

REGISTERED BILL  
MAY 07 2002  
STATE HOUSE

DATE: 5/6/02

FURTHER:

DATE TURNED IN TO OFFICE: 05/07/02

Finance Committee considered

SENATE BILL NO. 363

*SB 363 ELECTIONEERING COMMUNICATIONS*

"An Act relating to electioneering communications and communications intended to influence the outcome of an election and to campaign misconduct in the second degree; and providing for an effective date."

and recommends:

- be replaced with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- adopt previous ~~CS~~ CS SB 3103 (STA)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

**Senate Bill:**

- same title
- new title

**House Bill:**

- same title
- technical title
- new: SCR # \_\_\_\_\_

**NEW FISCAL NOTE(S):**

| Department | Date   | Fiscal | Zero | FN# |
|------------|--------|--------|------|-----|
| Admin      | 5/6/02 | 5.0    |      |     |
|            |        |        |      |     |
|            |        |        |      |     |
|            |        |        |      |     |

**PREVIOUS FISCAL NOTE(S):**

| Department | Date | Fiscal | Zero | FN# |
|------------|------|--------|------|-----|
| Gov        |      |        | ✓    | 2   |
|            |      |        |      |     |
|            |      |        |      |     |
|            |      |        |      |     |

APPROPRIATION - no fiscal note

| SIGNATURES AND RECOMMENDATIONS: | Do PASS | Do NOT PASS | No REC | AMEND |
|---------------------------------|---------|-------------|--------|-------|
| <i>Buddy Green</i>              | ✓       |             |        |       |
| <i>Alan Guste</i>               |         |             | ✓      |       |
| <i>Sam Welch</i>                | ✓       |             |        |       |
| <i>Loren D. Leman</i>           | ✓       |             |        |       |
|                                 |         |             |        |       |
|                                 |         |             |        |       |
| COCHAIR: <i>Carol P. ...</i>    | ✓       |             |        |       |
| COCHAIR: <i>Pat ...</i>         | ✓       |             |        |       |

RECEIVED 2002  
MAY 07 2002

# FISCAL NOTE

STATE OF ALASKA  
2002 LEGISLATIVE SESSION

Fiscal Note Number: \_\_\_\_\_  
Bill Version: CSSB 363 (STA)  
( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Admin  
Title An act relating to communications... BRU AK Public Offices Commission  
Component \_\_\_\_\_  
Sponsor Senate Rules  
Requester Senate Finance Component No. 70

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2003    | FY 2004    | FY 2005    | FY 2006    | FY 2007    | FY 2008    |
|------------------------|------------|------------|------------|------------|------------|------------|
| Personal Services      | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Travel                 | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Contractual            | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Supplies               | 5.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| Equipment              |            |            |            |            |            |            |
| Land & Structures      |            |            |            |            |            |            |
| Grants & Claims        |            |            |            |            |            |            |
| Miscellaneous          |            |            |            |            |            |            |
| <b>TOTAL OPERATING</b> | <b>5.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> |

|                             |  |  |  |  |  |  |
|-----------------------------|--|--|--|--|--|--|
| <b>CAPITAL EXPENDITURES</b> |  |  |  |  |  |  |
|-----------------------------|--|--|--|--|--|--|

|                               |  |  |  |  |  |  |
|-------------------------------|--|--|--|--|--|--|
| <b>CHANGE IN REVENUES ( )</b> |  |  |  |  |  |  |
|-------------------------------|--|--|--|--|--|--|

**FUND SOURCE** (Thousands of Dollars)

|   |            |            |            |            |            |            |
|---|------------|------------|------------|------------|------------|------------|
| 1002 Federal Receipts                   |            |            |            |            |            |            |
| 1003 GF Match                           |            |            |            |            |            |            |
| 1004 GF                                 | 5.0        | 0.0        | 0.0        | 0.0        | 0.0        | 0.0        |
| 1005 GF/Program Receipts                |            |            |            |            |            |            |
| 1037 GF/Mental Health                   |            |            |            |            |            |            |
| Other (Specify Type--Do not abbreviate) |            |            |            |            |            |            |
| <b>TOTAL</b>                            | <b>5.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> |

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

|           |   |   |   |   |   |   |
|-----------|---|---|---|---|---|---|
| Full-time | 0 | 0 | 0 | 0 | 0 | 0 |
| Part-time | 0 | 0 | 0 | 0 | 0 | 0 |
| Temporary | 0 | 0 | 0 | 0 | 0 | 0 |

**ANALYSIS:** (Attach a separate page if necessary)

This bill deletes the requirement that contributors report their maximum contributions to candidates or groups. It also creates new definitions for "communication," "electioneering communication," "express communication," and "issues communication." This new language provides a bright line for the Commission to evaluate when issue communications are subject to the contribution limits and reporting requirements of the campaign disclosure law (AS 15.13). One time funding is requested for paper, postage, printing and training outreach.

Prepared by: Brooke Miles  
Division: APOC  
Approved by: Jim Duncan, Commissioner  
Agency: Department of Administration

Phone 907-276-4176  
Date/Time 5/6/02 4:25 PM  
Date 5/6/2002

# FISCAL NOTE

MAY 07 2002

STATE OF ALASKA  
2002 LEGISLATIVE SESSION

Fiscal Note Number: 2  
Bill Version: SB 363  
(S) Publish Date: 5/6/02

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: OOG  
Title An Act relating to electioneering BRU Elections  
communications Component Elections  
Sponsor Senate Rules  
Requester Senate State Affairs Component No. 21

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2003    | FY 2004    | FY 2005    | FY 2006    | FY 2007    | FY 2008    |
|------------------------|------------|------------|------------|------------|------------|------------|
| Personal Services      |            |            |            |            |            |            |
| Travel                 |            |            |            |            |            |            |
| Contractual            | 0.0        |            |            |            |            |            |
| Supplies               |            |            |            |            |            |            |
| Equipment              |            |            |            |            |            |            |
| Land & Structures      |            |            |            |            |            |            |
| Grants & Claims        |            |            |            |            |            |            |
| Miscellaneous          |            |            |            |            |            |            |
| <b>TOTAL OPERATING</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> |

|                             |  |  |  |  |  |  |
|-----------------------------|--|--|--|--|--|--|
| <b>CAPITAL EXPENDITURES</b> |  |  |  |  |  |  |
|-----------------------------|--|--|--|--|--|--|

|                               |  |  |  |  |  |  |
|-------------------------------|--|--|--|--|--|--|
| <b>CHANGE IN REVENUES ( )</b> |  |  |  |  |  |  |
|-------------------------------|--|--|--|--|--|--|

**FUND SOURCE** (Thousands of Dollars)

|   |            |            |            |            |            |            |
|---|------------|------------|------------|------------|------------|------------|
| 1002 Federal Receipts                   |            |            |            |            |            |            |
| 1003 GF Match                           |            |            |            |            |            |            |
| 1004 GF                                 | 0.0        |            |            |            |            |            |
| 1005 GF/Program Receipts                |            |            |            |            |            |            |
| 1037 GF/Mental Health                   |            |            |            |            |            |            |
| Other (Specify Type--Do not abbreviate) |            |            |            |            |            |            |
| <b>TOTAL</b>                            | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> | <b>0.0</b> |

Estimate of any current year (FY2002) cost: 0.0  
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

|           |  |  |  |  |  |  |
|-----------|--|--|--|--|--|--|
| Full-time |  |  |  |  |  |  |
| Part-time |  |  |  |  |  |  |
| Temporary |  |  |  |  |  |  |

**ANALYSIS:** (Attach a separate page if necessary)

Prepared by: Gail Fenumiai, Election Administrative Supervisor Phone 465-3935  
Division Division of Elections Date/Time 4/22/02 2:31 PM  
Approved by: Lieutenant Governor Fran Ulmer Date 04/22/2002  
Agency Office of the Lieutenant Governor

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## Senate Rules Committee

Senator Randy Phillips, Chair

**SB 363, "An Act relating to electioneering communications and communications intended to influence the outcome of an election and to campaign misconduct in the second degree; and providing for an effective date."**

### Sponsor Statement

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SB 363, "Electioneering Communications", seeks to require parties, groups, and non-group entities making "electioneering communications" to disclose the source of funds used to pay for the communications.

SB 363 defines "electioneering communications" as a communication that is intended to influence the election of a candidate and that clearly identifies one or more candidates or political parties and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.

Senator John Cowdery, Vice-Chair  
Senator Rick Halford, Senator Gene Theriault, Senator Johnny Ellis  
Senator\_Randy\_Phillips@legis.state.ak.us

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REGULATING ELECTIONEERING:  
DISTINGUISHING BETWEEN  
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---

BY GLENN MORAMARCO



BRENNAN CENTER FOR JUSTICE

AT NYU SCHOOL OF LAW

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The Values of Campaign Finance Reform  
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A Survey of Existing Efforts to Reform the Campaign Finance System  
By Burt Neuborne

The Flow of Money in Congressional Elections  
By Kenneth Weine

Regulating Electioneering: Distinguishing Between "Express Advocacy" & "Issue Advocacy"  
By Glenn Moramarco

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*Cover design by Jennifer Eisenpresser*

## About the Author

**G**lenn J. Moramarco is a Senior Attorney at the Brennan Center for Justice at NYU School of Law. He graduated from Yale Law School (1986), where he served as an editor of the *Yale Law Journal*, after receiving a B. Phil. in Philosophy, Politics, and Economics from Oxford (1983) and a B.A. from Harvard (1981). Upon graduating from law school, he clerked for Judge Leonard I. Garth on the U.S. Court of Appeals for the Third Circuit (1986-87). He has spent equal amounts of time in civil and criminal litigation, working for Wilmer, Cutler & Pickering in Washington, D.C. (1987-89) and Fine, Kaplan & Black in Philadelphia (1994-97), with a distinguished five-year tenure as an Assistant U.S. Attorney in New Jersey (1989-94).

## Acknowledgments

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Joyce Foundation  
Stewart R. Mott Charitable Trust  
Open Society Institute  
Florence & John Schumann Foundation

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# Table of Contents

|   |    |
|---|----|
| Introduction.....   | 1  |
| “Issue Advocacy” and “Express Advocacy” -- The Paradigm Cases.....            | 3  |
| The Supreme Court Invents “Issue Advocacy” .....                              | 5  |
| The “Magic Words” Test.....   | 6  |
| The Appellate Courts Disagree About How To Define<br>“Express Advocacy” ..... | 6  |
| The Real World Practices.....   | 9  |
| “Magic Words” and First Amendment Jurisprudence.....                          | 11 |
| Recent Attempts to Better Define “Express Advocacy” .....                     | 13 |
| The FEC Adopts a “Reasonable Person” Approach .....                           | 13 |
| Senators Propose a Delimited Time Period Approach.....                        | 14 |
| Additional Approaches and Refinements.....                                    | 17 |
| Conclusion.....   | 19 |

## Introduction

For most of this century, one of the primary goals of federal campaign finance laws has been to restrict wealthy interests from exerting undue influence over the political process. Thus, in 1907, Congress passed legislation that prevented corporations from making financial contributions or expenditures in connection with any election for federal office. Forty years later, the ban was extended to labor unions, and in the early 1970s, Congress passed the Federal Election Campaign Act (FECA), which sought, among other things, to limit contributions by "fat cat" or wealthy donors to political parties and candidates.

Although these reforms did not completely remove the influence of "big money" from politics, the reforms nevertheless enjoyed some modest success in preventing the appearance of corruption that arises when wealthy donors and powerful corporations contribute directly and heavily to political campaigns. However, in recent years these reforms have lost their effectiveness, as wealthy donors, including prohibited contributors such as corporations and labor unions, have evaded the clear intent of the law.

In the 1996 federal elections, corporations, labor unions, political parties, and advocacy groups spent an estimated \$135 to \$150 million in advertisements that were wholly unregulated by the federal government because, the sponsors of the ads claimed, they were engaged in "issue advocacy" rather than "express advocacy." However, rather than educating the public broadly about issues, the typical "issue ad" mentioned a single candidate, targeted the segment of the public eligible to vote for that candidate, began to run when an election was imminent, and ended abruptly on Election Day.

The following is an example of an advertisement, run during the 1996 campaign, which the sponsor claimed was an unregulated "issue ad" rather than a regulated electioneering ad:

It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions. Call Congressman Ganske. Tell him to protect America's environment. For our families. For our future.

The sponsors of this advertisement claim it is an "issue ad" because, rather than urging viewers to "vote against" or "defeat" Congressman Ganske, the ad merely urges them to call Congressman Ganske. Surgically excising explicit words of advocacy, such as "elect" or "defeat," they claim, converts blatant electioneering into mere "issue advocacy," which is wholly unregulated and immune from federal disclosure laws.

Of course, to the eyes of the voting public, the above advertisement is indistinguishable from electioneering ads that Congressman Ganske's opponent would run. This ad and the vast majority of so-called "issue ads" that appeared during the 1996 federal election season had the unmistakable intent of encouraging the viewer to vote for or against

particular candidates. Although there are no reliable estimates concerning the dollar amount spent on "issue advocacy" in state and local races, it is nevertheless clear that the problem is not limited to federal elections. The presentation of electioneering ads under the guise of "issue advocacy" has given rise to a separate parallel track of wholly unregulated electioneering, a development that threatens to make a mockery of the entire

scheme of federal and state campaign finance regulation.

This paper reviews the history of the rise of "issue advocacy," describes the current legal landscape, and explains some of the leading regulatory approaches for defining "express advocacy" and "issue advocacy" in a more realistic and constitutionally-permissible manner. □

## "Issue Advocacy" and "Express Advocacy" -- The Paradigm Cases

The phrase "issue advocacy," like the phrase "express advocacy," appears nowhere in the statutes that comprise federal campaign finance law. Rather, the concepts were created by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), which held that political advertisements that expressly advocate the election or defeat of a candidate are subject to federal regulation, but political advertisements that merely relate to political issues (without expressly advocating the election or defeat of a candidate) are not subject to regulation.

Relying on the *Buckley* decision, some lower federal court decisions have adopted a very narrow, bright-line test -- the "magic words" test. Under the "magic words" test, regardless of the intent of the speaker or the effect of the advertisement on the listener, an advertisement that fails to use "magic words" such as "elect," "defeat," "support," "reject" (or nearly identical synonyms) is considered "issue advocacy" rather than "express advocacy." However, the proper legal test for defining "express advocacy" and "issue advocacy" remains a hotly contested legal issue. Before that issue can be addressed, it is necessary to understand what it is the law is attempting to differentiate between when it uses the terms "issue advocacy" and "express advocacy."

The paradigms are relatively easy to describe. A paradigmatic "issue advocacy" advertisement: (1) addresses an issue of national or local political importance, (2) discusses only the issue and not the actions of particular political actors in regard to that issue, and (3) is broadcast at a time when legislative or executive action on the issue may be pending or contemplated, but no election is imminent.

Recent examples of the "issue advocacy" paradigm are advertisements that labor unions ran in late 1993, when the Senate was considering ratification of the North American Free Trade Agreement (NAFTA):

In Washington, big corporations and lobbyists are spending millions making false claims about the NAFTA trade deal. But across America, people going to factories, to farms, to offices know it means jobs going south. Economists who've studied job loss say we'll lose up to 500,000 jobs to NAFTA. Americans want to expand trade, but not by trading away their jobs. NAFTA: It's a bad deal for America, and Americans know it.

When these anti-NAFTA advertisements were broadcast, there was no national election pending, and the primary purpose of the advertisements was to sway public and Congressional opinion on this important public policy choice.

Similarly, in late 1993 and early 1994, when President Clinton proposed comprehensive national health care reform, the Health Insurance Association of America ran a series of paradigmatic "issue advocacy" radio and television spots. The advertisements featured an ordinary American couple -- Harry and Louise -- discussing their fears about the proposed health care reform package. Again, there were no national elections pending, and the advertisements were intended to sway public opinion against health care reform and convince Congress to reject the President's health care initiatives.

A paradigmatic "express advocacy" advertisement: (1) names one or more individual candidates for public office, (2) attributes one or more actions or beliefs to the candidate, (3) appears in close proximity to an election, and (4) explicitly urges the viewer to vote either for or against the candidate. The following advertisement is an example of "express advocacy":

Senator Smith is standing in the way of reform. Voting against curbs on frivolous lawsuits that cost jobs. What's worse, Senator Smith's made a career of putting the rights of criminals ahead of the rights of victims. Voting to deny employers the right to keep convicted felons out of the workplace. That's wrong, that's liberal, but that's Senator Smith. On Tuesday, vote against Senator Smith.

The majority of political advertisements that appear during an electoral season fall in between these paradigms. The decision to classify an advertisement as either "express advocacy" or "issue advocacy" has enormous practical

implications. If the communication is deemed to be "express advocacy," then three consequences follow under federal election law. First, the communication is subject to disclosure rules. FECA requires that speakers engaging in "express advocacy" disclose the sources of their money and the nature of their expenditures. Second, the communication is subject to source restrictions. FECA bars certain speakers, such as corporations and unions, from spending money to engage in "express advocacy." Third, the communication is subject to fund-raising restrictions. FECA limits not only the sources from which speakers may raise their money, but also the size of contributions they may receive.

If, however, the communication is deemed to be "issue advocacy," then the communication is not, and indeed cannot constitutionally be, subject to regulation, including source restrictions, fund-raising restrictions, or even public disclosure. Thus, it is vitally important that campaign finance law be able to distinguish intelligently between "issue advocacy," which is intended to educate the public about important public issues, and "express advocacy," which is intended to persuade a voter to support or defeat a particular candidate at the polls. □

## The Supreme Court Invents "Issue Advocacy"

In 1974, on the heels of President Nixon's resignation and public hearings on the Watergate scandals, Congress built on reforms begun initially in 1971, and enacted FECA -- a comprehensive set of campaign reforms that established: (1) contribution limits for donations to politicians and political parties; (2) expenditure limits that applied to private parties, political parties, and those seeking public office; (3) disclosure rules for both contributions and expenditures; and (4) public financing of presidential elections. These reforms, which were set to go into effect with the upcoming 1975-76 election cycle, were immediately challenged in the courts.

The Supreme Court reviewed the constitutionality of FECA in *Buckley v. Valeo*, 424 U.S. 1 (1976). In general, the Court upheld the disclosure rules and the public financing of presidential elections. However, on the issue of limits on campaign contributions and expenditures, the Court issued a split decision. The Court upheld the limits on contributions as necessary to further the government's compelling interest in avoiding corruption or the appearance of corruption. However, the Court struck down the limits on expenditures as violating a candidate's First Amendment rights without serving a compelling government interest.

FECA attempted to regulate not only candidate and party expenditures, but also expenditures by private parties. One section of FECA imposed a \$1,000 limit on expenditures "relative to a clearly identified candidate." Another section of FECA imposed reporting requirements for persons who make independent expenditures of over \$100 "for the purpose of influencing" a federal election. The Court in *Buckley* concluded that these

regulations presented potential problems both of vagueness and overbreadth.

Under First Amendment "void for vagueness" jurisprudence, the government cannot punish someone without providing a sufficiently precise description of what conduct is legal and what is illegal. A vague or imprecise definition of "express advocacy" might serve to "chill" some political speakers who, although they desire to engage in discussions of political issues, may be afraid that their speech could be construed as electioneering. The Court in *Buckley* found that the FECA regulations, which applied to expenditures "relative to a clearly identified candidate" and "for the purpose of influencing an election" were not sufficiently precise to provide the certainty necessary for those wishing to engage in political speech.

Similarly, the overbreadth doctrine in First Amendment jurisprudence is concerned with a regulation that, however precise, sweeps too broadly and reaches constitutionally protected speech. In *Buckley*, the Court was concerned that a regulation that applies to any expenditure that is done "for the purpose of influencing" a federal election or that is "relative to a clearly identified candidate" could encompass not only direct electioneering, but also protected speech on issues of public and political importance. For example, the Harry and Louise health care advertisements, which were intended to be "issue advocacy" communications, might nevertheless have the effect of *influencing* viewers to oppose Democrats in general or President Clinton in particular. If the FECA regulations were interpreted to reach all expenditures that merely mention a political candidate or could influence the outcome of a federal election, the sweep would be broad indeed.

In order to avoid these vagueness and overbreadth problems, the Court held that the government's regulatory power under FECA would be construed to reach only funds used for communications that "expressly advocate" the election or defeat of a clearly identified candidate. Thus, it was the Supreme Court, and not the Congress, that invented the distinction between "express advocacy," which may be regulated, and "issue advocacy," which cannot be regulated. Although the words "express advocacy" and "issue advocacy" appear nowhere in the statutory language, they are now an important part of the statutory and constitutional federal election law framework.

### The "Magic Words" Test

In an important footnote in the *Buckley* opinion, the Supreme Court provided some guidance on how to decide whether a communication is "express advocacy" or "issue advocacy." The Court stated that its construction of FECA would limit the reach of the statute "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" It is this footnote from *Buckley* that has led some to conclude that the Supreme Court has adopted a "magic words" test for distinguishing between "express advocacy" and "issue advocacy." Under the "magic words" approach, unless a communication contains one of the words listed by the Supreme Court in this footnote, or a near-perfect synonym, the communication is "issue advocacy," regardless of the intent of the speaker or the likely reaction of any reasonable listener.

Proponents of the "magic words" approach interpret it strictly. Thus, the following advertisement, even if aired within days of an election, would be considered "issue advocacy" by strict constructionists:

Congresswoman Smith voted to increase income taxes, sales taxes and capital gains taxes by over a billion dollars. Then she voted against the largest property tax cut in history. Is she: (a) a liberal, (b) a big spender, (c) out of touch, or (d) all of the above? If you said "(d) all of the above," you've made the right call. Make another right call to Congresswoman Smith. She never met a tax she didn't hike.

Because the tag line on the ad says "call" Congresswoman Smith rather than "defeat" Congresswoman Smith, it would be deemed an "issue ad" under the strict "magic words" approach. If adopted by the courts, the "magic words" approach, with its narrow and wooden definition of "express advocacy" would create a potentially massive loophole in the campaign finance laws that would allow advocacy groups and prohibited donors to spend unlimited resources on unregulated electioneering advertisements like the one cited above.

### The Appellate Courts Disagree About How To Define "Express Advocacy"

The Supreme Court has only once applied the "express advocacy" test to a concrete set of facts, and that case, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1980), has aspects that both support and undermine the "magic words" approach. In that case, Massachusetts Citizens for Life, a nonprofit corporation, published a "Special Election Edition" of its newsletter which urged its readers to "vote pro-life" in an upcoming primary election, listed every candidate for state and federal office, and identified each candidate's view on pro-life issues, together with a disclaimer stating that the newsletter did not endorse any particular candidate.

The Supreme Court held that, despite the disclaimer, the pro-life newsletter contained "express advocacy." The Court began its analysis by returning to *Buckley*, and reiterating that a finding of "express advocacy" depends upon the use of language such as "vote for," "elect," or "support." However, despite the fact that the newsletter used the explicit phrase "vote pro-life," the Court did not limit its analysis to the mere presence or absence of these "magic words." Rather, the Court examined the newsletter as a whole, and rested its decision on the "essential nature of the message and what it conveyed "in effect." Thus, *Massachusetts Citizens for Life* can be read as supporting a test for "express advocacy" that looks beyond the mere presence or absence of "magic words" and considers the context and true intent of a communication.

Because the Supreme Court has not definitively settled the issue of how to differentiate between advertisements that constitute "issue advocacy" and advertisements that constitute "express advocacy," the issue has been left to the lower federal courts. The federal courts of appeals have split in their interpretation of "issue advocacy."

One of the earliest decisions in this area is *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). In that case a private citizen, Harvey Furgatch, placed a full page advertisement in the *New York Times* and the *Boston Globe* that was critical of President Carter during the week preceding the 1980 election. Furgatch's advertisement stated that President Carter was "cultivat[ing] the fears, not the hopes, of the voting public," and "degrading the electoral process and lessening the prestige of the office." Furgatch's advertisement accused President Carter of trying "to buy entire cities, the steel industry, the auto industry, and others with public funds" during the election campaign. Finally, the advertisement warned that "[i]f he succeeds the

country will be burdened with four more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT."

The FEC sued Furgatch for, among other things, failing to report his expenditures on these newspaper advertisements. The United States Court of Appeals for the Ninth Circuit held that, even though Furgatch's advertisements did not use any of the "magic words" listed in *Buckley*, they nevertheless expressly advocated the defeat of President Carter, and thus had to be reported to the FEC as independent expenditures.

According to the appellate court, the "magic words" test urged by Furgatch would preserve the First Amendment interest in unfettered expression only at the expense of eviscerating FECA. Nominally independent campaign spenders could too easily circumvent the Act by simply avoiding certain key words while conveying a message that is unmistakably an electioneering message. The Court held that a communication is "express advocacy" when the communication, when read as a whole and with limited reference to external events, is reasonably susceptible to interpretation only as an exhortation to vote for or against a specific candidate.

Despite this important early ruling by the United States Court of Appeals for the Ninth Circuit, the recent trend among federal appellate courts has been to adopt the "magic words" approach for "express advocacy." For example, in *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997), the FEC brought an enforcement action against the Christian Action Network, alleging that the following advertisement, which was aired in the weeks leading up to the November 3, 1992 presidential election, should not have been funded with corporate money because it expressly advocated the defeat of President Clinton and Vice-President Gore:

Bill Clinton's vision for America includes job quotas for homosexuals, giving homosexuals special civil rights, allowing homosexuals in the armed forces. Al Gore supports homosexual couples' adopting children and becoming foster parents. Is this your vision for a better America? For more information on traditional family values, contact the Christian Action Network.

Despite the obvious intent of this television commercial, the United States Court of Appeals for the Fourth Circuit, in very strong language, criticized the FEC's position that the ad, which failed to use "magic words" such as "defeat" or "vote against," was expressly advocating the defeat of Clinton and Gore. The court found that the Supreme Court had limited the FEC's regulatory authority to communications containing explicit words urging election or defeat of candidates. □

## The Real World Practices

Corporations, labor unions, political parties, and advocacy groups have seized upon the "magic words" approach adopted by some courts and have engaged in multi-million dollar electioneering campaigns under the guise of "issue advocacy." A recent report by the Annenberg Public Policy Center at the University of Pennsylvania examined the "issue advocacy" expenditures of 27 organizations in the 1995-96 election cycle (groups such as the AFL-CIO, the NRA, the NEA, and the Sierra Club) and found that these 27 organizations alone spent an estimated \$135 million to \$150 million in election-related advertising. This was at a time when all federal candidates for office combined (President, Senate, and House of Representatives) spent an estimated \$400 million on advertising. Indeed, in some races, "issue advocacy" spending by interested groups exceeded the advertising expenditures of the candidates themselves. As the Annenberg Center noted, this level of spending by unregulated groups is "unprecedented, and represents an important change in the culture of campaigns."

The "issue advocacy" advertisements sponsored by these organizations are virtually indistinguishable from the campaign commercials put out by the candidates. For example, during the 1996 election season, Citizens for the Republic Education Fund, a tax-exempt organization founded by Lyn Nofziger on June 20, 1996, spent hundreds of thousands of dollars on "issue ads" that were intended to help Republican Senate candidates. Citizens for the Republic Education Fund aired the following television commercial against Arkansas Democratic Senate candidate Winston Bryant:

Senate candidate Winston Bryant's budget as Attorney General increased 71%. Bryant has taken taxpayer funded junkets to the Virgin Islands, Alaska, and Arizona. And spent about \$100,000 on new furniture. Unfortunately, as the state's top law enforcement official, he's never opposed the parole of any convicted criminal, even rapists and murderers. And almost 4,000 Arkansas prisoners have been sent back to prison for crimes committed while they were out on parole. Winston Bryant: government waste, political junkets, soft on crime. [Superimposed: Call Winston Bryant and tell him to give the money back.]

Because the ad urges the viewer to "call Winston Bryant," rather than vote against him, the Citizens for the Republic Education Fund considered this an issue advertisement, not subject to federal regulation, rather than "express advocacy," which would have been subject to spending limits and disclosure.

Similarly, the Democratic National Committee in 1996 ran an advertisement in which the announcer states:

Protect families. For millions of working families, President Clinton cut taxes. The Dole/Gingrich budget tried to raise taxes on eight million. The Dole/Gingrich budget would've slashed Medicare \$270 billion, cut college scholarships. The President defended our values, protected Medicare. And now a tax cut of \$1,500

a year for the first two years of college, most community colleges free. Help adults go back to school. The President's plan protects our values.

Because the advertisement never used the magic words, "vote for" Clinton or "defeat" Dole, the Democratic National Committee considered this an issue ad that did not expressly advocate the reelection of President Clinton or the defeat of Senator Dole.

The "magic words" approach is a loophole that threatens to swallow the entirety of federal campaign financing law. The bans on corporate and labor union expenditures are rendered meaningless when corporations and labor unions run multi-million dollar advertising

campaigns that target individual legislators for defeat under the banner of "issue advocacy." Similarly, the \$5,000 limit on contributions to PACs, which was upheld by the Supreme Court, is rendered meaningless when individuals contribute sums substantially in excess of that amount in order to fund multi-million dollar advertising campaigns that attempt to influence the outcome of specific electoral races. And the expenditure limits which the presidential candidates voluntarily agreed to abide by as a condition for receiving public matching funds are rendered meaningless when the national party committees run unregulated advertising campaigns that mirror those of their nominees.

□

## "Magic Words" and First Amendment Jurisprudence

The federal court decisions that reject the Ninth Circuit approach in *Furgatch* and adopt a "magic words" test for "express advocacy" construe *Buckley* as imposing restrictions that are beyond those imposed in any other First Amendment context. In every area of First Amendment jurisprudence, courts are required to engage in delicate line drawing between protected speech and speech that properly may be regulated. For example, in another election-related context -- union representation elections -- employers are permitted to make "predictions" about the consequences of unionizing, but they may not issue "threats." Although the courts have developed an extensive jurisprudence to distinguish between "predictions" and "threats," there is no bright-line test, and an employer could harbor considerable uncertainty as to whether the words he is about to utter are either protected under the First Amendment or sanctionable as illegal advocacy.

Similarly, in libel cases involving the press, an area of core First Amendment concern, the Court has eschewed the simple bright-line approach of imposing liability based on the truth or falsity of the statement published. Instead, the Court utilizes a multi-factor analysis that examines, among other things, whether the subject of the statement is a public figure, whether the statement involves matters of public concern, whether the speaker acted with reckless disregard for the truth or falsity of the statement, and whether a reasonable reader would perceive the statement as stating actual facts or merely rhetorical hyperbole.

In no area of First Amendment jurisprudence has the Court mandated a wooden, mechanical test that ignores context and

purpose. In no area of First Amendment jurisprudence has the Court held that the only constitutionally permissible test is one that would render the underlying regulatory scheme unenforceable. It is doubtful, therefore, that the Supreme Court in *Buckley* intended to single out election regulations as requiring a mechanical, formulaic, and utterly unworkable test.

Moreover, many of those courts that have adopted the "magic words" approach have applied it uncritically to all of the various different types of possible election law restrictions, and have thereby failed to grapple with the important distinction in First Amendment jurisprudence between restrictions on speech and mere disclosure rules. In *Buckley*, the Court made it clear that the governmental interests that justify disclosure of election-related spending are broader than the governmental interests that justify prohibitions or restrictions on election-related speech. When legislation does not proscribe speech, there is less of a concern about either chilling or vagueness. Thus, even if certain advertisements cannot be prohibited because they are arguably within the ambit of "issue advocacy," it does not follow that the speaker cannot be required to disclose the funding sources for those ads. If a legislature were to pass a law requiring, for example, that the source of funds be disclosed for every communication whose cost exceeds \$10,000 and mentions a specific candidate for public office within 60 days of an election, such a law might well be upheld regardless of how "express advocacy" and "issue advocacy" are defined in other contexts.

Finally, and most importantly, even if *Buckley* should be read as limiting the current

regulatory reach of FECA to advertisements using "magic words," that holding would not foreclose future legislatures, either state or federal, from adopting new legislation that regulates electioneering or defines "express advocacy" more broadly. The decision to narrowly construe a statute to save it from potential vagueness and overbreadth problems does not prevent further legislative refinements that eliminate those problems. For example, in the obscenity context, the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), provided specific examples of "hard core" sexual conduct that could be prohibited under state or federal obscenity laws. In a companion case, *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973), the Court stated that, if necessary to eliminate potential vagueness and overbreadth problems in federal obscenity statutes, the Court was prepared to narrowly construe such statutes to reach only those specific examples of "hard core" sexual conduct specifically delineated in *Miller v. California*. However, the Court made it clear that Congress remained free to enlarge upon this narrowing construction and go beyond the specifically enumerated "magic acts." *12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. at 130 n.7 ("Of course, Congress could always define other specific 'hard core' conduct.")

This same reasoning doubtless applies in the election law context. In *Buckley*, the Court was confronted with FECA regulations that purported to regulate all expenditures that were "relative to a clearly identified candidate" and "for the purpose of influencing" an election -- two very broad and imprecise phrases. When the Court chose to save FECA from constitutional invalidity by narrowly construing these phrases to reach only "express advocacy," it was forced to invent its own definition of "express advocacy" without any legislative language to use as a guide. Even if the Court intended to limit "express advocacy" in FECA to "magic words," future legislative attempts to regulate electioneering activity are not necessarily bound by that limitation. Future legislatures are, of course, bound by the vagueness and overbreadth concerns that undergird the *Buckley* decision. But as long as the legislation is both sufficiently narrow and precise, future legislatures are free to adopt a more refined definition of "express advocacy" and regulate electioneering activity in a manner that accords with political reality. *See Miller v. California*, 413 U.S. at 25 (the function of the Court is not to propose regulatory schemes, but instead to await concrete legislative efforts while providing the general principles for acceptable constitutional definitions). □

## Recent Attempts To Better Define “Express Advocacy”

**S**purred in part by the abuses of the last election cycle, where corporations, labor unions, political parties, and advocacy groups spent hundreds of millions of dollars on advertisements that they claimed were mere “issue ads” despite a clear electioneering intent, the government and reformers inside and outside of government have attempted to codify a definition of “express advocacy” that goes beyond the “magic words” approach and better reflects real world electioneering practices. Prominent among the recent attempts to define “express advocacy” are two different general approaches: (1) a “reasonable person” approach, which has been adopted by the FEC, and (2) a delimited time-period approach, which has been proposed in the Senate. These two approaches demonstrate the tension inherent in any attempt to satisfy simultaneously the Supreme Court’s dual concerns regarding vagueness and overbreadth. The “reasonable person” approach tends to tilt in favor of increased breadth of coverage, but sacrifices some clarity. The “delimited time-period” approach offers clarity, but raises issues of potential over- and under-breadth of coverage. Either of these two approaches, however, is a clear improvement over the unworkable “magic words” approach.

### The FEC Adopts a “Reasonable Person” Approach

The FEC promulgated a regulation which incorporated a “reasonable person” approach into its definition of “express advocacy.” Under the regulation, “express advocacy” is defined to include not only those communications which contain “magic words,” but also communications that “[w]hen taken as a whole and with limited reference to external events such

as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) . . . .” The regulation further states that, under its reasonable person approach, the electoral portion of the communication must be “unmistakable, unambiguous, and suggestive of only one meaning.”

The definition of “express advocacy” contained in this FEC regulation attempts to codify the expanded definition of “express advocacy” that met with the court’s approval in *Furgatch*. It goes beyond “magic words” by incorporating a “reasonable person” standard that applies in only a very narrow set of circumstances. In short, if “magic words” are not used, the advertisement is “express advocacy” only if the electioneering purpose of the advertisement is unmistakable, unambiguous, and so clear that reasonable minds simply could not differ. Thus, the regulation attempts to bring within the regulatory sphere some of the most egregious instances of electioneering that occur without the use of “magic words.”

Despite its narrow reach, this regulation was immediately challenged in the courts as an unconstitutional encroachment on free speech. In *Maine Right to Life Committee, Inc. v. FEC*, 914 F. Supp. 8 (D. Me. 1996), a non-profit membership corporation brought suit in federal district court in Maine, arguing that this definition of “express advocacy” was beyond the FEC’s authority because it was both too broad and unconstitutionally vague. The trial court concluded that this FEC definition of “express advocacy,” although derived from the appellate language in the *Furgatch* opinion,

goes further than permitted by Supreme Court precedent. In a thoughtful opinion, the trial court nevertheless showed great sympathy for the FEC's regulatory attempt:

[T]he Federal Election Campaign Act is designed to avoid excessive corporate financial interference in elections and the FEC presumably has some expertise on the question what form that interference may take based on its history of complaints, investigations and enforcement actions. . . . Language, moreover, is an elusive thing. The topic here is communication and it is commonplace that the meaning of words is not fixed, but depends heavily on context as well as the shared assumptions of speaker and listener. . . . One does not need to use the explicit words "vote for" or their equivalent to communicate clearly the message that a particular candidate is to be elected. [This] appears to be a very reasonable attempt to deal with these vagaries of language and, indeed, is drawn quite narrowly to deal with only the "unmistakable" and "unambiguous," cases where "reasonable minds cannot differ" on the message. "Limited reference to external events" is hardly a radical idea. It is required even by the *Buckley* terminology. After all, how does one know that "support" or "defeat" means an election rather than an athletic contest or some other event without considering the external context of a federal election with specific candidates?

Despite these words of endorsement, the court reluctantly concluded that *Buckley* and *Massachusetts Citizens for Life* required the more rigid "magic words" approach. The court

believed that the Supreme Court endorsed a bright line test in order to protect free speech, regardless of the effect on enforcement of the election laws. As the court noted, "[t]he result is not very satisfying from a realistic communications point of view and does not give much recognition to the policy of the election statute to keep corporate money from influencing elections in this way." Thus, although the court candidly indicated that it believed that "the FEC had the better of the argument on its regulation so far as the logic of language is concerned," it nevertheless concluded that *Buckley* had foreclosed anything other than the narrow "magic words" test.

This trial court decision was affirmed by the United States Court of Appeals for the First Circuit. Because that decision conflicts with the decision by the United States Court of Appeals for the Ninth Circuit in *Furgatch*, the government asked the Supreme Court to review the case and resolve the split among the appellate courts. The Supreme Court declined to consider the case, and thus the split remains.

### Senators Propose a Delimited Time Period Approach

In response to criticism that the "reasonable person" approach and other similar tests that involve subjective criteria are too vague, some reformers have sought to define "express advocacy" through clearly delimited criteria that expand upon the "magic words" approach. Prominent among these types of reforms is a "delimited time period" approach. Under this approach, any advertisement that airs within a specified period of time prior to an election is deemed "express advocacy" if it refers to a specifically identified candidate.

In the McCain-Feingold Bill introduced in the Senate in 1997, for example, the definition of "express advocacy" included not only

communications that contain “magic words,” but also communications that advocate the election or defeat of a candidate by “referring to one or more clearly identified candidates in a paid advertisement . . . within 60 calendar days preceding the date of an election. . . .” Under this delimited time period approach, a potential speaker knows with certainty which advertisements will be deemed “express advocacy,” since the criteria -- explicitly referring to a candidate and the date on which the advertisement is communicated -- are clear and objectively determined.

The principal objection leveled against the delimited time period approach is that it is potentially overbroad. One can imagine an advertisement which, although its intent is to influence the debate on an issue, mentions or depicts a political candidate who is strongly identified with that issue. Thus, for example, opponents of the Vietnam War might desire to air an anti-war advertisement that depicts President Johnson, or opponents of some more recent congressional initiative might desire to produce advertisements that depict Newt Gingrich.

Despite these theoretical possibilities, the delimited time period approach is based on the common-sense recognition that, in the real world, advertisements that depict candidates and are run shortly before an election are almost invariably intended to influence the election or defeat of the depicted candidate. In fact, the public rarely sees commercials depicting a

politician or political candidate except immediately before an election, and those commercials are broadcast in that time frame precisely because they are intended to influence the outcome of the imminent election.

Under McCain-Feingold’s delimited time period approach, a person who desires to produce an issue advertisement is given clear notice of what is and is not permissible. Advertisements that simply discuss issues, without naming candidates are always permissible. Advertisements that are communicated more than 60 days prior to an election must simply avoid the use of “magic words.” Advertisements that are communicated within 60 days of an election can discuss issues, as long as the ads do not depict a particular candidate.

The commercials listed below in the column on the left, all of which were broadcast during the 1996 election, were considered issue ads by their sponsors. Under the McCain-Feingold proposal, these advertisements would all be recharacterized as “express advocacy.” However, the advocacy organizations, if their true intent is to educate the public rather than influence the outcome of a specific election, could easily reformulate these ads as shown in the column on the right, and run those advertisements any time, even within days of an election. Additionally, because the ads in the column on the left fail to use “magic words,” under the McCain-Feingold proposal they can be broadcast without change as “issue ads” when an election is more than 60 days away. □

## EXPRESS ADVOCACY

**Announcer:** They worked hard all their lives. They're our neighbors, our friends, our parents. They earned Social Security and Medicare. But Congressman X voted five times to cut their Medicare. Even their nursing home care. To pay for a \$16,892 tax break he voted to give the wealthy. Congressman X, it's not your money to give away. Don't cut their Medicare. They earned it.

**Announcer:** Some things are wrong. They've always been wrong. And no matter how many politicians say they're right, they're still hateful and wrong. Stand up for the right values. Call Representative X today. Ask him why he voted against the Flag Protection Amendment. Against the values we hold dear. The Constitutional Amendment to safeguard our flag, because America's values are worth protecting.

**Announcer:** Election year. There'll be a lot flying through the air. But when you look through the mud, you see what Congressman X has helped to achieve: The first real cut in spending since World War II. 270 wasteful government programs eliminated. Historic welfare reform that requires recipients to work for their benefits. Why would we ever go back to the past? When you see the mud, remember the accomplishments. Call Congressman X and tell him to keep on reforming our government.

## ISSUE ADVOCACY

**Announcer:** They worked hard all their lives. They're our neighbors, our friends, our parents. They earned Social Security and Medicare. Now Congress wants to cut their Medicare, even their nursing home care. Why? To pay for a \$16,892 tax break for the wealthy. *Write or phone your Congressman and tell him not to cut Medicare. They earned it.*

**Announcer:** Some things are wrong. They've always been wrong. And no matter how many politicians say they're right, they're still hateful and wrong. Stand up for the right values. *Call your Congressman and ask him to support the Flag Protection Amendment. Get Congress to support the values we hold dear. The Constitutional Amendment to safeguard our flag, because America's values are worth protecting.*

**Announcer:** Election year. There'll be a lot flying through the air. But when you look through the mud, you see what Congress has achieved: The first real cut in spending since World War II. 270 wasteful government programs eliminated. Historic welfare reform that requires recipients to work for their benefits. Why would we ever go back to the past? When you see the mud, remember the accomplishments. *Call your Congressman and urge him to keep on reforming our government.*

As the above examples illustrate, it is possible to define "express advocacy" in a manner that both upholds the intent of the federal election laws (by preventing blatant electioneering with unregulated expenditures), while providing clear notice to advocacy groups concerning the limits imposed on "issue advocacy" when an election is imminent. Although the delimited time period approach has a broader sweep than some advocacy groups might ideally desire, it nevertheless provides a very wide berth for true issue-oriented campaigns, even when they are conducted in the midst of a federal election. The rule of thumb would be, if you are interested in advancing an issue, rather than a candidate, then stick to the issue being advanced, rather than the political personalities who may be associated with the issue, at least when an election is imminent.

### Additional Approaches and Refinements

The "reasonable person" approach and the delimited time-period approach do not, of course, exhaust the spectrum of possible reforms that can provide the requisite level of certainty without prohibiting too much non-electioneering speech. Another model for reform is an intent-based approach, which attempts to regulate advertisements based on the speaker's actual intent. Under this approach, a statute might prohibit, for example, advertisements in which the speaker's "primary purpose" is to influence voters to elect a clearly identified candidate.

The intent-based approach raises no serious concerns in regard to overbreadth — it is narrowly-tailored to reach only those advertisements that are truly intended to be electioneering ads. Neither is it impermissibly vague, for if there is one thing that any

individual speaker surely knows, it is his or her own purpose or intent. Of course, the problem arises at the enforcement stage, since although an individual speaker will know his or her own intent, that intent cannot be objectively ascertained by a fact-finder. In practice, the enforcement of an intent-based approach would likely mirror the enforcement of a "reasonable person" approach. A person is presumed to intend the normal consequences of his actions, and regulators would assume that the intent of an advertisement can be discerned from how the ad is received by the viewing public.

A regulatory solution to defining "express advocacy" and "issue advocacy" can adopt one or more of these approaches, in whole or in part. There are also a multitude of refinements that can be made to any of these approaches. For example, one could add a dollar threshold, adopt various targeting requirements, adopt higher burdens of proof, use legal presumptions, or allow limited exemptions, to name just a few possibilities.

A dollar threshold, for example, is useful for insuring that the election law does not inhibit *de minimis* electoral communications and likewise does not become a trap for small and unsophisticated groups not engaging in a significant amount of electioneering. Thus, a statute could specify that expenditures by an individual or organization during an election cycle that, in the aggregate, amount to less than perhaps \$10,000 are not subject to regulation.

A separate targeting requirement is helpful in ensuring that the regulations are narrowly tailored to reach advertisements that are in fact intended to influence the outcome of a particular election. Thus, a regulation could prohibit communications that refer to a clearly identified candidate and are "targeted to or substantially distributed in the geographic area in which the

candidate is seeking election." Under this refinement, if the Sierra Club, for example, wants to educate the American public concerning the anti-environmental record of the Speaker of the House, it can do so during an election year if the ads are run nationally rather than targeted to the media market for the Speaker's district.

Another method for addressing potential overbreadth problems in the "reasonable person" or intent-based approaches is to raise the standard of proof required for an exercise of regulatory power. For example, there is a world of difference between regulating an advertisement which a reasonable person could interpret as containing an electioneering message, and regulating advertisements that no reasonable person could take as containing anything other than an electioneering message. The first approach sweeps in all ads that are arguably electioneering, while the latter approach sweeps in only those ads that are indisputably electioneering. Similarly, an intent-based approach could require a regulator to present "clear and convincing" evidence of a speaker's electioneering intent before finding an election law violation, a standard which would reduce the likelihood of government over-regulation of speech that is close to the line.

The use of presumptions provides another potential refinement that can serve to address the overbreadth issue in regard to any of these approaches. For example, an intent-based approach could incorporate a rebuttable presumption that ads which mention a candidate and are aired within a certain time frame are for an electioneering purpose. Because the presumption is rebuttable, rather than

conclusive, there is less risk of overbreadth. Thus, the Vietnam War protestors discussed above could air their advertisement depicting President Johnson, although they would be on notice that, if the ad is run close to an election in which President Johnson is a candidate, the burden will be on them to demonstrate their non-electioneering intent. The use of objective presumptions, while providing speakers with a high degree of certainty concerning what type of speech will normally be subject to regulation, also provides a safety-valve that allows speakers to demonstrate that their communication, although in a format usually associated with electoral advocacy, is in fact not electioneering.

Finally, exemptions can also be provided for specific electioneering conduct that raises heightened First Amendment concerns. For example, an exemption can be provided for speech with an electioneering message that is communicated solely to an organization's own membership. Such an exemption eliminates the possibility that prohibitions on electioneering will attempt to reach regular editions of a newsletter put out by a corporation or labor union and sent only to their members. Similarly, an exemption can be tailored for non-partisan voting cards, such as those put out by the League of Women Voters.

As this short discussion indicates, reform initiatives are not limited to any single approach for defining "express advocacy." There are several different types of approaches that provide the requisite level of certainty without restricting too much speech that truly is not electioneering in nature. Likewise, there are many refinements which can, in principle, help make the major approaches more narrowly-tailored to reach only electioneering speech. □

## Conclusion

Any attempt by campaign finance reformers to expand the definition of "express advocacy" beyond "magic words" will likely lead to a court challenge until the Supreme Court resolves the split among the appellate courts concerning this issue. While the Court in *Buckley* was properly concerned that an ambiguous test for "express advocacy" might serve to chill constitutionally protected "issue advocacy," that concern does not justify a wooden "magic words" test that elevates form over substance and eviscerates the effectiveness of the entire regulatory scheme governing electioneering. In every area of First Amendment jurisprudence, courts are required to engage in delicate line drawing between protected speech and speech that properly may be regulated. It is unlikely that the First Amendment requires, in the area of election regulations alone, a mechanical, formulaic test that readily invites evasion.

The challenge facing campaign finance reformers seeking to regulate electioneering communications is to develop a test for "express advocacy" that meets the Supreme Court's dual concerns regarding vagueness and overbreadth, which are necessarily in tension with each other. The test must be clear enough so that persons or organizations seeking to engage in political advertising will be able to determine with reasonable certainty beforehand whether an advertisement will be treated as regulated "express advocacy." Additionally, the test must be broad enough to cover situations in which an electioneering intent and message are clear, but not so broad as to sweep in true "issue advocacy." Recent proposals by the FEC and Congressional reformers are promising attempts to define "express advocacy" and "issue advocacy" in both a more realistic and a constitutionally permissible manner. □



BRENNAN CENTER FOR JUSTICE

AT NYU SCHOOL OF LAW

161 Avenue of the Americas, 5th Floor, New York, NY 10013 (212) 998-6730 / Fax (212) 995-4550

**SENATE COMMITTEE REPORT  
First Committee of Referral**

DATE: 4/18/02

FURTHER:

Date of 5-Day Notice: 4/18/02  
(in accordance with Uniform Rule 23)

DATE TURNED  
IN TO OFFICE: 5/3/02

State Affairs Committee considered SENATE BILL NO. 363

*SB 363 ELECTIONEERING COMMUNICATIONS*

"An Act relating to electioneering communications and communications intended to influence the outcome of an election and to campaign misconduct in the second degree; and providing for an effective date."

and recommends:

- be replaced with \_\_\_\_\_ CS SB 363 (STK)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

- Senate Bill:**  
 same title  
 new title
- House Bill:**  
 same title  
 technical title  
 new: SCR # \_\_\_\_\_

**NEW FISCAL NOTE(S):**

| Department | Date | Fiscal | Zero | FN# |
|------------|------|--------|------|-----|
| DOA        | 4/22 | ✓      |      | 1   |
| Gov        | 4/22 |        | ✓    | 2   |
|            |      |        |      |     |
|            |      |        |      |     |

**PREVIOUS FISCAL NOTE(S):**

| Department | Date | Fiscal | Zero | FN# |
|------------|------|--------|------|-----|
|            |      |        |      |     |
|            |      |        |      |     |
|            |      |        |      |     |
|            |      |        |      |     |

APPROPRIATION - no fiscal note

| SIGNATURES AND RECOMMENDATIONS: | DO PASS | DO NOT PASS | NO REC | AMEND |
|---------------------------------|---------|-------------|--------|-------|
| <i>[Signature]</i>              | ✓       |             |        |       |
| <i>[Signature]</i>              | ✓       |             |        |       |
| <i>[Signature]</i>              | ✗       |             |        |       |
|                                 |         |             |        |       |
| CHAIR: <i>[Signature]</i>       | ✗       |             |        |       |

SB 363-ELECTIONEERING COMMUNICATIONS  
SENATE FINANCE COMMITTEE

SIGN-IN

NAME: Tammy Kempton Subject/Bill No: SB 363  
Co./Dept./Title: APOC Phone: 4865  
Address: Senate office Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions *regarding fiscal note*

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_  
Address: \_\_\_\_\_ Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions

**SB**

**364**

HFIN

FILE

MICHAEL D. BRANDNER, M.D.  
PLASTIC AND RECONSTRUCTIVE SURGERY  
SURGERY OF THE HAND AND MICROVASCULAR SURGERY

MAY 9, 2002

TO: HOUSE JUDICIARY COMMITTEE  
I AM A PHYSICIAN PRACTICING  
IN ANCHORAGE AND I AM IN SUPPORT  
OF SB 364. THIS BILL, IF PASSED  
WOULD PREVENT THE MEDICAID  
FINANCING OF MEDICALLY UN-  
NECESSARY ABORTIONS (AS MOST  
OF THEM ARE) AS I UNDER-  
STAND IT. PASSING THIS  
BILL WOULD BE AN EXCELLENT  
MORAL/ETHICAL CHOICE AS  
WELL AS A VERY GOOD FISCAL  
MOVE FOR ALASKA.  
THANK YOU.

SINLERELY

Michael D Brandner MD

requested, including a statement from a physician. Within 60 days after the department receives a completed application for a waiver or renewal for a waiver under this section, the commissioner will notify the applicant that

(1) the commissioner approves the waiver subject to conditions he or she has established; or

(2) the commissioner denies the waiver.

(n) Notwithstanding (a) — (m) of this section, the commissioner will not grant a general relief medical waiver under this section at any time on or after October 1, 1995. (Eff. 12/24/85, Register 96; am 11/20/94, Register 132)

Authority: AS 47.05.010  
AS 47.25.120

AS 47.25.230

AS 47.25.252

**7 AAC 47.290. DEFINITIONS.** In 7 AAC 47.010 — 7 AAC 47.290

(1) "prescribed drug" means a simple or compound substance, or mixtures of substances, prescribed for the cure, mitigation, or prevention of disease, or for health maintenance that is prescribed by a physician or other licensed practitioner of the healing arts within the scope of practice as defined and limited by federal and state law, and is dispensed by a licensed pharmacist on a valid prescription that is recorded and maintained in the pharmacist's records;

(2) "disabled" or "disability" means being unable to or the inability to engage in substantial gainful activity by reason of a medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months;

(3) "elective procedure" means a procedure that is subject to the choice or decision of the patient or physician regarding medical services that are advantageous to the patient but not necessary to prevent the death or disability of the patient, and includes an elective abortion;

(4) "major medical care" means non-elective inpatient hospital services that cannot be performed on an outpatient basis and that are certified as necessary by the professional review organization contracted by the division of medical assistance; "major medical care" does not include inpatient psychiatric hospital services;

(5) repealed 2/19/93;

(6) "recipient" means an individual who is financially eligible for General Relief Medical assistance and who may receive a covered medical service if determined to be eligible to receive the service;

(7) "elective abortion" means a procedure, other than a therapeutic abortion, to terminate a pregnancy;

(8) "therapeutic abortion" means the termination of a pregnancy;

(A) certified by a physician as medically necessary to prevent the death or disability of the woman, or to ameliorate a condition harmful to the woman's physical or psychological health; or

(B) that resulted from actions that would constitute a crime of sexual assault under AS 11.41.410 — 11.41.425, a crime of sexual abuse of a minor under AS 11.41.434 — 11.41.440, or the crime of incest under AS 11.41.450. (Eff. 8/1/85, Register 95; am 12/4/85, Register 96; am 8/1/86, Register 99; am 11/26/86, Register 100; am 2/19/93, Register 125; am 8/8/97, Register 143)

Authority: AS 47.05.010  
AS 47.25.120

AS 47.25.130

AS 47.25.170

## ARTICLE 2. GENERAL RELIEF ADULT RESIDENTIAL CARE.

| Section                                      | Section                      |
|--|------------------------------|
| 300. Scope                                   | 410. Availability of hearing |
| 310. Adult residential care                  | 420. Report of change        |
| 320. Adult residential care facility         | 430. Review of eligibility   |
| 330. Eligible individuals                    | 440. Facility application    |
| 340. Income limits                           | 450. Payment by individual   |
| 350. Resource limits                         | 460. Payment by department   |
| 360. Relative responsibility                 | 470. Rates                   |
| 370. Concurrent applications                 | 480. Services provided       |
| 380. Alternative resources                   | 490. Absence or discharge    |
| 390. Assistance application                  | 500. Facility agreement      |
| 400. Eligibility determination and placement | 510. Emergency placement     |
|  | 520. Fraud                   |

**7 AAC 47.300. SCOPE.** The department has determined that a need exists among the state's adult population for the availability of nonmedical residential care. The purpose of the program described in this chapter is to provide financial assistance to needy adults who are lacking in adaptive behavior to the degree that they require the protective oversight of an adult residential care facility. The program objective is to enable those adults to obtain the level of care which an individual could receive in his or her own home from interested friends or relatives and to live in the least restrictive setting possible. (Eff. 11/23/80, Register 76)

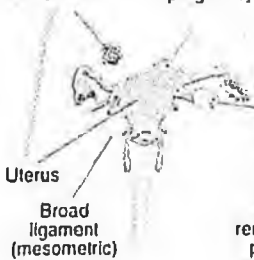
Authority: AS 47.05.010

AS 47.25.120

**7 AAC 47.310. ADULT RESIDENTIAL CARE.** Adult residential care is a range of care which includes more than room and board but which does not include continuous nursing or medical care. It encompasses 24-hour supportive and protective services in all activities of normal daily living for an individual 18 years of age or older. The care is provided in a residential environment and encourages independent living to the extent possible for each resident. (Eff. 11/23/80, Register 76)

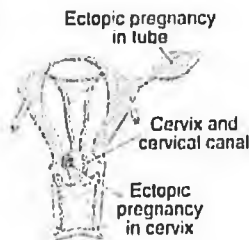
Ectopic pregnancies are reported by site where abnormal attachment occurs; more than 95 percent occur in the fallopian tube

Abdominal pregnancy



Site of interstitial pregnancy

Half of all ectopic pregnancies resolve spontaneously without rupture but surgical intervention is usually necessary for the remainder; rarely, an abdominal or mesometric pregnancy may continue until a viable fetus is delivered through an abdominal incision



Ovarian pregnancy

### 633 Ectopic pregnancy

Pregnancy in which the fertilized egg develops outside the uterine environment.

**INCLUDES** ruptured ectopic pregnancy

#### 633.0 Abdominal pregnancy

Intraperitoneal pregnancy

#### 633.1 Tubal pregnancy

Fallopian pregnancy

Rupture of (fallopian) tube due to pregnancy

Tubal abortion

#### 633.2 Ovarian pregnancy

#### 633.8 Other ectopic pregnancy

Pregnancy:

cervical

combined

cornual

Pregnancy:

Intraligamentous

mesometric

mural

#### 633.9 Unspecified ectopic pregnancy

### OTHER PREGNANCY WITH ABORTIVE OUTCOME (634-639)

The following fourth-digit subdivisions are for use with categories 634-638:

#### .0 Complicated by genital tract and pelvic infection

Endometritis

Salpingo-oophoritis

Sepsis NOS

Septicemia NOS

Any condition classifiable to 639.0, with condition classifiable to 634-638

**EXCLUDES** urinary tract infection (634-638 with .7)

#### .1 Complicated by delayed or excessive hemorrhage

Albinogenemia

Defibrination syndrome

Intravascular hemolysis

Any condition classifiable to 639.1, with condition classifiable to 634-638

#### .2 Complicated by damage to pelvic organs and tissues

Laceration, perforation, or tear of:

bladder

uterus

Any condition classifiable to 639.2, with condition classifiable to 634-638

#### .3 Complicated by renal failure

Oliguria

Uremia

Any condition classifiable to 639.3, with condition classifiable to 634-638

#### .4 Complicated by metabolic disorder

Electrolyte imbalance with conditions classifiable to 634-638

#### .5 Complicated by shock

Circulatory collapse

Shock (postoperative) (septic)

Any condition classifiable to 639.5, with condition classifiable to 634-638

#### .6 Complicated by embolism

Embolism:

NOS

amniotic fluid

pulmonary

Any condition classifiable to 639.6, with condition classifiable to 634-638

#### .7 With other specified complications

Cardiac arrest or failure

Urinary tract infection

Any condition classifiable to 639.8, with condition classifiable to 634-638

#### .8 With unspecified complication

#### .9 Without mention of complication

### 634 Spontaneous abortion

Spontaneous expulsion from the uterus of products of conception.

**INCLUDES** miscarriage  
spontaneous abortion

Requires fifth-digit to identify stage:

0 unspecified

1 incomplete

2 complete

#### 634.0 Complicated by genital tract and pelvic infection

#### 634.1 Complicated by delayed or excessive hemorrhage

#### 634.2 Complicated by damage to pelvic organs or tissues

#### 634.3 Complicated by renal failure

#### 634.4 Complicated by metabolic disorder

#### 634.5 Complicated by shock

#### 634.6 Complicated by embolism

#### 634.7 With other specified complications

#### 634.8 With unspecified complication

#### 634.9 Without mention of complication

### 635 Legally induced abortion

Intentional expulsion from the uterus of products of conception; by medical professionals within the boundaries of the law.

**INCLUDES** abortion or termination of pregnancy:  
elective  
legal  
therapeutic

**EXCLUDES** menstrual extraction or regulation (V25.3)

Requires fifth-digit to identify stage:

0 unspecified

1 incomplete

2 complete

#### 635.0 Complicated by genital tract and pelvic infection

#### 635.1 Complicated by delayed or excessive hemorrhage

#### 635.2 Complicated by damage to pelvic organs or tissues

#### 635.3 Complicated by renal failure

#### 635.4 Complicated by metabolic disorder

#### 635.5 Complicated by shock

#### 635.6 Complicated by embolism

#### 635.7 With other specified complications

#### 635.8 With unspecified complication

#### 635.9 Without mention of complication

### 636 Illegally induced abortion

Intentional expulsion from the uterus of products of conception; outside the boundaries of the law.

**INCLUDES** abortion:  
criminal  
illegal  
self-induced

Requires fifth-digit to identify stage:

- 0 unspecified
- 1 incomplete
- 2 complete

- 636.0 Complicated by genital tract and pelvic infection
  - 636.1 Complicated by delayed or excessive hemorrhage
  - 636.2 Complicated by damage to pelvic organs or tissues
  - 636.3 Complicated by renal failure
  - 636.4 Complicated by metabolic disorder
  - 636.5 Complicated by shock
  - 636.6 Complicated by embolism
  - 636.7 With other specified complications
  - 636.8 With unspecified complication
  - 636.9 Without mention of complication
- 637 Unspecified abortion
- INCLUDES** abortion NOS  
retained products of conception following abortion,  
not classifiable elsewhere

Requires fifth-digit to identify stage:

- 0 unspecified
- 1 incomplete
- 2 complete

- 637.0 Complicated by genital tract and pelvic infection
- 637.1 Complicated by delayed or excessive hemorrhage
- 637.2 Complicated by damage to pelvic organs or tissues
- 637.3 Complicated by renal failure
- 637.4 Complicated by metabolic disorder
- 637.5 Complicated by shock
- 637.6 Complicated by embolism
- 637.7 With other specified complications
- 637.8 With unspecified complication
- 637.9 Without mention of complication

638 Failed attempted abortion

Failed, intentional expulsion from the uterus of products of conception.

**INCLUDES** failure of attempted induction of (legal) abortion

**EXCLUDES** incomplete abortion (634.0-637.9)

- 638.0 Complicated by genital tract and pelvic infection
- 638.1 Complicated by delayed or excessive hemorrhage
- 638.2 Complicated by damage to pelvic organs or tissues
- 638.3 Complicated by renal failure
- 638.4 Complicated by metabolic disorder
- 638.5 Complicated by shock
- 638.6 Complicated by embolism
- 638.7 With other specified complications
- 638.8 With unspecified complication
- 638.9 Without mention of complication

639 Complications following abortion and ectopic and molar pregnancies

Note: This category is provided for use when it is required to classify separately the complications classifiable to the fourth-digit level in categories 634-638; for example:

- a) when the complication itself was responsible for an episode of medical care, the abortion, ectopic or molar pregnancy itself having been dealt with at a previous episode
- b) when these conditions are immediate complications of ectopic or molar pregnancies classifiable to 630-638 where they cannot be identified at fourth-digit level.

639.0 Genital tract and pelvic infection

Endometritis  
Parametritis  
Pelvic peritonitis  
Salpingitis  
Salpingo-oophoritis  
Sepsis NOS  
Septicemia NOS

following conditions  
classifiable to  
630-638

**EXCLUDES** urinary tract infection (639.8)

639.1 Delayed or excessive hemorrhage

Excessive bleeding from the uterus.

Afibrinogenemia  
Defibrination syndrome  
Intravascular hemolysis

following conditions classifi-  
able to 630-638

639.2 Damage to pelvic organs and tissues

Laceration, perforation, or  
tear of:  
bladder  
bowel  
broad ligament  
cervix  
periurethral tissue  
uterus  
vagina

following conditions  
classifiable to  
630-638

639.3 Renal failure

Decline in the ability of the kidneys to filter and cleanse the blood.

Oliguria  
Renal:  
failure (acute)  
shutdown  
tubular necrosis  
Uremia

following conditions classifi-  
able to 630-638

639.4 Metabolic disorders

Electrolyte imbalance following conditions classifiable to  
630-638

639.5 Shock

Circulatory collapse  
Shock (postoperative)  
(septic)

following conditions  
classifiable to  
630-638

639.6 Embolism

Sudden blockage of an artery.

Embolism:  
NOS  
air  
amniotic fluid  
blood-clot  
fat  
pulmonary  
pyemic  
septic  
soap

following conditions  
classifiable to  
630-638

639.8 Other specified complications following abortion or ectopic and molar pregnancy

Acute yellow atrophy or  
necrosis of liver  
Cardiac arrest or failure  
Cerebral anoxia  
Urinary tract infection

following conditions  
classifiable to  
630-638

639.9 Unspecified complication following abortion or ectopic and molar pregnancy

Complication(s) not further specified following conditions  
classifiable to 630-638



# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: SB 364  
 ( s ) Publish Date: 4/24/02

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Health & Social Services  
 Title: MEDICAL SERVICES UNDER THE STATE MEDICAID PROGRAM BRU: Medical Assistance  
 Component: Medicaid Services  
 Sponsor: SENATE (RLS) BY REQUEST  
 Requestor: SENATE (FIN) Component Number: 2077

**Expenditures/Revenues (Thousands of Dollars)**

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 |
|------------------------|---------|---------|---------|---------|---------|---------|
| Personal Services      |         |         |         |         |         |         |
| Travel                 |         |         |         |         |         |         |
| Contractual            |         |         |         |         |         |         |
| Supplies               |         |         |         |         |         |         |
| Equipment              |         |         |         |         |         |         |
| Land & Structures      |         |         |         |         |         |         |
| Grants & Claims        |         |         |         |         |         |         |
| Miscellaneous          |         |         |         |         |         |         |
| <b>TOTAL OPERATING</b> | *       | *       | *       | *       | *       | *       |

|                             |  |  |  |  |  |  |
|-----------------------------|--|--|--|--|--|--|
| <b>CAPITAL EXPENDITURES</b> |  |  |  |  |  |  |
|-----------------------------|--|--|--|--|--|--|

|                                 |  |  |  |  |  |  |
|---------------------------------|--|--|--|--|--|--|
| <b>CHANGE IN REVENUES ( 0 )</b> |  |  |  |  |  |  |
|---------------------------------|--|--|--|--|--|--|

**FUND SOURCE (Thousands of Dollars)**

|                                      |   |   |   |   |   |   |
|--------------------------------------|---|---|---|---|---|---|
| 1002 Federal Receipts                |   |   |   |   |   |   |
| 1003 GF Match                        |   |   |   |   |   |   |
| 1004 GF                              |   |   |   |   |   |   |
| 1005 GF/Program Receipts             |   |   |   |   |   |   |
| 1037 GF/Mental Health                |   |   |   |   |   |   |
| Other (Specify Type--do not abbrevia |   |   |   |   |   |   |
| <b>TOTAL</b>                         | * | * | * | * | * | * |

Estimate of any current year (FY2002) cost: \_\_\_\_\_

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

|           |  |  |  |  |  |  |
|-----------|--|--|--|--|--|--|
| Full-time |  |  |  |  |  |  |
| Part-time |  |  |  |  |  |  |
| Temporary |  |  |  |  |  |  |

**ANALYSIS:** (Attach a separate page if necessary)

The department cannot determine a fiscal impact related to this bill, as it is unclear how physicians will interpret the language in subsection (b), and how that interpretation may or may not differ from current practice in referring a woman for an abortion.

Prepared by: Nancy Weller Phone 465-3355  
 Division: Medical Assistance Date/Time 04/22/2002  
 Approved by: Elmer A. Linstrom, Deputy Commissioner Date 04/22/2002  
 Agency: Department of Health & Social Services

For distribution information, call the Governor's Legislative Office

SENATE BILL NO. 364

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST

Introduced: 4/18/02  
Referred: Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to medical services under the state Medicaid program."

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 \* Section 1. AS 47.07 is amended by adding a new section to read:

4           Sec. 47.07.068. Payment for abortions. (a) Except as otherwise required by  
5 federal law, the department may pay for an abortion under this chapter only if the  
6 abortion is a medically necessary abortion or is an abortion to terminate a pregnancy  
7 resulting from rape or incest. The department shall adopt regulations regarding  
8 payment for abortions in conformity with this section and applicable federal  
9 regulations.

10           (b) A claim for payment for a medically necessary abortion that is submitted  
11 to the department must be accompanied by a written certification by the treating  
12 physician that the abortion is medically necessary to treat a serious

13                           (1) adverse physical condition of a pregnant woman that

14   (A) either is caused by the pregnancy or would be significantly  
15 aggravated by continuation of the pregnancy; and

1 (B) would seriously endanger the physical health of the woman  
2 if the pregnancy were not terminated by an abortion; or

3 (2) psychological illness of a pregnant woman who requires  
4 medication for treatment of the illness if

5 (A) the medication required to treat the illness would be highly  
6 dangerous to the fetus; and

7 (B) the health of the woman would be endangered if the  
8 medication was not taken during the pregnancy.

9 (c) In this section,

10 (1) "abortion" has the meaning given in AS 18.16.090;

11 (2) "incest" means an act that would constitute the crime of incest  
12 under AS 11.41.450;

13 (3) "rape" means an act that would constitute a crime of sexual assault  
14 or sexual abuse of a minor under AS 11.41.410 - 11.41.440.

**Number and Percent  
of Reported Induced Abortions  
with Any Mention of  
Immediate Complication  
by Type of Immediate Complication  
Michigan Occurrences, 2000**

| TYPE OF IMMEDIATE<br>COMPLICATIONS | NUMBER | PERCENT |
|------------------------------------|--------|---------|
| Total Immediate Complications      | 26     | 0.10    |
| Shock                              | 9      | 0.03    |
| Uterine Perforation                | 4      | 0.01    |
| Cervical Laceration                | 0      | 0.00    |
| Hemorrhage                         | 5      | 0.02    |
| Allergic Response                  | 1      | 0.00    |
| Death                              | 0      | 0.00    |
| Infection                          | 0      | 0.00    |
| Retained Products                  | 8      | 0.03    |
| Other Complications                | 3      | 0.01    |

Note: Abortions with at least one immediate complication does not equal the sum of all the complications specified because a woman may have multiple complications reported.

Source: 2000 File of Reported Induced Abortions Occurring in Michigan, Division for Vital Records and Health Statistics, Michigan Department of Community Health

- [Natality & Pregnancy Index](#)
- [Statistics & Reports](#)
- [Community Health Home](#)
- [Michigan.gov](#)

Immediate Complications--By Type

◀ Previous      Next ▶

**Number and Percent  
of Reported Induced Abortions  
with Any Mention of  
Subsequent Complication  
by Type of Subsequent Complication  
Michigan Occurrences, 2000**

| TYPE OF SUBSEQUENT<br>COMPLICATIONS | NUMBER | PERCENT |
|-------------------------------------|--------|---------|
| Total Subsequent<br>Complications   | 7      | 0.03    |
| Shock                               | 0      | 0.00    |
| Uterine Perforation                 | 0      | 0.00    |
| Cervical Laceration                 | 0      | 0.00    |
| Hemorrhage                          | 3      | 0.01    |
| Allergic Response                   | 0      | 0.00    |
| Death                               | 0      | 0.00    |
| Infection                           | 2      | 0.01    |
| Retained Products                   | 0      | 0.00    |
| Other Complications                 | 3      | 0.01    |

Note: Abortions with at least one subsequent complication does not equal the sum of all the complications specified because women may have multiple complications reported.

Source: 2000 File of Reported Induced Abortions Occurring in Michigan, Division for Vital Records and Health Statistics, Michigan Department of Community Health

---

[Natality & Pregnancy Index](#) | [Subsequent Complications--By Type](#) ▾  
[Statistics & Reports](#)  
[Community Health Home](#) ◀ Previous Next ▶  
[Michigan.gov](#)

### CERTIFICATE TO REQUEST FEDERAL (MEDICAID) FUNDS FOR ABORTION

Effective November 13, 1997, Congress passed another revision of the Hyde Amendment pertaining to federally funded Medicaid abortions. The provision states that federal funds are available for an abortion only "(1) if the pregnancy is the result of an act of rape or incest; or (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed."

\_\_\_\_\_  
(Recipient's Full Name)

\_\_\_\_\_  
(Recipient's Medicaid Identification Number)

had an abortion procedure performed on       /      /        
( Mo. / Day / Year )

Indicate the circumstance that applies below:

I certify that prior to performing the abortion procedure on the above patient to terminate her pregnancy, I obtained a non-notarized signed statement from the patient that her pregnancy was the result of an act of  rape or  incest. That statement is now part of the patient's medical record.

I certify that in my professional judgement, the abortion procedure on the above patient was performed due to physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would place the woman in danger of death unless an abortion was performed, based on full consideration of all factors as described in the attached operative report.

\_\_\_\_\_  
(Signature of Recipient's Attending Physician)

M.D.

D.O.

\_\_\_\_\_  
(Month / Day / Year)

(Date of Physician's Signature)

This certificate to request federal (Medicaid) funds for an abortion must be personally signed and dated by the recipient's attending physician. A facsimile signature or signature of the physician's authorized representative is not acceptable. Each provider submitting a claim for abortion services (e.g., physician, inpatient hospital, outpatient hospital) must attach a completed certificate bearing an original signature of the recipient's attending physician. The signature requirement will not be waived for resubmission.

Rev 10/98

Figure II-3. Certificate to Request Federal (Medicaid) Funds for Abortion

# Alaska State Legislature

*Session:*  
State Capitol  
Juneau, AK 99801  
Phone: (907) 465-2327  
Fax: (907) 465-5241



*Interim:*  
119 N. Cushman  
Fairbanks, AK 99701  
Phone: (907) 456-8161  
Fax: (907) 456-8163

Senator Pete Kelly  
District P

## SB 364 Sponsor Statement

“An Act relating to medical services under the State Medicaid program”

A majority of Alaskans agree it is inappropriate to use state funds to provide elective abortions. Despite the many efforts of the legislature, however, we have been unable to implement the will of the people. All attempts to bring Alaskan Medicaid funding under federal standards, which prohibit funding abortions except for rape, incest and life of mother, have been thwarted by the Alaska Supreme Court.

The Alaska Administrative Code defines therapeutic abortion as, “the termination of a pregnancy; certified by a physician as *medically necessary* to prevent the death or disability of the woman, or to ameliorate a condition harmful to the woman’s physical or psychological health.” *Medically necessary* has proved too broad, allowing elective abortions to take cover under its umbrella of protection. Currently, any form of emotional discomfort a woman may experience from pregnancy could warrant a “medically necessary” termination.

SB 364 defines “medically necessary” thus restricting Medicaid funded abortions to those cases that fall under Hyde Amendment guidelines.

**SB**

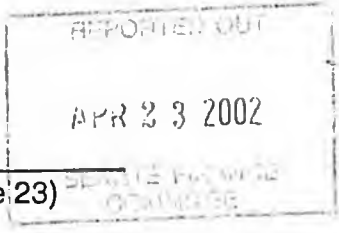
**364**

SFIN

FILE

# SENATE FINANCE COMMITTEE REPORT

DATE: 4/18/02



FURTHER:

Date of 5-Day Notice: \_\_\_\_\_  
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 04/23/02

Finance Committee considered SENATE BILL NO. 364

"An Act relating to medical services under the state Medicaid program."

and recommends:

- be replaced with \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- adopt previous \_\_\_\_\_ CS \_\_\_\_\_ (\_\_\_\_\_)
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

**Senate Bill:**

- same title
- new title

**House Bill:**

- same title
- technical title
- new: SCR # \_\_\_\_\_

**NEW FISCAL NOTE(S):**

| Department | Date    | Fiscal | Zero | FN# |
|------------|---------|--------|------|-----|
| DHSS       | 4/22/02 | *      |      |     |
|            |         |        |      |     |
|            |         |        |      |     |
|            |         |        |      |     |
|            |         |        |      |     |

**PREVIOUS FISCAL NOTE(S):**

| Department | Date | Fiscal | Zero | FN# |
|------------|------|--------|------|-----|
|            |      |        |      |     |
|            |      |        |      |     |
|            |      |        |      |     |
|            |      |        |      |     |
|            |      |        |      |     |

APPROPRIATION - no fiscal note

| SIGNATURES AND RECOMMENDATIONS: | DO PASS | DO NOT PASS | NO REC             | AMEND |
|---------------------------------|---------|-------------|--------------------|-------|
| <i>[Signature]</i>              | ✓       |             |                    |       |
| <i>[Signature]</i>              |         | ✓           |                    |       |
| <i>[Signature]</i>              | ✓       |             | <i>[Signature]</i> |       |
| <i>[Signature]</i>              |         |             | ✓                  |       |
| <i>[Signature]</i>              | ✓       |             |                    |       |
| <i>[Signature]</i>              | ✓       |             |                    |       |
| COCHAIR: <i>[Signature]</i>     |         | ✓           |                    |       |
| COCHAIR: <i>[Signature]</i>     | ✓       |             |                    |       |

# FISCAL NOTE

STATE OF ALASKA  
2002 LEGISLATIVE SESSION

APR 23 2002  
LEGISLATIVE OFFICE

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: SB 364  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Health & Social Services  
 Title: MEDICAL SERVICES UNDER THE STATE MEDICAID PROGRAM BRU: Medical Assistance  
 Component: Medicaid Services  
 Sponsor: SENATE (RLS) BY REQUEST  
 Requestor: SENATE (FIN) Component Number: 2077

**Expenditures/Revenues (Thousands of Dollars)**

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 |
|------------------------|---------|---------|---------|---------|---------|---------|
| Personal Services      |         |         |         |         |         |         |
| Travel                 |         |         |         |         |         |         |
| Contractual            |         |         |         |         |         |         |
| Supplies               |         |         |         |         |         |         |
| Equipment              |         |         |         |         |         |         |
| Land & Structures      |         |         |         |         |         |         |
| Grants & Claims        |         |         |         |         |         |         |
| Miscellaneous          |         |         |         |         |         |         |
| <b>TOTAL OPERATING</b> | *       | *       | *       | *       | *       | *       |

|                      |  |  |  |  |  |  |
|----------------------|--|--|--|--|--|--|
| CAPITAL EXPENDITURES |  |  |  |  |  |  |
|----------------------|--|--|--|--|--|--|

|                          |  |  |  |  |  |  |
|--------------------------|--|--|--|--|--|--|
| CHANGE IN REVENUES ( 0 ) |  |  |  |  |  |  |
|--------------------------|--|--|--|--|--|--|

**FUND SOURCE (Thousands of Dollars)**

|                                      |   |   |   |   |   |   |
|--------------------------------------|---|---|---|---|---|---|
| 1002 Federal Receipts                |   |   |   |   |   |   |
| 1003 GF Match                        |   |   |   |   |   |   |
| 1004 GF                              |   |   |   |   |   |   |
| 1005 GF/Program Receipts             |   |   |   |   |   |   |
| 1037 GF/Mental Health                |   |   |   |   |   |   |
| Other (Specify Type--do not abbrevia |   |   |   |   |   |   |
| <b>TOTAL</b>                         | * | * | * | * | * | * |

Estimate of any current year (FY2002) cost: \_\_\_\_\_

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

|           |  |  |  |  |  |  |
|-----------|--|--|--|--|--|--|
| Full-time |  |  |  |  |  |  |
| Part-time |  |  |  |  |  |  |
| Temporary |  |  |  |  |  |  |

**ANALYSIS:** (Attach a separate page if necessary)

The department cannot determine a fiscal impact related to this bill, as it is unclear how physicians will interpret the language in subsection (b), and how that interpretation may or may not differ from current practice in referring a woman for an abortion.

Prepared by: Nancy Weller Phone 465-3355  
 Division: Medical Assistance Date/Time 04/22/2002  
 Approved by: Elmer A. Lindstrom, Deputy Commissioner Date 04/22/2002  
 Agency: Department of Health & Social Services

For distribution information, call the Governor's Legislative Office

SENATE FINANCE COMMITTEE  
4 / 23 / 2002 COMMITTEE ACTION

|                                |                                  |
|--------------------------------|----------------------------------|
| <b>Bill Number</b>             | <del>364</del> <sup>SB</sup> 364 |
| <b>Amendment</b>               |                                  |
| <b>Motion</b>                  | ADOPT Bill                       |
| <b>Motion by</b>               | Ward                             |
| <b>Objection by</b>            |                                  |
| <b>Removed</b>                 |                                  |
| <b>Second Objection by</b>     |                                  |
| <b><u>Committee Member</u></b> | <b>Y</b> <b>Vote</b> <b>N</b>    |
| Senator Austerman              | ✓      ✓                         |
| Senator Green                  | ✓                                |
| Senator Hoffman                |                                  |
| Senator Leman                  | ✓                                |
| Senator Olson                  | ✓                                |
| Senator Ward                   | ✓                                |
| Senator Wilken                 | ✓                                |
| Co-Chair Donley                | ✓      ✓                         |
| Co-Chair Kelly                 | ✓                                |
| <b><u>Tally</u></b>            |                                  |
| Yea                            | 6                                |
| Nay                            | 2                                |
| Absent                         |                                  |
| <b>MOTION</b>                  | PASSED                           |

# Alaska State Legislature

*Session:*  
State Capitol  
Juneau, AK 99801  
Phone: (907) 465-2327  
Fax: (907) 465-5241



*Interim:*  
119 N. Cushman  
Fairbanks, AK 99701  
Phone: (907) 456-8161  
Fax: (907) 456-8163

Senator Pete Kelly  
District P

## SB 364 Sponsor Statement

“An Act relating to medical services under the State Medicaid program”

A majority of Alaskans agree it is inappropriate to use state funds to provide elective abortions. Despite the many efforts of the legislature, however, we have been unable to implement the will of the people. All attempts to bring Alaskan Medicaid funding under federal standards, which prohibit funding abortions except for rape, incest and life of mother, have been thwarted by the Alaska Supreme Court.

The Alaska Administrative Code defines therapeutic abortion as, “the termination of a pregnancy; certified by a physician as *medically necessary* to prevent the death or disability of the woman, or to ameliorate a condition harmful to the woman’s physical or psychological health.” *Medically necessary* has proved too broad, allowing elective abortions to take cover under its umbrella of protection. Currently, any form of emotional discomfort a woman may experience from pregnancy could warrant a “medically necessary” termination.

SB 364 defines “medically necessary” thus restricting Medicaid funded abortions to those cases that fall under Hyde Amendment guidelines.



SB 364-MEDICAID PAYMENTS FOR ABORTIONS  
SENATE FINANCE COMMITTEE

SIGN-IN

NAME:  Dr. John Middaugh Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: DHSS Phone: \_\_\_\_\_  
Address: Div. Pub. Health - EPI - ANCH. Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions

NAME:  Nancy Wenger Subject/Bill No: \_\_\_\_\_  
Co./Dept./Title: DHSS DMA Phone: 465-5825  
Address: PO Box 110660 Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions Fiscal note

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_

Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_

Address: \_\_\_\_\_ Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions

NAME: \_\_\_\_\_ Subject/Bill No: \_\_\_\_\_

Co./Dept./Title: \_\_\_\_\_ Phone: \_\_\_\_\_

Address: \_\_\_\_\_ Zip: \_\_\_\_\_

Do you wish to testify?  Yes  No  Respond To Questions

SITE: ANCHORAGE LIO

COMMITTEE: SFIN

DATE: C4-23-02

SUBJECT OF MEETING:

SB 364

UPDATE #: 1



P R I N T YOUR NAME

ADDRESS (MAILING & ZIP)

REPRESENTING

DO YOU WANT  
TO TESTIFY?  
Y or N

| P R I N T YOUR NAME                        | ADDRESS (MAILING & ZIP) | REPRESENTING                              | DO YOU WANT TO TESTIFY?<br>Y or N |
|--|-------------------------|---|-----------------------------------|
| <del>Robin Smith</del><br>Email address:   |                         | Self                                      | Y- SB364                          |
| ✓ Jennifer Rudinger<br>Email address:      |                         | AK Civil Liberties Union                  | Y- SB364                          |
| ✓ Pauline Utter<br>Email address:          |                         |   | Y- SB364                          |
| <del>Marie Lavigne</del><br>Email address: |                         | Nat. Assoc. of Social Workers- AK Chapter | Y- SB364                          |
| Email address:                             |                         |   |                                   |
| Email address:                             |                         |   |                                   |
| Email address:                             |                         |   |                                   |
| Email address:                             |                         |   |                                   |
| Email address:                             |                         |   |                                   |
| Email address:                             |                         |   |                                   |
| Email address:                             |                         |   |                                   |
| Email address:                             |                         |   |                                   |
| Email address:                             |                         |   |                                   |

**SB**

**366**

SFIN

FILE



OFFICIAL BUSINESS

Alaska State Legislature  
Senate  
Office of the Secretary

STATE CAPITOL, ROOM 213  
JUNEAU, ALASKA 99801-1182  
(907) 465-3701  
FAX: 465-2832  
EMAIL: senate\_secretary@legis.state.ak.us

**FOR YOUR IMMEDIATE ATTENTION**

DATE: May 9, 2002  
TO: Senate Finance Committee  
(Mindy, Room 520)  
FROM: Office of the Senate Secretary  
SUBJ: Waived Bill(s)

The Chair of the Committee noted above has waived referral on the following bill(s):

**RETRIEVE**

SENATE BILL NO. 366

"An Act relating to the fee for the Chitina dip net fishing permit; and providing for an effective date."

Please give the bill file(s) to the page for forwarding to the next Committee of referral.

Thank you.

# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
Bill Version: SB 366  
(S) Publish Date: 5/9/02

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Fish and Game  
Title Chitina Dip Net Fishery Permit Fee BRU Sport Fisheries  
Component Sport Fisheries  
Sponsor Senate Judiciary  
Requester Senate Resources Component No. 464

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2003        | FY 2004        | FY 2005        | FY 2006        | FY 2007        | FY 2008        |
|------------------------|----------------|----------------|----------------|----------------|----------------|----------------|
| Personal Services      |                |                |                |                |                |                |
| Travel                 |                |                |                |                |                |                |
| Contractual            | (115.9)        | (115.9)        | (115.9)        | (115.9)        | (115.9)        | (115.9)        |
| Supplies               |                |                |                |                |                |                |
| Equipment              |                |                |                |                |                |                |
| Land & Structures      |                |                |                |                |                |                |
| Grants & Claims        |                |                |                |                |                |                |
| Miscellaneous          |                |                |                |                |                |                |
| <b>TOTAL OPERATING</b> | <b>(115.9)</b> | <b>(115.9)</b> | <b>(115.9)</b> | <b>(115.9)</b> | <b>(115.9)</b> | <b>(115.9)</b> |

|                             |  |  |  |  |  |  |
|-----------------------------|--|--|--|--|--|--|
| <b>CAPITAL EXPENDITURES</b> |  |  |  |  |  |  |
|-----------------------------|--|--|--|--|--|--|

|  |                |                |                |                |                |                |
|--|----------------|----------------|----------------|----------------|----------------|----------------|
| <b>CHANGE IN REVENUES (1024 F&amp;G)</b> | <b>(115.9)</b> | <b>(115.9)</b> | <b>(115.9)</b> | <b>(115.9)</b> | <b>(115.9)</b> | <b>(115.9)</b> |
|--|----------------|----------------|----------------|----------------|----------------|----------------|

**FUND SOURCE** (Thousands of Dollars)

|                          |                |                |                |                |                |                |
|--------------------------|----------------|----------------|----------------|----------------|----------------|----------------|
| 1002 Federal Receipts    |                |                |                |                |                |                |
| 1003 GF Match            |                |                |                |                |                |                |
| 1004 GF                  |                |                |                |                |                |                |
| 1005 GF/Program Receipts |                |                |                |                |                |                |
| 1037 GF/Mental Health    |                |                |                |                |                |                |
| 1024 Fish and Game Fund  | (115.9)        | (115.9)        | (115.9)        | (115.9)        | (115.9)        | (115.9)        |
| <b>TOTAL</b>             | <b>(115.9)</b> | <b>(115.9)</b> | <b>(115.9)</b> | <b>(115.9)</b> | <b>(115.9)</b> | <b>(115.9)</b> |

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

|           |   |   |   |   |   |   |
|-----------|---|---|---|---|---|---|
| Full-time | 0 | 0 | 0 | 0 | 0 | 0 |
| Part-time | 0 | 0 | 0 | 0 | 0 | 0 |
| Temporary | 0 | 0 | 0 | 0 | 0 | 0 |

**ANALYSIS:** (Attach a separate page if necessary)

For the past two years (2000 and 2001) the cost of a Chitina dip net fishing permit has been \$25.

- \$5 from each permit went to pay for site services including portable restrooms and garbage receptacles;
- \$2 from each permit went to pay for administration of the permit program and services; and
- \$18 from each permit went to the Chitina and Ahtna Corporations for guaranteed access on corporation lands by permit holders and eligible family members

Passage of SB 366 would reduce the cost of a Chitina dip net permit from \$25 to \$10.

Prepared by: Kelly Hopler, Director  
Division: Sport Fish  
Approved by: Frank Rue, Commissioner  
Agency: Alaska Department of Fish and Game

Phone 465-4180  
Date/Time 5/4/02 4:00 PM  
Date 5/6/2002

**FISCAL NOTE #1**

**STATE OF ALASKA  
2002 LEGISLATIVE SESSION**

**BILL NO. SB 366**

---

**ANALYSIS CONTINUATION**

The average number of permits sold during 2000 and 2001 is 7,729. Funds generated from the sale of 7,729 permits totals \$193.2.

If the cost of a permit is reduced to \$10, the funds generated from the sale of 7,729 permits will be reduced by \$115.9.

The reduced revenues will not provide a funding level that allows for guaranteed access contracts for the corporation lands. All funds generated from the sale of the \$10 fishing permit will be transferred by RSA to the Department of Natural Resources (DNR), Division of Parks and Outdoor Recreation. DNR will use these funds to upgrade and expand the site services for fishery participants.

The passage of this legislation will result in a decrease of \$115.9 in revenue, and contractual expenditures will be reduced by a commensurate amount of \$115.9. There is no fiscal impact to the operation of the Division of Sport Fish.

**SENATE COMMITTEE REPORT  
First Committee of Referral**

DATE: 4/22/02

FURTHER: Finance

Date of 5-Day Notice: 24 hour Rule  
(in accordance with Uniform Rule 23)

DATE TURNED  
IN TO OFFICE: 5/8/02

Resources Committee considered SENATE BILL NO. 366

SB 366 CHITINA DIP NET FISHERY PERMIT FEE

"An Act relating to the fee for the Chitina dip net fishing permit; and providing for an effective date."

and recommends:

- be replaced with re SB 366 (RES)
- adopt previous CS ( )
- attached amendment(s)
- adopt Letter of Intent by \_\_\_\_\_ Committee
- further referral to \_\_\_\_\_ Committee

**Senate Bill:**

- same title
  - new title
- House Bill:**
- same title
  - technical title
  - new: SCR # \_\_\_\_\_

**NEW FISCAL NOTE(S):**

| Department | Date   | Fiscal | Zero | FN# |
|------------|--------|--------|------|-----|
| F+G        | 5/4/02 | ✓      |      | 1   |
|            |        |        |      |     |
|            |        |        |      |     |
|            |        |        |      |     |
|            |        |        |      |     |

**PREVIOUS FISCAL NOTE(S):**

| Department | Date | Fiscal | Zero | FN# |
|------------|------|--------|------|-----|
|            |      |        |      |     |
|            |      |        |      |     |
|            |      |        |      |     |
|            |      |        |      |     |
|            |      |        |      |     |

APPROPRIATION - no fiscal note

| SIGNATURES AND RECOMMENDATIONS: | DO PASS | DO NOT PASS | NO REC | AMEND |
|---------------------------------|---------|-------------|--------|-------|
| <i>Christina Taylor</i>         | ✓       |             |        |       |
| <i>Ben Steiner</i>              | ✓       |             |        |       |
| <i>George White</i>             | ✓       |             |        |       |
|                                 |         |             |        |       |
|                                 |         |             |        |       |
| CHAIR: <i>J. Soyars</i>         | ✓       |             |        |       |

**SB**

**367**

SFIN

FILE

SB 367

was referred to the  
Senate Finance  
Committee

Hearing(s) were held

The bill did not move  
from Committee

Amendment #1  
adopted

22-LS1701A

by Sen. Wilkin

1           Sec. 39.35.527. Election to terminate coverage as a peace officer, ~~[OR]~~ fire  
2 fighter, or juvenile officer. (a) Any active member may elect to irrevocably  
3 relinquish hazardous duty [PEACE OFFICER OR FIRE FIGHTER] status with the  
4 system and to retain all credited service as if it had been acquired as a member other  
5 than a peace officer, ~~[OR]~~ fire fighter, or juvenile officer.

6           (b) In order to relinquish hazardous duty [PEACE OFFICER OR FIRE  
7 FIGHTER] status with the system, a person must be an active member and must file a  
8 written request with the administrator by July 1, 1984, for active members who are  
9 peace officers or fire fighters or within six months after employment as a peace  
10 officer or fire fighter, or by July 1, 2003, or within six months after employment as  
11 a juvenile officer for active members who are juvenile officers, whichever occurs  
12 later. No person has more than one opportunity to exercise this option.

13           (c) As soon as possible after the relinquishment, the administrator shall refund  
14 to a person who relinquishes hazardous duty [PEACE OFFICER OR FIRE  
15 FIGHTER] status under this section a refund equal to the amount by which the  
16 balance of the person's accumulated mandatory contributions plus interest exceeds the  
17 balance which would exist if all service credit had been acquired as a member other  
18 than a peace officer, ~~[OR]~~ fire fighter, or juvenile officer.

19           (d) A written request to relinquish hazardous duty [PEACE OFFICER OR  
20 FIRE FIGHTER] status is irrevocable upon filing with the administrator.

21           (e) In this section, "hazardous duty status" means status as a peace  
22 officer, fire fighter, or juvenile officer under this system.

23 \* Sec. 6. AS 39.35.680 is amended by adding a new paragraph to read:

24           (41) "juvenile officer" means a <sup>State of Alaska</sup> youth counselor, unit leader, or  
25 superintendent in a juvenile detention or juvenile correctional facility <sup>operated by</sup>  
26 ~~the State of Alaska.~~

27 \* Sec. 7. The uncodified law of the State of Alaska is amended by adding a new section to  
28 read:

29           TRANSITION. (a) An employee who was employed before January 1, 2003, but on  
30 or after June 23, 1983, in a position that meets the definition of "juvenile officer" enacted in  
31 sec. 6 of this Act may convert the credited service for that position during that time to credited  
service as a juvenile officer as enacted by this Act by claiming the service as juvenile officer

1 service before the member is appointed to retirement. When the member claims this credited  
2 service as juvenile officer service, an indebtedness of the member to the system shall be  
3 established. The indebtedness is equal to (1) the contributions to the system that the  
4 employee would have made if the service had counted as juvenile officer service, less (2) the  
5 contributions to the system that the employee actually made. Interest, as prescribed by  
6 regulation, accrues on this indebtedness, as required by regulation. Any outstanding  
7 indebtedness that exists at the time a person is appointed to retirement will require an actuarial  
8 adjustment to the benefits payable based upon the service claimed under this subsection.

9 (b) In this section, "juvenile officer service" means service that is eligible for  
10 enhanced retirement benefits as established in this Act.

# Alaska State Legislature

Session:  
State Capitol  
Juneau, AK 99801  
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Interim:  
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Fairbanks, AK 99701  
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Senator Pete Kelly

District P

## SB 367 Sponsor Statement

“An Act relating to retirement contributions and benefits under the public employees’ retirement system of certain juvenile detention employees and juvenile correctional institution employees.”

Alaska law, A.S. 39.35.370(a)(2), states that peace officers and firefighters are entitled to normal retirement benefit after 20 years of service. SB 367 adds *juvenile officers* to this statute as employees eligible to participate in the 20-year retirement system. The term *juvenile officer* is defined as, “youth counselor, unit leader, or superintendent in a juvenile detention or juvenile correctional facility.” Juvenile officers are the employees who work with juveniles **inside** a correctional facility. They have the same or very similar training as other peace officers as well as the authority to restrain and arrest individuals.

Juveniles who are in a correctional facility are there for reasons such as commission of a serious crime, mental health problems, substance abuse problems, or a combination of all of these issues. These youths demand the highest level of care and rehabilitation efforts while presenting high levels of risk to their officers.

As presently written, the statutes create an uneven situation where a probation officer working outside a correctional facility could arrest and deliver a juvenile to a correctional facility. The officer outside the facility would be entitled to a 20-year retirement while the officers inside the facility are not. Adult correctional officers also qualify for a 20-year retirement.

Providing a 20-year retirement system for juvenile officers is fair since these employees perform the same or very similar work duties as other employees charged with preserving public safety. SB 367 also creates an incentive for existing juvenile officers to remain in their positions and will attract qualified applicants for new positions.

**STATE OF ALASKA**  
**DEPARTMENT OF HEALTH AND SOCIAL SERVICES**  
*DIVISION OF JUVENILE JUSTICE*

*Tony Knowles, GOVERNOR*

*P.O. BOX 110635  
JUNEAU, ALASKA 99811-0635  
PHONE: (907) 465-2212  
FAX (907) 465-2333*

May 1, 2002

Senator Pete Kelly, Co-Chair  
Senate Finance Committee  
Alaska Capitol Building, Room 518  
Juneau, Alaska 99801

RE: SB 367

Dear Senator Kelly,

During the committee hearing on SB 367 on April 29, 2002 Senator Ward asked if there were other states which provided a 20 year retirement benefit to their juvenile youth facility staff.

We have made direct inquiries to a number of other states and have found some jurisdictions provide a 20 year retirement benefit to youth facility staff. We have not made contact with all 49 states, so the following should not be considered to be a definitive list of jurisdictions who provide this benefit to these staff.


**Arizona.** Youth corrections officers, youth program officers and other designated positions within the State Department of Juvenile Corrections may retire with 20 years of credited service. (A.R.S. § 38-881 and 38-885B)

**Illinois.** State juvenile security officers are eligible for retirement after 20 years of credited service if they are 50 years of age. (40 ILCS 5/Sec.14.110)

**Louisiana.** State adult and juvenile corrections officers are eligible for a 20 year retirement under a reduced actuarial benefit at age 50 and a full retirement benefit at any age with 25 years of credited service. (L.S.R. Subtitle 11, Par IV, § 441)

Again while this is not an exhaustive list, it does answer Sen. Ward's question as to whether or not other jurisdictions provide a 20 year retirement benefit to those with a similar duty or function within a juvenile corrections system. If you have other questions or concerns, please do not hesitate to contact me.

Sincerely,



Robert Buttane  
Administrative Juvenile Probation Officer

## Arizona

38-881. Definitions

In this article, unless the context otherwise requires:

1. "Accidental disability" means a physical or mental condition that the local board finds totally and permanently prevents an employee from performing a reasonable range of duties within the employee's department, was incurred in the performance of the employee's duties and was the result of any of the following:

(a) Physical contact with inmates, prisoners, parolees or persons on probation.

(b) Responding to a confrontational situation with inmates, prisoners, parolees or persons on probation.

(c) A job related motor vehicle accident while on official business for the employee's employer. A job related motor vehicle accident does not include an accident that occurs on the way to or from work. Persons found guilty of violating a personnel rule, a rule established by the employee's employer or a state or federal law in connection with a job related motor vehicle accident do not meet the conditions for accidental disability.

2. "Accumulated member contributions" means the sum of all member contributions deducted from a member's salary and paid to the fund, plus member contributions transferred to the fund by another retirement plan covering public employees of this state, plus previously withdrawn accumulated member contributions which are repaid to the fund in accordance with this article, minus any benefits paid to or on behalf of a member.

3. "Average monthly salary" means one-thirty-sixth of the aggregate amount of salary paid a member by a participating employer during a period of thirty-six consecutive months of service in which the member received the highest salary within the last one hundred twenty months of service. Average monthly salary means the aggregate amount of compensation paid a member divided by the member's months of service if the member has less than thirty-six months of service. In the computation under this paragraph, a period of nonpaid or partially paid industrial leave shall be considered based on the salary the employee would have received in the employee's job classification if the employee was not on industrial leave.

4. "Beneficiary" means an individual who is being paid or who has entitlement to the future payment of a pension on account of a reason other than the individual's membership in the retirement plan.

5. "Claimant" means a member, beneficiary or estate that files an application for benefits with the retirement plan.

6. "Credited service" means credited service transferred to the retirement plan from another retirement system or plan for public employees of this state, plus those compensated periods of service as a member of the retirement plan for which member contributions are on deposit in the fund.

7. "Designated position" means:

(a) For a county:

(i) A county detention officer.

(ii) A nonuniformed employee of a sheriff's department whose primary duties require direct contact with

inmates.

(b) For the state department of corrections and the department of juvenile corrections, only the following specifically designated positions:

(i) Food service.

(ii) Nursing personnel.

(iii) Corrections physician assistant.

(iv) Therapist.

(v) Corrections dental assistant.

(vi) Hygienist.

(vii) Corrections medical assistant.

(viii) Correctional service officer, including assistant deputy warden, deputy warden, warden and superintendent.

(ix) State correctional program officer.

(x) Parole or community supervision officers.

(xi) Investigators.

(xii) Teachers.

(xiii) Institutional maintenance workers.

(xiv) Youth corrections officer.

(xv) Youth program officer.

(xvi) Behavioral health treatment unit managers.

(xvii) The director and assistant directors of the department of juvenile corrections and the superintendent of the state educational system for committed youth.

(xviii) The director, deputy directors and assistant directors of the state department of corrections.

(xix) Other positions designated by the local board of the state department of corrections or the local board of the department of juvenile corrections pursuant to section 38-891, subsection E.

(c) For a city or town, a city or town detention officer.

(d) For an employer of an eligible group as defined in section 38-842, full-time dispatchers.

8. "Employee" means a person determined by the local board to be employed by a participating employer in a designated position.
9. "Employer" means an agency or department of this state or a political subdivision of this state which has one or more employees in a designated position.
10. "Fund" means the corrections officer retirement plan fund.
11. "Fund manager" means the fund manager of the public safety personnel retirement system.
12. "Local board" means the retirement board of the employer that consists of persons appointed or elected to administer the plan as it applies to the employer's members in the plan.
13. "Member" means any employee who meets all of the following qualifications:
  - (a) Who is a full-time paid person employed by a participating employer in a designated position.
  - (b) Who is receiving salary for personal services rendered to a participating employer or would be receiving salary except for an authorized leave of absence.
  - (c) Whose customary employment is for more than twenty hours each week and for more than six months in a calendar year.
14. "Normal retirement date" means the first day of the calendar month immediately following an employee's completion of twenty years of service, the employee's sixty-second birthday and completion of ten years of service or the month in which the sum of the employee's age and years of credited service equals eighty.
15. "Participating employer" means an employer which the fund manager has determined to have one or more employees in a designated position or a county, city or town which has entered into a joinder agreement pursuant to section 38-902.
16. "Pension" means a series of monthly payments by the retirement plan.
17. "Retired member" means an individual who is being paid a pension on account of the individual's membership in the retirement plan.
18. "Retirement" means termination of employment after a member has fulfilled all requirements for a pension.
19. "Retirement plan" or "plan" means the corrections officer retirement plan established by this article.
20. "Salary" means the base salary or base wages, shift differential pay and holiday pay paid a member in a designated position for personal services rendered to a participating employer on a regular monthly, semimonthly or biweekly payroll basis. Salary includes amounts that are subject to deferred compensation or tax shelter agreements. Salary does not include any remuneration or reimbursement other than as prescribed by this paragraph.
21. "Service" means employment rendered to a participating employer as an employee in a designated position. Any absence that is authorized by an employer, including any periods during which the employee