ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
6911 HOUSE JUDICIARY

155

containing all collection actions taken for each case referred to the National Office shall be sent to the Area Director for information and appropriate action upon completion of all debt collection procedures for that case.

(9) The responsibility for closing the case remains with the Area Director. Once final collection action has been completed, the case may be closed whenever appropriate.

f. Application of Payments. Payments, which are for less than the full amount of the debt, shall be applied as follows:

(1) Administrative charges;

(2) Delinquent charges;

(3) Interest;

(4) Outstanding principal.

2. National Office Debt Collection Procedures. Upon receipt of a case from an Area Director, OMDS shall verify the amount of the outstanding debt and proceed to implement National Office debt collection procedures.

a. Second Demand Letter. Before sending the case to a debt collection agency (DCA), OMDS shall send the second demand letter to the employer, notifying him/her of the overdue debt and requesting immediate payment to OMDS or the debt will be referred to a collection agency and to one or more credit reporting bureaux (CRB).

b. Referral to Debt Collection Agency. If the debt remains uncollected after one calendar month from the date that the second demand letter was sent, the case shall be referred to the DCA. The DCA will have the case for a period of up to 6 months during which time it will attempt to collect the overdue debt.

(1) Any penalty settlement or repayment offers received by the DCA shall be referred to the Director, Office of Field Programs for approval.

(2) All monies collected by the DCA will be forwarded to a special account set up for the purpose.

c. Referral to Credit Reporting Bureau. If the DCA fails to collect the debt within the established time frame, the uncollected debt shall be returned

to OMDS. OMDS shall initiate the procedure for reporting the delinquent employer for listing with the CRB. A letter shall be sent to the employer informing him/her of this action and of the consequences of continued nonpayment.

d. Referral to the Solicitor. If the debt was not collected by the DCA, OMDS shall transmit all qualifying cases to the Director, Office of Field Programs for evaluation.

(1) Cases to be considered for referral to the Regional Solicitor shall ordinarily meet the following criteria:

(a) The DCA reports that the debt is collectible according to credit data available on the debtor employer;

(b) The debt has a current uncollected penalty amount of $5,000 or more.

(2) Cases that do not meet the criteria given in E.2.d.(1) shall be handled in accordance with E.2.c. and E.2.e.

(3) OMDS shall order litigation reports from the DCA for all such cases upon notification by the Director, Office of Field Programs that the case is to be returned to the Area Director for referral to the Solicitor.

(4) The Director, Office of Field Programs, shall notify the Area Director through the Regional Administrator that the case is to be referred to the Regional Solicitor in accordance with E.3.

e. Reporting to Internal Revenue Service. If the case is not to be referred to the Regional Solicitor for legal action, FINOSH shall prepare appropriate IRS 1099 Forms at the end of the year, reporting all uncollected debts to the Internal Revenue Service as income to the involved employers. A copy of the form shall also be sent to the affected employers.

3. Referral of an Uncollected Debt to the Solicitor. If the Director, Office of Field Programs, determines that an uncollected debt is to be referred to the Regional Solicitor, OMDS shall update the data base to show that the case has been returned to the Area Office for action following IMIS procedures.

a. The Area Director shall forward the case file to the Regional Solicitor with a memorandum requesting that appropriate legal action be undertaken to collect the unpaid debt. This action shall be handled in accordance with current IMIS procedures.

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

No. 1
Bill Version: CSSSHB 33(L&C)
(H) Publish Date: 2/22/91

Revision Date:
Title: "An Act relating to penalties for violation of workplace safety laws;..."
Sponsor: Representative Koponen
Requestor: House Labor & Commerce

Department Affected: Labor
BRU: Labor Standards & Safety
Component: Occupational Safety & Health
COMPONENT SERIAL NO. 970

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL	20.0	20.0				
CONTRACTUAL	40.0	40.0				
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	60.0	60.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE	705.0	282.0	112.0	45.0	18.0	0.0

FUNDING: (Thousands of Dollars)

GENERAL FUND	60.0	60.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	60.0	60.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

see attached

Prepared by: Robert Libbey, Director
Phone: 264-2452
Division: Labor Standards & Safety
Date: 2/14/91

Approved by Commissioner: Nancy Bear Usera
Agency: Department of Labor
Date: 2/14/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

COMMITTEE COPY

Fiscal Note Analysis for:

"An Act relating to penalties for violation of workplace safety laws..."

This bill would increase the amount of the penalties charged for the violation of workplace safety laws. Because of the increase in penalties, we expect an increase in the number of contested violations and in the number of requests for informal conferences. This increased workload would result in additional travel for existing staff as well as the OSHA Review Board members. Additional legal support for the review board would also be required.

Expenditures

Travel	$20.0
OSH Review Board (10.0)	
Existing Staff (10.0)	
Contractual	$40.0
Legal support for Review Board (25.0)	
Legal support for department (15.0)	
Total Cost	$60.0

These costs should decrease after the first two years if the bill achieves its goal of providing more incentive for employers to voluntarily correct hazards so that we find fewer serious violations. Therefore we should have no additional costs beyond 1993.

Revenues

The department assessed a total of $300,600 in penalties in FY 90 with a collection rate of approximately 70%. We estimate about $1,000,000 in additional penalties would be assessed in FY 92 with the new rates. Assuming our 70% collection rate, revenues would increase by $700,000.

After the first year, we anticipate revenues would decrease as employers voluntarily correct hazards and fewer violations are detected. Thus, after five years with the new penalties we project the deterrent affect of the higher rates would bring revenues back to what they currently are.

The bill would also permit the collection of expenses incurred when employers fail to appear at an OSH Review Board Hearing. The average daily cost for the OSH Review Board to hold hearings is $1,000. If it must cancel five days of hearings because employers do not appear at hearings, the Board could ask for $5,000 in reimbursable expenses from employers. Once employers understand that they may be liable for such costs, the number of cancellations should decrease and therefore, it is expected after the second year, no significant revenue will be raised under this provision.

Assumption: Effective date of July 1, 1991.

THE FOLLOWING PAGES MAY
NOT FILM LEGIBLY BECAUSE OF
THE POOR QUALITY OF THE ORIGINAL

Alaska's oil reserves slip away

In 1981, during an oil industry boom fueled by the Iranian revolution, Alaska oil employment jumped by one-third, while that of Texas, the nation's next-largest oil producer, rose by only a little more than one fifth.

In 1986, in the midst of an oil industry recession caused by international crude oil price wars, Alaska oil employment fell by about 5 percent, the least of the five leading U.S. oil states and only half the loss suffered by the next-best performer, Texas. In 1987 Alaska's oil patch job loss was about the same, while Texas' plunged nearly 30 percent and two other states lost more than 10 percent.

In 1988, with oil industry jobs on a slight rebound, Alaska led

Fred Pratt

the way, with a percentage growth outdistancing the other leading producers by a 2 to-1 margin.

That's among a number of interesting facts in an updated review of our state's oil industry by three Alaska Department of Labor staffers. The article is published in the November issue of the department's statistical report, "Alaska Economic Trends."

The authors stress that Alaska produces far more oil per well and per employee than the other states, a fact that decides how Alaska weathers the ups and downs of the industry.

The average Alaska oil well [illegible] barrels last year, compared with the average Texas well's yield of only 8,900 barrels. That's goes a long way to explaining why there are 30 times as many oil field workers and almost 200 times as many oil wells in Texas as there are in Alaska.

Alaska oil jobs are primarily in production and transportation from large fields owned by major companies, so our state hasn't suffered as much as others from big swings in oil employment.

Most of us know our state is the top oil producer in the United States, making up one-quarter of the national total last year. Most don't know that we run

Workers collect pain with their paychecks

By SHARON COHEN
Associated Press Writer

In 18½ years in a meatpacking plant, Dave Kellen's wages have helped build his house, put food on the table and raise two daughters. But, he says, he has paid a terrible price: the use of his hands.

Kellen's hands are too weak to chop wood, much less twist open a bottle. He blames it on years of such jobs as tearing gobs of fat from hogs, repeating the same few steps, struggling to keep pace with hundreds of carcasses an hour.

His employer, John Morrell & Co., says plant safety is improving and is contesting a $4.3 million government fine for allegedly allowing dangerous work conditions. Meanwhile, Kellen, 41, who has endured surgery twice on each hand, now sweeps floors at the Sioux Falls, S.D., plant. And he's worried.

"I'm sitting here with my hands 37 percent crippled. They're what's got to make my living for the next 20 years," he said. "Is Morrell going to be there? Are my hands going to get worse? I don't know who'd be willing to hire me. That's what's got me scared. It's like going blind slowly."

Such problems go beyond one man, one company or one occupation.

Many union, safety and academic experts say Kellen is an example of an insidious trend in American industry: Companies are producing more, cutting payrolls, modernizing, computerizing—and creating a more hazardous workplace.

"People are getting hurt more than they ever were," argues Joseph Kinney, director of the National Safe Workplace Institute. "They're under more pressure to produce than they ever were. A lot of companies that once were using seven workers to do a job are now asking five to do it.

"The new fat-free American

business syndrome is asking those who are left to do too damn much."

Similar concerns have surfaced from congressional hearings in union organizing drives, in auto, meatpacking, construction, steel and other industries. Experts say a recession, competition and the changing business landscape play a role.

"We live in a time of corporate downsizing, mergers and acquisitions and leveraged buyouts that end or greatly diminish many of the modest safety and health programs that exist," said a September report by the workplace institute. "The raiders and downsizers are unwitting participants in our industrial carnage."

While most workers no longer confront sweatshop horrors and archaic equipment, some experts say a new trend in which technology allows experienced employees to be replaced by those with less training has contributed to increasing dangers.

Others disagree, noting large investments that companies, including the Big Three automakers, are making to improve plant designs. They also cite giant government penalties against lead, paper, meatpacking, construction and other firms that are serving as a deterrent.

"I think workplaces are generally safer," said Bernie Zeitler, deputy director of compliance programs at the Occupational Safety and Health Administration.

Kinney's group says OSHA has improved, but he cites government numbers: the average number of workdays lost due to on-the-job accidents for each 100 workers rose from 58.5 days in 1983 to 69.9 days in 1987.

And the National Safety Council says permanent work-related disabilities rose from 60,000 in 1986 to 70,000 in 1987.

Safety experts speculate conditions may be even grimmer because companies underreport injuries to avoid OSHA inspections. In fact, the government has cited Union Carbide Corp., USX Corp. and others for alleged recordkeeping violations.

Overtime, worker turnover

Ironically, some trace rising injuries to economic prosperity, especially in steel. One steelworkers' local says its injury rate nearly doubled when overtime peaked.

"When you're tired and you work in a dangerous operation, fatigue is going to lead to accidents," said Mike Wright, the United Steelworkers of America's health and safety director.

A 1988 University of Texas study found nearly 90 percent of injury increases in durable goods industries could be explained by overtime and employee turnover.

Those aren't the only culprits.

"Automation is increasing and the workers who performed a variety of the jobs are being replaced by machinery," said Bob Hall, research director at the Institute for Southern Studies in North Carolina.

"The jobs that are left are not as complicated (and) increasingly treat people as robots (and treat) arms and hands like they're part of a machine. But you can't oil a person's arm or hand."

Workers who cut, chop or pull thousands of times daily have developed painful and sometimes disabling hand, arm and wrist ailments, known as repetitive trauma disorders. The most severe form is called carpal tunnel syndrome, a thickening or swelling of tendons in the wrist.

Repetitive trauma disorder cases—including hearing loss—soared from 20,700 to 72,840 from 1983 to 1987, the government says, though some attribute part of that to heightened awareness.

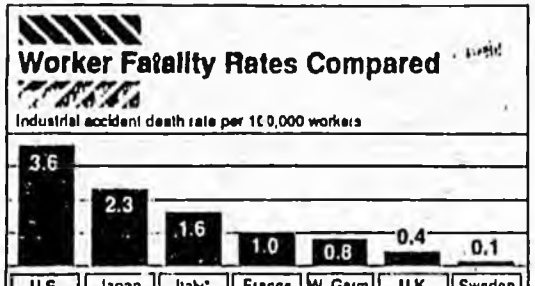
Much publicity has focused on meatpacking where, the United Food and Commercial Workers Union says, production jumped nearly 20 percent in the last five years while production employees dropped by almost 10,000.

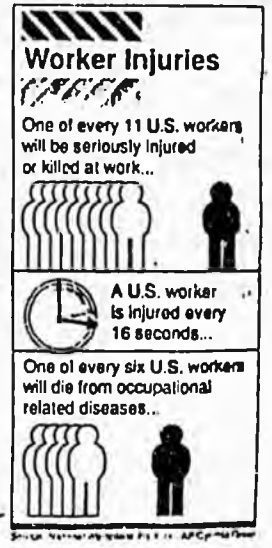
"When line speeds are increased and the workforce is decreased in the name of efficiency, injuries go

(See DANGER, Page D 5)

Associated Press

FRUITS OF HIS LABOR—Repetitive injuries suffered on the job at the John Morrell & Co. meatpacking plant in Sioux City, S.D., have left worker Dave Kellen with disabled hands.





DANGER: Companies push workers harder and create a more hazardous workplace

(Continued from Page D 1)

up," said Debbie Berkowitz, the union's health and safety director.

Meat packers' injuries

Meat and poultry workers, some of whom have testified before Congress, have complained about treacherously fast production lines, where meat flies off damaged conveyor belts and blood splatters in their faces. They have described cysts, infections and crippling hand and back pains that make it hard to lift their children, comb their hair or hold a glass.

Former poultry employee Lillie Watson worked as a packer and leg cutter for nearly a decade, making thousands of cuts a day. She had surgery three times on her hands, has arthritic legs and says she can't scrub floors or lift heavy pots.

"I feel bitter and angry," she said. "Ain't no job I can get where I can use my hands occasionally."

Workers such as Watson often don't have many options, either because of the scarcity of job opportunities or limited education.

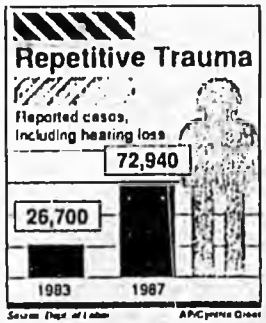
Another injured worker, Bev Whaley, said she had surgery on her right hand because of her job at the Morrell plant in Sioux Falls. She said a doctor told her she'd have to "learn to live with it. I wanted to take a baseball bat and smash his hands and tell him he'd have to learn to live with it."

Her union local claims assembly line speeds have increased in many areas; for example, in the beef kill department -where the animal is knocked out, its throat slit, the hide pulled off and the body split in half—the hourly rate jumped from 10S on hour in 1979 to 193 in 1986.

Said co-worker Kellen, "You're just pushed to the limit."

But companies dispute the charges. Poultry producer Perdue Farms Inc. recently estimated repetitive trauma disorders at its plants at less than 1 percent.

And though OSHA contends Morrell knew conditions were causing injuries but did nothing, company spokesman Raoul Baxter said safety-improvement efforts were being made and the agency reviewed records during an atypical time—a period that included a strike.



In 11 months, records showed 880 of 2,000 workers sustained repetitive strain injuries. Baxter said there are no quick fix programs for such injuries. "It's going to take a lot of hard work," he said. "Our progress has been dramatic."

Morrell says injuries at Sioux Falls fell per 100 workers from 70.5 in January 1988 to 13.48 in July 1989. Baxter attributed the high injury rate to the hiring of replacements and other strike effects; for the decline, he credited outside consultants, workers and supervisors.

But Jim Lyon, union local president, said he hasn't seen any safety progress and said company numbers are "totally inaccurate." He also contends a program providing prizes for injury-free records encourages people not to report them.

Morrell isn't the only meatpacker to come under government scrutiny.

OSHA also fined the nation's largest meatpacker, IBP Inc., but a $5.7 million penalty was reduced to $975,000 after the company agreed to conduct a three-year safety program to reduce motion injuries.

OSHA lowers fines

A recent workplace institute study of several large penalties found OSHA had bargained fines down from $29.3 million to $9.5 million.

And in cases where OSHA fines are smaller—in the thousands of dollars—the agency "is not effective in providing the stimulus employers need to properly deal with safety and health," said John Moran, a former official of the National Institute for Occupational Safety and Health. "The bottom line in business is the dollar bill."

OSHA's Zettler said his agency usually doesn't reduce penalties by more than half. In IBP's case, he said, "we believe the significant reduction was justified by what we were getting back."

Zettler also conceded OSHA doesn't have staff to inspect all hazardous places annually and it may cost more to comply than pay a penalty. "If it takes us 15 years to get there, the guy has saved that investment for 15 years," he said.

But he says his agency has increased safety awareness and most major companies have health experts. Many also have hired safety design experts.

One is the University of Michigan's Center for Ergonomics.

Director Don Chaffin believes it's simplistic to blame productivity alone for increased injuries and says corporations are paying more attention to these concerns.

But one union local disagrees. At the Allegheny Ludlum Corp., plant in Brackenridge, Pa., maintenance division injuries jumped from 27 percent to 45.47 percent during four heavy overtime months in 1988, said Carol Mochak, USW local 1196's safety chairman.

"People tend to overlook a lot of safety procedures," he said. "They're lax in wearing safety equipment. All they want to do is get the job done as quickly as possible."

Cost-cutting pressures

Productivity also has been an issue in construction, said Moran, the former NIOSH official who now works at a firm that trains hazardous waste cleanup workers.

"It's been getting worse for the last several years—the economic pressures, the greater and greater emphasis on cutting costs," he said.

"It's 'Get it done faster.' If you're laying a pipeline, you save money as a contractor by not putting in proper shielding or shoring in the trench."

He said in 96 percent of trench cave in deaths he studied at NIOSH, there was no shoring or sloping.

Shortcuts in the name of efficiency are ultimately uneconomical, said Berkowitz of the United Food and Commercial Workers. "Any gains made by pushing people will [illegible] in high turnover and worker compensation."

As for Kellen, he has agreed to a workers compensation settlement

PRATT:

(Continued from Page D 1)

of BP operating in Alaska, is cutting its seven layers of management down to four. Texaco is cutting 11 layers of management down to five.

The Economist article explains that most of the recent "savings" claimed by oil companies were not the result of leaner management but rather a price war among the smaller oil field contractors who do most of their work. As crude oil prices plunged in the past few years, market prices for refined products remained fairly stable and the large integrated oil companies made out fairly well.

This is coming to an untidy end, the article notes, and the crude oil exploration and production subsidiaries are having to learn to stand or fall on their own profitability.

That's not good news for Alaska, which is primarily an exploration and production state. We seem to have come out quite well in retrenchments by our two largest players, BP and Atlantic Richfield, but our thin oil reserves base and high costs mean we can't automatically assume we'll be among the heavyweights forever.

And what are our political leaders doing? They halted all state oil lease sales six months ago and bet our future on the vain hope of persuading Congress to open the Arctic National Wildlife Refuge, a move that promises meager benefits for Alaskans at best.

Someone needs to take a new look at this.

■ *Free-lance journalist Fred Pratt has been covering Alaska business and politics for the past 18 years.*

NEST EGG:

(Continued from Page D 1)

Purchasing cash value life insurance and participating in dividend reinvestment plans are more traditional ways of imposing the discipline of saving upon yourself.

But Downey, the financial planner, frowns on purchasing insurance as a savings vehicle, instead of purchasing just the insurance you need for adequate coverage.

She also doesn't like automatic transfers to a credit union, bank or savings and loan account.

"I've seen many customers who constantly tap those accounts, so that the savings plan becomes meaningless."

Yet those who have stuck to a self-imposed savings plan report emotional benefits from the financial security.

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But companies dispute the charges. Poultry producer Perdue Farms Inc. recently estimated repetitive trauma disorders at its plants at less than 1 percent.

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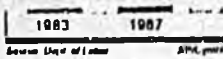

In 11 months, records showed 800 of 2,000 workers sustained repetitive strain injuries. Baxter said there are no quick fix programs for such injuries. "It's going to take a lot of hard work," he said. "Our progress has been dramatic."

Morrell says injuries at Sioux Falls fell per 100 workers from 70.5 in January 1988 to 13.48 in July 1989. Baxter attributed the high injury rate at the meatpacker, IBP Inc., but a $3.1 million penalty was reduced to $975,000 after the company agreed to conduct a three-year safety program to reduce motion injuries.

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Shortcuts in the name of efficiency are ultimately uneconomical, said Berkowitz of the United Food and Commercial Workers. "Any gains made by pushing people will be eaten up by high turnover and worker compensation."

As for Kellen, he has agreed to a workers compensation settlement of more than $16,600.

But he asks: "What's the price on your hands? You've got to provide for your family. There was a time when everybody thought of retiring there after 30 years. I don't look for any future there at all. It's a sad deal."

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(Continued from Page D-1)

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Yet those who have stuck to a self-imposed savings plan report emotional benefits from the financial security.

Two years ago, Jim Tooley, 41, a North Dartmouth, Mass., clinical social worker, arranged for automatic transfers to a mutual fund from his bank account.

"Especially being self-employed, I was looking for a way to discipline myself," Tooley said.

Now he feels more comfortable about month-to-month income variations and future college bills for his children.

"Saving automatically imposes a nice structure on my financial life," he said.

(7)

HOUSE COMMITTEE REPORT

Date Referred: January 21, 1991 FURTHER REFERRALS: Judiciary

Date of Committee Action: 3-18-91

The STATE AFFAIRS Committee considered: HB 40

HOUSE BILL NO. 40 FALSE INFORMATION IN ELECTION PAMPHLET

"An Act relating to the providing of false information in an election pamphlet."

RECOMMENDATIONS:
be replaced with CSHB 40 [✓] the same title [ ] a new title

[ ] have attached amendments(s)
[✓] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the ______ Committee

ADOPTS: ______ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact ______ [ ] fiscal note(s) ______

[✓] zero fiscal note Dept. of Law Division of Elections [ ] zero fiscal note(s) ______

SIGNING DO PASS:	SIGNING OTHER RECOMMENDATIONS: Check appropriate column:	Do Not Pass	No Rec	Amend
Gene Kubina				
Tom Moyer				
[illegible signature]	Dave Donley		✓	
E. Brucklacher	Gary Wilken		✓	

Gene Kubina
Chairman's Signature

HOUSE COMMITTEE REPORT

4/12/91 Rules

(7)

Date Referred: March 20, 1991 FURTHER REFERRALS:

Date of Committee Action: 4-11-91

The JUDICIARY Committee considered: HB 40

HOUSE BILL NO. 40 FALSE INFORMATION IN ELECTION PAMPHLET

"An Act relating to the providing of false information in an election pamphlet."

RECOMMENDATIONS: [ ] the same title
be replaced with CSHB 40 (JUD) [X] a new title
[ ] have attached amendments(s)
[X] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[ ] zero fiscal note _____ 2-[X] zero fiscal note(s) Dept. of Law 3-20-9

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
David Donley Donley	X	Terry Martin MARTIN		✓	
Mark Hanley Hanley	X				
Ellis Ellis	X				
Mike Miller mwmiller	X				
Kevin Paul Parnell PARNELL	✓				

David Donley
CHAIRMAN'S SIGNATURE

CS FOR HOUSE BILL NO. 40 (JUDICIARY)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVE BRUCKMAN

A BILL

FOR AN ACT ENTITLED

"An Act relating to the offense of campaign misconduct in the first degree."

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

* Section 1. AS 15.56.010(a) is amended to read:

(a) A person commits the crime of campaign misconduct in the first degree if the person

(1) knowingly circulates or has written, printed, or circulated a letter, circular, or publication relating to an election, to a candidate at an election, or an election proposition or question without the name and address of the author appearing on its face;

(2) knowingly prints or publishes an advertisement, billboard, placard, poster, handbill, paid-for television or radio announcement or other communication intended to influence the election of a candidate or outcome of a ballot proposition or question without the words "paid for by" followed by the name and address of the candidate, group, or individual paying for the advertising or communication and, if a candidate or group, with the name of the campaign **chair** [CHAIRMAN]; [OR]

(3) knowingly writes or prints and circulates, or has written, printed, and

circulated, a letter, circular, bill, placard, poster, or advertisement in a newspaper, on radio or television **or in the election pamphlet under AS 15.58 that**

(A) **contains information** [CONTAINING FALSE FACTUAL INFORMATION RELATING TO A CANDIDATE FOR AN ELECTION;

(B) WHICH] the person knows to be false; and

(B) relates to a candidate's reputation for honesty or integrity, qualifications for office, or background or experience, including information about the candidate writing, printing, or circulating the information [(C) WHICH WOULD PROVOKE A REASONABLE PERSON UNDER THE CIRCUMSTANCES TO A BREACH OF THE PEACE OR DAMAGES THE CANDIDATE'S REPUTATION FOR HONESTY, INTEGRITY, OR THE CANDIDATE'S QUALIFICATIONS TO SERVE IF ELECTED TO OFFICE].

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

No. 1
Bill Version: CSHB 40(STA)
(H) Publish Date: 3/20/91

Revision Date: _____ Department Affected: Department of Law
Title: "An Act relating to false information in an election pamphlet." BRU: Prosecution
Component: Criminal Justice Litigation
Sponsor: Representative Bruckman
Requestor: House State Affairs COMPONENT SERIAL NO. | | | 8 | 9 |

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared By: Richard I. Pegues, Director Phone: 465-3672
Division: Administrative Services Richard I. Pegues /FOR/ Date: February 11, 1991
Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law Date: February 11, 1991

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 40

House Bill No. 40 amends AS 15.56.010(a) by adding a new offense to the crime of campaign misconduct in the first degree to include a person who submits, or causes to be submitted, factual information that the person knows is false for inclusion in the election pamphlet under AS 15.68. Campaign misconduct in the first degree is a class A misdemeanor. Although there have been past incidents of false information being submitted for inclusion in the state's official election pamphlet, the number of such incidents has not been great enough to warrant fiscal note costs.

COMMITTEE COPY

STATE OF ALASKA
1991 LEGISLATIVE SESSION

No. 2
Bill Version: CSHB 40(STA)
(H) Publish Date: 3/20/91

Revision Date: _____ Department Affected: Office of the Governor-Elections
Title: An Act relating to the providing of false info. in an election pamphlet BRU: Division of Elections
Component: _____
Sponsor: Representative Bruckman
Requestor: State Affairs COMPONENT SERIAL NO. [ ][ ][ ][ ]

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Elizabeth Ziegler, Deputy Director Phone: 465-4611
Division: Division of Elections Date: 2-8-91
Approved by Commissioner: Randal C. Hickel
Agency: Division of Elections Date: 2-8-91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(les).

Rev 10/90

COMMITTEE COPY

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04/05/91

AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE BRUCKMAN

TO: CSHB 40(STA)

Page 2, line 3, following "integrity,":

Delete "or"

Page 2, line 4, following "office":

Insert ", or background or experience"

#1

JE

MU -

Post

3111 C STREET
ANCHORAGE, ALASKA 99503
(907) 561-2034

WHILE IN SESSION
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4843

ALASKA STATE HOUSE

LABOR & COMMERCE

STATE AFFAIRS

REPRESENTATIVE BETTY BRUCKMAN

MEMORANDUM

TO: Judiciary Subcommittee HB 40

FROM: Rep. Betty Bruckman

DATE: April 9, 1991

SUBJECT: HB 40, " An Act relating to the offense of election misconduct in the first degree.

I felt a little background on HB 40 would be appropriate. It was my original intent to make it a crime to knowingly lie in the official election pamphlet printed and circulated by the State.

It was the decision of the State Affairs subcommittee to broaden the scope of the intent of my legislation to encompass all forms of intentional deceit during the course of a political campaign. The subcommittee decided to repeal the current statute and rewrite it entirely. During the course of the rewrite I became concerned that inadvertent misstatements would be prosecutable under the new language and asked the drafter to emphasize the *malicious intent* of the untruth, hence the "prepared".

I have been apprised by staff counsel that the legal standard *knowingly* would protect innocent misstatements from prosecution and I would be amenable to the revision of section 1,(a), Paragraph 3 - to **knowingly writes or prints or circulates, or has written, printed, and circulated, a letter, circular, bill, placard poster or advertisement in a newspaper on radio, television, or in an election pamphlet under AS 15.58.**

Regarding Section 1, (a) paragraph 1 & 2, the drafter did not substantively alter existing law. It apparently was the intent of the

subcommittee to retain the distinctions referred to in existing statue but to update the language.

3111 C STREET
ANCHORAGE, ALASKA 99503
(907) 561-2034

WHILE IN SESSION
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4843

ALASKA STATE HOUSE

LABOR & COMMERCE

STATE AFFAIRS

MEMORANDUM

REPRESENTATIVE BETTY BRUCKMAN

TO: Representative Dave Donley

FROM: Rep. Betty Bruckman

DATE: March 25, 1991

SUBJECT: Scheduling HB 40

I would appreciate your scheduling HB 40 before the House Judiciary Committee at your earliest convenience.

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

SPONSOR STATEMENT
HB 40

AN ACT RELATING TO THE PROVIDING OF FALSE INFORMATION IN AN ELECTION PAMPHLET

The public relies on the information provided by the Division of Elections as "official" information and we have a responsibility to insure that the information provided by the candidates is as accurate as possible.

It was my intent when I filed this legislation to create a mechanism whereby candidates are notified that they are accountable for the information that they provide.

STATE OF ALASKA

WALTER J. HICKEL, GOVERNOR

ALASKA PUBLIC OFFICES COMMISSION

REPLY TO:

☑ 2221 E. Northern Lights, Room 128
Anchorage, AK 99508
(907) 276-4176

☐ Juneau Branch Office
Box CO
Juneau, AK 99811-0222
(907) 465-4864

February 11, 1991

Representative Betty Bruckman
P.O. Box V
Juneau, Ak 99811

Dear Representative Bruckman:

The Alaska Public Offices Commission discussed HB 40 "An act relating to the providing of false information in an election pamphlet" at your request during their meeting on February 8, 1991.

The Commission would like to convey its' appreciation for the opportunity to comment. However, they did not feel commenting on this bill would be appropriate since AS 15.56 is not within their jurisdiction.

If I can be of further assistance, please let me know.

Sincerely,

ALASKA PUBLIC OFFICES COMMISSION

Karen Boorman

Karen Boorman
Executive Director

cc: APOC Members
Barbara Prichart, Department of Administration

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF ELECTIONS
P.O. BOX AF
JUNEAU, ALASKA 99811-0105
PHONE (907) 465-4611

February 8, 1991

To: The Honorable Gene Kubina
House State Affairs Committee

From: Elizabeth Ziegler, Deputy Director
Division of Elections

Re: HB 40, False Statement in Election Pamphlet

Position: The Division of Elections supports the intent of this bill. There are no fiscal impacts to the division.

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 40

Revision Date: _____ Department Affected: Office of the Governor-Election

Title: An Act relating to the providing of false info. in an election pamphlet

BRU: Division of Elections

Component: _____

Sponsor: Representative Bruckman

Requestor: State Affairs

COMPONENT SERIAL NO. [ ] [ ] [ ] [ ]

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	-0-	-0-	-0-	-0-	-0-	-0-
TRAVEL	-0-	-0-	-0-	-0-	-0-	-0-
CONTRACTUAL	-0-	-0-	-0-	-0-	-0-	-0-
SUPPLIES	-0-	-0-	-0-	-0-	-0-	-0-
EQUIPMENT	-0-	-0-	-0-	-0-	-0-	-0-
LAND & STRUCTURES	-0-	-0-	-0-	-0-	-0-	-0-
GRANTS, CLAIMS	-0-	-0-	-0-	-0-	-0-	-0-
MISCELLANEOUS	-0-	-0-	-0-	-0-	-0-	-0-
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Elizabeth Ziegler, Deputy Director Phone: 465-4611

Division: Division of Elections Date: 2-8-91

Approved by Commissioner: Charlotte E. Nicholson

Agency: Division of Elections Date: 2-8-91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 10/90

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 40

Revision Date: _____ Department Affected: Department of Law

Title: "An Act relating to false information in an election pamphlet." BRU: Prosecution

Component: Criminal Justice Litigation

Sponsor: Representative Bruckman

Requestor: House State Affairs COMPONENT SERIAL NO. [ ][ ][8][9]

Expenditures/Revenues: (Thousands of Dollars)

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GRANTS, CLAIMS						
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CAPITAL						
REVENUE						

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FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Richard I. Pegues

Prepared By: Richard I. Pegues, Director Phone: 465-3672

Division: Administrative Services Richard I. Pegues /FOR/ Date: February 11, 1991

Approved by Commissioner: Charles E. Cole, Attorney General

Agency: Department of Law Date: February 11, 1991

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 40

House Bill No. 40 amends AS 15.56.010(a) by adding a new offense to the crime of campaign misconduct in the first degree to include a person who submits, or causes to be submitted, factual information that the person knows is false for inclusion in the election pamphlet under AS 15.68. Campaign misconduct in the first degree is a class A misdemeanor. Although there have been past incidents of false information being submitted for inclusion in the state's official election pamphlet, the number of such incidents has not been great enough to warrant fiscal note costs.

a California appeals court upheld the law, ruling that although compulsory blood tests are considered searches subject to Fourth Amendment protection, "the control of a communicable disease is a valid exercise of the state's police power." The state Supreme Court has ordered a stay of the law pending an appeal. None of the plaintiffs have been tested yet.

Georgia. After a verdict, guilty plea, or plea of no contest to any "AIDS transmitting crime," the court may require the defendant to take an HIV test within 45 days. If the defendant refuses, the court can order involuntary testing. Having HIV testing may be made a condition of a suspended sentence or probation for any part of a sentence for such a crime. The Department of Human Resources, which tests offenders, must give results to the victim or victim's parent or guardian if it believes the crime posed a significant risk.

A California appeals court upheld the California law, but that decision is being appealed.

Illinois

Public Act 85-1399 (1988) amended the Unified Code of Corrections section on sentencing to require HIV testing of persons convicted of various sex and drug crimes. Results of the testing must be delivered to the judge of the court that entered the conviction for *in camera* inspection. The judge has discretion to decide who, if anyone, can be informed of the test results.

Indiana. The court must order a person convicted of a sex crime that created a demonstrated risk of transmission of HIV to have HIV testing. The state board of health, which does the test, must notify victims if tests confirm that the offender has antibodies to HIV. It must also provide counseling for the victim.

South Carolina. Within 15 days after conviction of a sex offense resulting in exposure of the victim to blood or body fluids of the offender, the offender must have HIV testing. The results are reported to the prosecutor, who in turn must notify the victim and offender. The offender must pay for the test unless poor.

Michigan. On conviction for certain crimes that can result in transmitting HIV, the court must order the offender to be tested for HIV. The court must also order the offender to have counseling. If the victim consents, the court must give the person administering the test the name, address, and telephone number of the victim, and immediately give the results to the victim and provide a referral for counseling.

Oregon. On conviction, the court must seek the offender's consent to an HIV test. If the offender refuses, the court may, at the request of the victim or the victim's parent or guardian, order the offender to take an HIV test after the victim has taken such a test. Results of the offender's test must be sent to a doctor designated by the victim. If test results are negative, the court may order the convicted person to take another HIV test 6 months after the first one. ■

Robert L. Bayless
Staff Scientist

This article including footnotes to sources is available to legislators as an LRU Research Response.

Courts Look Closely at Campaign-Statement Laws

Laws prohibiting false campaign statements must be carefully written under U.S. Supreme Court decisions on freedom of speech. Campaign statements can be punished only if made with knowledge that they are false, or reckless disregard for whether they are false. Courts since 1975 have struck down at least four state laws prohibiting false campaign statements.

An alternative to such laws may be voluntary codes of fair campaign practices, enacted in Illinois and four other states. By signing the codes, candidates promise to run honest campaigns.

First Amendment Issues

Political speech is protected by the First Amendment to the U.S. Constitution, guaranteeing the right of free expression. Several U.S. Supreme Court cases decided since 1963 have the effect of protecting speech in political campaigns. Major cases relevant to campaign statements are summarized below.

New York Times Co. v. Sullivan (1964)
A public official sued the *New York Times* for publishing a paid advertisement that falsely said he mistreated protesting students while performing his duties. He won in the trial court. But the U.S. Supreme Court said the First Amendment restricts a public official from getting damages for a defamatory falsehood relating to his official conduct. The Court said that neither factual errors—which are inevitable in free debate—nor defamatory content alone are enough to remove the constitutional protection of political statements. The crux of the Court's opinion said:

(continued on p. 6)

Campaign Statement Laws *(continued from p. 5)*

> The Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

In later cases the Court extended this holding to persons who, although not public officials, are "public figures"—meaning they have become involved in matters of legitimate public concern. This specifically applies to candidates for public office, even if they are not yet public officials.

The courts set a higher standard of intent in defamation suits by public officials or candidates than by private persons.

Vanasco v. Schwartz (1976)
This case applied the "malice" standard of *New York Times* in striking down key provisions of a state law on false campaign statements. Two candidates sued the New York State Board of Elections, challenging the constitutionality of the New York Fair Campaign Code. One of the candidates had been accused of distributing campaign literature that misrepresented his party affiliation. The other was accused of misrepresenting his opponent's voting record. The Code prohibited misrepresentation of a candidate's qualifications, position, or party affiliation. The Code did not say that such misrepresentation must be deliberate or malicious.

A three-judge federal district court said the law's prohibitions on false statements "cast a substantial chill on the expression of protected speech and are unconstitutionally overbroad and vague." The court further said that the falsity of statements complained of must be proven by "clear and convincing" evidence. The U.S. Supreme Court affirmed the judgment without opinion, thus giving no indication whether it agreed with the district court's statement about clear and convincing evidence.

At least three other laws prohibiting false campaign statements have been struck down. Nebraska's law was held invalid by its Supreme Court in 1983. Louisiana's law was struck down by the Louisiana Supreme Court in 1989. Also, in 1987 the U.S. District Court for the Southern District of Ohio overturned that state's corrupt-practices law. The Ohio case was somewhat different from the others. Rather than finding fault with the law's false-statement provisions, the court said its *enforcement* provisions were overbroad. It held that the law's provisions requiring administrative adjudication by the state elections commission imposed a prior restraint on constitutionally protected free speech. The court struck down the commission's authority to assess liability based on evidence less than would be required by a court. A report that the Louisiana and Ohio cases are on appeal could not be confirmed.

Federal Law
The Federal Election Campaign Act does not prohibit publication or broadcast of false information in political campaigns. The Act *does* require that each political communication identify the person or group paying for it, and tell whether the candidate authorized it. This applies to political communications advocating the election or defeat of an identified candidate, or soliciting campaign contributions.

Illinois' Code of Fair Campaign Practices is not legally enforceable, but a candidate's signing of it becomes a public record.

Illinois Law
Illinois law similarly does not prohibit publication or broadcast of false information in campaigns. The Election Code simply requires that specific information appear on some forms of political material. The Code requires that the name and address of persons disseminating written political material about candidates or ballot propositions be printed on the material. This provision applies to pamphlets, circulars, handbills, advertisements, and any other separate campaign material, but not to articles published in recognized periodicals. Violation is punishable by up to 364 days in jail and/or a fine up to $1,000.

The Election Code also requires that political committees include a statement on all materials and advertisements soliciting funds, saying that a copy of the committee's financial report is or will be available from the State Board of Elections or the county clerk. Violators can be assessed a civil penalty up to $1,000.

Other States' Laws
Half the states have laws prohibiting false campaign statements. Only five expressly prohibit false statements made maliciously. Montana, North Carolina, and Oregon specify that false statements must have been made knowingly and recklessly; Florida that they were made knowingly and maliciously; and Washington that they were made maliciously.

Laws of the other 20 states are not as rigorous in requiring malice, which may make them more vulnerable to a constitutional challenge. The laws of 14 states apply to false statements made "knowingly." Such laws in Louisiana and Ohio have been successfully challenged in the cases now reportedly on appeal. The laws of the other 6 states are even broader. They merely prohibit various kinds of false statements, making them most likely to fail the *New York Times* test.

The kinds of statements to which the laws apply also vary. Laws of 7 states (California, Hawaii, Michigan, Nevada, New Jersey, Texas, and Virginia) apply to only one or two kinds of false statements—usually false claims of incumbency, endorsement, or election code violations. Laws of 9 states apply to written statements only.

Enforcement

A recent survey shows that some states have so little confidence in the validity of their false-statement laws that they shrink from active enforcement. Some election administrators surveyed said stricter enforcement would result in lawsuits that could lead to repeal of laws.

Codes of Fair Campaign Practices

A voluntary code of fair campaign practices may be an alternative to attempts to prohibit false statements. Five states including Illinois have such codes. (The others are California, Montana, New York, and Washington.)

The codes generally include a pledge that candidates can sign voluntarily, promising to conduct an honest, open, ethical campaign. The added benefit this offers candidates is the right to include a statement on campaign literature saying they have subscribed to the code.

The Illinois code, enacted in 1989, says the candidate will conduct a campaign based on the principles of "decency, honesty, and fair play." It discourages use of defamatory or scurrilous attacks on opponents. Subscription to the code is voluntary, and adherence to it by a signer cannot be legally enforced. However, a copy of the code signed by a candidate and filed with the State Board of Elections becomes a public record.

Many of the laws in 25 states that prohibit false campaign statements seem vulnerable to challenge. Some are enforced little.

A portion of the code specifically addresses false campaign statements:

> (4) I will not use campaign material of any sort which misrepresents, distorts, or otherwise falsifies the facts, nor will I use malicious or unfounded accusations which aim at creating or exploiting doubts, without justification, as to the personal integrity or patriotism of my opposition. ■

Karen A. Fahrion
Research Associate

This article, with footnotes and appendices, is available to legislators as an LRU Research Response.

Costs to Raise "Circuit Breaker" Grants

Illinois' "circuit breaker" program gives partial property-tax relief to people who are 65 or older, or disabled, and have annual household income under $14,000. The income limit has risen 40% since the program started in 1972, versus a 215% increase in the Consumer Price Index. In fiscal year 1988, property taxes took 3.8% of personal income in Illinois, compared to 3.5% nationwide.

The "circuit breaker" might be liberalized by at least two methods: (1) raising the $14,000 income limit, or (2) changing the grant formula to increase the maximum grant. Raising the income limit without changing the formula would cost the state only about $3 million per year because the present formula, even without the income limit, would give grants only to households with incomes under $15,556. The second method, changing the formula to increase the grant, might be done in various ways. The most liberal presumably would be making the grant pay the entire property-tax bill of qualifying households. Doing this, only for households with residents 65 or older that would be eligible for a grant under current law, would cost the state about $386 million more per year. A more modest possibility is simply indexing the grant formula to inflation since the program began.

Present Law

The Senior Citizens and Disabled Persons Property Tax Relief and Pharmaceutical Assistance Act (commonly called the "circuit breaker" law) took effect October 1, 1972. The purpose of the Act was to provide some relief

(continued on p. 8)

A BACKGROUND REPORT ON FALSE POLITICAL ADVERTISING IN ELECTION CAMPAIGNS

Prepared by: Mac Rominger
Legal Intern

Office of the Attorney General
State of Washington

August 19, 1986

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  - 2. Federal case law
- B. State Law
  - 1. Introduction
  - 2. State statutes
  - 3. State case law

PART IV — Washington Case Law

PART V — Proposed Model Statute

INTRODUCTION

The Washington "false political advertising" statute, RCW 42.17.530, imposes civil liability on a person who sponsors political advertising which contains information that the person "should reasonably be expected to know, to be false." Because this standard would allow for the imposition of civil penalties on persons for the negligent sponsorship of false information in a political campaign it is probably unconstitutional as violative of the right to freedom of speech guaranteed by the First Amendment of the U.S. Constitution. Hence, the statute should be modified in order to be constitutionally defensible.

The intent of this brief is to define the necessary elements of a "false political advertising" statute so as to withstand attacks against its constitutionality.

Because the First Amendment offers its broadest protection of free speech during campaigns for political office, any statute that attempts to regulate political speech/political advertising will be subjected to strict judicial scrutiny if it is challenged. Therefore, any such statute must be narrowly drawn so as not to infringe upon this free speech right.

This brief attempts to identify, analyze, and discuss the various issues related to false representation in election campaigns. Therefore, the brief is divided into the following

five parts:

Part I briefly identifies the recommended elements to be included in the drafting of a constitutionally defensible statute.

Part II discusses the constitutional concerns associated with prohibitions directed at false representation in election campaigns.

Part III explores the existing federal and state statutory and case law pertaining to false political advertising statutes.

Part IV examines Washington case law which may have an impact on any future false political advertising statute which might be drafted and adopted.

Part V sets forth a proposed model statute that will be more readily defensible against challenges to its constitutional validity.

P A R T I

RECOMMENDED STATUTORY ELEMENTS

Briefly, the crucial elements of a constitutional statute are as follows:

(1) "Actual Malice" Standard: The statute must be narrowly drawn so that only those false statements made "knowingly or with

reckless disregard to their truth or falsity" will be proscribed.

(2) Burden of Proof: The statute must incorporate a "clear and convincing" burden of proof.

(3) Judicial Review: The statute must include a provision for judicial review of any administrative decision involving the statute.

(4) Operational Definition of Terms: To avoid charges of vague or ambiguous wording, and to ensure that the statute is sufficiently narrowly drawn, many of the terms of the statute should be operationally defined. For example, terms such as "sponsor", "political advertisement", "candidate", "knowingly", "reckless disregard", "false statement", etc. should be operationally defined in a definitions section immediately preceeding the text of the statute.

P A R T I I

CONSTITUTIONAL CONCERNS--FREE SPEECH ISSUES

The major constitutional concern with false political advertising statutes is the fear that such statutes infringe upon the right to free speech guaranteed by the First Amendment of the U. S. Constitution. The leading United States Supreme Court case

regarding First Amendment concerns is New York Times v. Sullivan, 376 U.S. 254 (1963).

In New York Times, an elected official brought a libel suit against the Times for publishing an article which falsely represented the official's actions while performing his duties. The Court's discussion in New York Times has been extensively quoted in later cases dealing more directly with false representation in election campaigns.

The Supreme Court, in New York Times, stated that freedom of expression of public issues is a right secured by the First Amendment. Id. at 269. The Court further added that this right "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes." Id. at 269. The Court recognized that such "unfettered interchange" required that "public debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Id. at 270. In light of this idea, the Court concluded that neither factual error, which is inevitable in free debate, nor defamatory content, which injures a person's reputation, are sufficient to remove the constitutional protections from such statements.

The Court further indicated that any regulation or statute which would compel the critics of official conduct to guarantee

the truth of their assertions amounts to self-censorship and could lead individuals to make only those statements which "steer far wider of the unlawful zone" than is necessary, thus dampening the vigor and limiting the variety of public debate. Id. at 279.

As a result, the Court concluded that the constitutional guarantees require:

> . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"--that is, knowledge that it was false or with reckless disregard of whether it was false or not. Id. at 280.

The United States Supreme Court, in further analyzing the realm and extent of the free speech right in election campaigns, has held that in proceedings concerning the regulation of speech during campaigns for political office the constitutional guarantee of freedom of speech "has its fullest and most urgent application." Monitor Patriot v. Roy, 401 U.S. 265, 272 (1970). (See also: Buckley v. Valeo, 424 U.S. 1 (1976).)

However, the fact that speech, uttered or written, during a campaign for political office is given broad constitutional protections, does not mean that it cannot be regulated in a constitutionally defensible manner. The United States Supreme Court has stated that merely because speech is used in a political context for political ends does not automatically entitle that speech to the protection of the constitution.

Garrison v. La., 379 U.S. 64 (1964). The Court has also ruled that calculated falsehoods fall into a class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefits that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. N.H., 315 U.S. 568, 572 (1942). (See also, Gertz v. Robert Welch, Inc., 418 U.S. 423 (1979)).

The Supreme Court, in relying on Chaplinsky, further ruled in Garrison that knowingly false statements and false statements made in reckless disregard of the truth, do not enjoy constitutional protection. Garrison, 379 U.S. at 75.

The basic premise posited in New York Times and its progeny can also be explained and perhaps more easily understood through a brief analysis of what is commonly referred to as the Overbreadth Doctrine.

Under this doctrine, which finds application when First Amendment interests are at stake, the courts may invalidate a statute that primarily regulates unprotected expression if the statute also reaches protected expression in the process. Thus, the doctrine recognizes that despite any legitimate state interest involved, the chilling effect on protected expression is too high a price to pay when the regulatory scheme has not been narrowly drawn. (See: Malchow, The Use of Adverse Publicity to

Regulate Compaign Speech, 12 Pac.L.J. 811 (1981); Note, The First Amendment Overbreadth Doctrine, 33 Harv.L.Rev. 844 (1970).

Therefore, any false political advertising statute that has a potential for improper application and which poses a significant likelihood of deterring important First Amendment speech may be declared unconstitutional on its face under the overbreadth doctrine. Thus, even though the statute may not be invalid as applied to the parties before the court, it may still be invalidated based entirely upon an analysis of its language and potential application.

In summation, the regulation of false statements in political advertising is constitutional, but any attempt to regulate speech in a political campaign must be narrowly drawn so as to prohibit only constitutionally unprotected speech. If the adopted statute can be seen to infringe in the slightest manner on constitutionally protected speech, the lesson of the overbreadth doctrine and the New York Times et. al. case law analysis, is that the statute will be ruled unconstitutional on its face as violative of the First Amendment.

P A R T I I I

Part III will discuss existing federal and state statutory and case law which generally supports the proposition that attempts to regulate the negligent publication of false

information in political campaigns is probably unconstitutional.

FEDERAL AND STATE LAW

1. Federal Legislation and Statutory Law.

In 1975, Congress passed legislation which prohibited falsely attributed campaign statements and other false representations in federal elections. 18 U.S.C.A. §617. However, a year later this same legislation was repealed.

A comprehensive Senate bill was also introduced in 1974, but not enacted, which would have outlawed the deliberate commission of certain acts including: placing misleading advertisements in the media, and making false statements of material fact about candidates. (See: S. 3261, 93d Cong., 2nd Sess. §20 (1974)). Apparently, the federal government has either misgivings as to the necessity or misgivings as to the constitutionality of such a regulatory scheme.

2. Federal Case Law

In the federal courts, the regulation of campaign speech has received scant attention. The United States Supreme Court itself has never directly addressed the validity of state statutes prohibiting false representations in campaign speech. However, there are three cases that are useful in this analysis.

In the first case, the United States Supreme Court, in affirming that the government has a legitimate interest in

regulating deceptive commercial advertising, was also quick to emphasize that when speech contains ideas, it may be protected "even if it contains inaccurate assertions of fact." Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 780 (1976) (Stewart, J., concurring).

The inference to be drawn is that if free speech concerns can override compelling state interests in the commercial advertising realm, then at least an equal level, and presumably a greater level, of "inaccurate assertions of fact" will be constitutionally protected in the political advertising realm. This is especially true in light of the holdings in the Monitor Patriot and Buckley cases which state that the First Amendment has its broadest application and fullest protection in the political arena.

The second case, Vanasco v. Schwartz, 401 F. Supp. 87 (S.D.N.Y. 1975), aff'd mem., 423 U.S. 1041 (1976), is the only federal case which directly discusses the false representation issue in a political campaign context. It is the definitive case on the issue of regulation of false representations in a political campaign. The case is also important because the New York statute and statutory purpose involved in the case are very similar to the provisions and purpose of the current Washington political advertising statute, RCW 42.17.530.

In Vanasco, a U. S. District Court decision, two candidates

for public office attempted to have sections of New York's Fair Campaign Code declared unconstitutional on grounds that the sections violated the First Amendment's right to freedom of speech. The challenged sections prohibited:

1. Attacks on a candidate based on race, sex, religion or ethnic background;

2. Misrepresentation of a candidate's qualifications, including personal vilification, character defamation, whispering campaigns, libel, slander, or scurrilous attacks on any candidate, his or her staff, or personal or family life, misuse of title or misuse of the phrase "re-elect."

3. Misrepresentation of any candidate's position, including misrepresentation of political issues or voting record, use of false or misleading quotations or attributing a particular position to a candidate solely by virtue of a candidate's membership in an organization; and

4. Misrepresentation of any candidate's party affiliation or party endorsement by persons or organizations, including use of doctored photographs or writing or fraudulent or untrue endorsements. [New York Fair Campaign Code, Sec. 6201.1(c)(d)(e)(f)].

Enforcement of this code was vested in the New York State Board of Elections. This administrative board could hear complaints, issue findings, levy fines, and initiate judicial

proceedings to enforce its orders.

In a decision affirmed without opinion by the United States Supreme Court, the three-judge panel held that the code did violate the First Amendment because the sections that dealt with misrepresentation were unconstitutionally overbroad and vague. The court found that the code created a "substantial chill" on protected First Amendment speech because the New York Times "actual malice" standard was not incorporated into the code. Id. at 95. The District Court found that the Election Board had penalized Vanasco merely because he "misrepresented" his party endorsement. Because there was no finding that the misrepresentation was deliberate or that it was made with knowledge of its falsity or with reckless disregard of the truth, the Court held that the code was unconstitutionally applied to Vanasco.

On the basis of the Vanasco and New York Times holdings, it is quite evident that the federal courts feel that "vigorous and open debate on public issues in political campaigns requires that innocent misstatement and negligent falsehood be protected." Malchow, The Use of Adverse Publicity to Regulate Campaign Speech, 12 Pac.L.J. 811, 842 (1981). (See also: J. Nowak, R., Rotunda & J. Young, Constitutional Law 781-782 (1978)). In other words, the Vanasco/New York Times holdings mandate, at a minimum, that only that speech uttered or printed with knowledge

of its falsity or with reckless disregard of its truthfulness is constitutionally unprotected speech. Therefore, any statute or regulation that attempts to prohibit speech that contains falsehoods which are negligently made during a political campaign would be unconstitutional on its face.

The Vanasco Court also made two other significant findings with respect to other constitutionally required elements of a false representation statute.

First, the Court expressed concern that the New York Code did not provide for judicial review of an Election Board's decision or the penalty it imposed.

Second, the Court expressed concern that the standard of proof used by the Board for any violations of the code needed only to be based upon a finding of "substantial evidence." Because of the "high degree of protection" afforded by the New York Times rule, the Court concluded that the falsity of the statements complained of should be proven by "clear and convincing" evidence. Vanasco, 401 F. Supp. at 99 (Emphasis supplied). In New York Times, the Court found that the plaintiff bears the burden of proving the violation with "convincing clarity." New York Times, 376 U.S. at 285-286.

The last federal case is St. Amant v. Thompson, 390 U.S. 727 (1968). In St. Amant, a candidate for political office falsely charged another public official with criminal conduct during a

television interview. The Court, relying in its opinion on the New York Times standard, ruled that "reckless disregard" cannot be shown by proof of mere negligence; in order to find reckless disregard "there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." Id. at 731.

Once again, the Court held that proof that a political candidate "negligently" made false statements does not meet the New York Times standard and that a statute which would impose liability for such negligent falsehoods is unconstitutional.

The court, in St. Amant, also made an important ruling with regard to the "subjective intent" of the defendant as a defense in a defamation case. The Court held that a defendant cannot "automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith." Id. at 732.

Thus, a political candidate is not entitled to a favorable ruling by merely stating that he "believed his statements were true." A candidate's subjective intent or subjective belief when uttering or publishing false statements is not conclusive. Rather, the trier of fact is entitled to decide whether, given

the surrounding facts and circumstances, the false statements were made "knowingly" or with "reckless disregard" of the truth.

In summation, the existing federal case law supports the conclusion in Part I that "actual malice", a clear and convincing standard of proof, and judicial review elements must be present in a constitutionally defensible statute.

B. State Law

1. Introduction

Although the vast majority of states have statutes which attempt to regulate campaign practices in one way or another, there are 19 states that have statutes which deal directly with false representation during an election campaign. Of these 19 states, some have a more comprehensive scheme than do others.

The remainder of the states which have statutes related to fair campaign practices generally have either a "voluntary code of conduct" or require only that any political advertisement or other campaign literature contain the name and address of the candidate and/or group sponsoring such materials. These latter statutes, which can be collectively entitled "Anonymous Political Advertising Prohibited", ostensibly provide that "knowingly" false statements pertaining to any candidate or any other election matter are constitutionally protected so long as the

sponsoring person or party is identified in the statement, advertisement, poster, etc.

It is not necessary to discuss the construction or validity of these "Anonymous Advertising" statutes. It is sufficient to point out that they exist and that any future political candidate in the State of Washington who might challenge Washington's more comprehensive statute would unquestionably argue that the more limited "Anonymous Advertising" statutes are in better consonance with established free speech rights.

2. State statutes

Table A is a statute chart which attempts to list and briefly explain the statutes in the 19 states which proscribe "false representation." Some of these statutes are more comprehensive than others. The following is an attempt to categorize these false representation statutes:

(1) False Representations Statute: The most typical statute is one which broadly prohibits a person from knowingly publishing a false representation pertaining to any candidate or any election matter, which is intended to affect voting at an election.

There are three lesser or more limited classes of statutes which can be characterized as follows:

(a) Defamation Statute: This type of statute proscribes only the publication of false information which might defame or injure the other candidate.

(b) Fraudulent/False Endorsement Statute: This type of statute proscribes only those statements which falsely attribute an endorsement by someone or some group.

(c) False Representation of Incumbency: This type of statute proscribes only false claims of incumbency.

Because a Type 1 statute broadly prohibits a false representation of any kind pertaining to any candidate or election matter, it also includes the proscriptions in statute types (a), (b) and (c). Only 12 of the 19 states have the comprehensive-type statute. The type of statute each state has is reflected in the third column of Table A.

The remaining three columns listed in Table A are Mental Culpability, Burden of Proof, and Penalty Provision. The Mental Culpability column shows the statutory standard required to convict and/or find civil liability for a violation.

The Burden of Proof column shows the standard of proof required of the plaintiff or prosecutor in order to convict and/or find civil liability for a violation.

The Penalty Provision column lists the civil and/or criminal penalties which can be imposed for a violation of the statute.

The following examples are intended to assist the reader in

understanding the statute chart:

Mississippi: a type (a) statute, prohibits only the uttering or publication of false statements intended to defame an opposing candidate. However, the violation must be "wilfully and knowingly" in order to subject the candidate to a criminal misdemeanor charge.

Florida: a type (b) statute prohibits only the fraudulent or false representation that a candidate is endorsed by a particular person or group. However ,the violation must be "willfull" in order to subject the candidate to a civil penalty.

Michigan: a type (c) statute, prohibits only the false representation that a candidate is an incumbent when in fact he is not. Any violation of this statute is a misdemeanor. Note that there is no mental culpability element included in this statute; rather the statute simply states that any candidate who represents himself as an incumbent when in fact he is not, shall be guilty of a misdemeanor.

Oregon: a type (1) statute broadly prohibits a person from publishing any letter, advertisement, etc., which contains a false statement of material fact relating to any candidate. However, the violation must be made with "knowledge or with reckless disregard" that the publication contains a false statement, and in order for the plaintiff to prevail, he must show by "clear and convincing" evidence that the defendant

violated the statute.

Of special note with regard to the Oregon statute, is that it is the only statute which makes false political advertising a private action. In other words, the aggrieved candidate must file suit himself rather than in the other 18 states where either a prosecutor or a state election board acts as plaintiff.

Before turning to an analysis and discussion of state case law related to the false representation issue, three other significant factors regarding the statute chart should be pointed out.

First, the State of Washington, which has a comprehensive statute, is the only state which allows liability to be imposed for the "negligent" use of falsehoods.

Second, the statute table clearly reflects that only one state, Oregon, includes a burden of proof element within the statute itself. It is possible that some states which utilize Election Boards to enforce the statutes have incorporated a standard of proof within the admininistrative rules, etc., that the boards adhere to during violation proceedings. The following discussion on state case law (see the Nebraska District Court decision), and the later discussion in Part IV on Washington case law, discusses the necessity of actually drafting such a standard or burden of proof element into the statute itself. Third, because the existing statute provides for judicial review (see

TABLE A

STATE	(1) MENTAL CULPABILITY	BURDEN OF PROOF	ELEMENTS/ TYPE	PENALTY PROVISION
Alaska 15.56.010(3)	"knowingly"	None	(1)	Class A Misd.
Florida 106.143(3)	"willfully"	None	(B)	Civil
Louisiana 18:1463	None	None	(B)	Max Fine $2000 Max Prison 2yrs
Michigan 6.1944	None	None	(C)	Misdemeanor
Massachusetts 56 §92	"knowingly"	None	(1)	Max Fine $1000 Max Jail 6 mos
Minnesota 210A.02 210A.04	"knowingly" or "intentionally"	None	(1)	
Mississippi 23-3-33	"willfully" and "knowingly"	None	(A)	Misdemeanor
Montana 13-35-234	"knowingly" or with "reckless disregard"	None	(A)	Misdemeanor
New Hampshire 69:14	"knowingly"	None	(B)	Max Fine $1000 Max Jail 1year
North Carolina 163-274(8)	"knowingly" or with "reckless disregard"	None	(A)	Misdeameanor
North Dakota 16.1-10-04	"knowingly"	None	(1)	Class A Misd.
Nebraska 49-1474(2)	"knowingly"	None	(1)	Class III Misd.
Ohio 3599.091	"knowingly" or with "reckless disregard"	"Preponderance of evidence"-establ. by case law only	(1)	1st Degree Misd.
Oregon 260.532	"knowingly" or "reckless disregard"	"Clear and convincing" evidence	(1)	Private action
Tennessee 2-19-142	"knowingly"	None	(1)	Misdemeanor
Utah 20-17-530	"knowingly"	None	(1)	Class A Misd.
Washington 42.17.530	"knowingly or negligently"	None	(1)	Civil
West Virginia 3-8-11(e)	"knowingly"	None	(1)	Misdemeanor

RCW 42.17.395(5)), it is unnecessary to discuss this crucial element of a constitutially defensible statute.

3. State case law

As might be expected, there exists more case law at the state level than at the federal level. Therefore, the purpose of this section will be to analyze a cross-section of these cases, each of which represents a challenge to a particular type of "regulation of campaign conduct" statute. This case law discussion will be divided into subsections and basically is designed to analyze challenges to, or definitions of, specific elements or terms within a particular statute. For example, subsection (a) examines cases in which the element or term "false information" has been challenged or defined. Subsection (b) examines cases in which the element "knowingly" was challenged or defined. Subsection (c) examines cases which discuss the issue of the necessary "burden of proof." Finally, subsection (d) examines the case of Schmitt v. McLaughlin, 275 N.W.2d 587 (1979), which posits a three-part test to determine whether a statute that attempts to regulate free speech in a political campaign is constitutional.

(a) "False Information"

Minnesota and Oregon both have comprehensive statutes which purport to prohibit the "knowing" publication of a false statement of material fact or false information pertaining to a political candidate or any other election matter. (See M.S.A. §210A.04 and O.R.S. 260.532(1)).

In 1980 and 1983, actions in Oregon were initiated against political candidates for the alleged publication of "false statements of material fact" in the cases of Sumner v. Bennett, 45 Or. App. 275, 608 P.2d 566 (1980) and Committee of 1000 to Re-elect State Senator Walt Brown v. Eivers, 296 Or. 195, 679 P.2d 1159 (1983).

In both cases, the Oregon courts held that a statement is "not false, . . . if any reasonable inference can be drawn from the evidence that the statement is factually correct or that the statement is merely an expression of opinion." Brown, 674 P.2d at 1163. The Court in Sumner added that regardless of how "ill-founded or unreasonable" a defendant's opinions might be, they are not actionable as a "false statement of material fact" as long as a reasonable inference exists that such a statement is only an opinion. Sumner, 608 P.2d at 569.

The Minnesota Supreme Court came to a similar conclusion in Kennedy v. Voss, 304 N.W.2d 299 (1981). In interpreting "false information" as included as an element in M.S.A. §210A.04, the

Kennedy court held that an extreme and illogical inference in campaign literature, based upon an accurate statement of fact, does not constitute false information. Id. at 300.

The court also added that the statute was directed towards the making of a false statement of fact and "not against criticism of a candidate or unfavorable deductions derived from a candidate's conduct. " Id. at 300.

An example of a fact situation which highlights the problem would be: An incumbent County Council member, during the previous years budget hearings, votes against the adoption of the County budget as a whole because he disagrees with one particular budget item. During the next campaign, his opponent publishes an article claiming that the incumbent is against a "senior citizen's center, budget increases for local law enforcement, better salaries for tachers, and bike trails for children." At first glance such a publication appears to be false, misleading, and intended to injure the credibility of the incumbent and thus affect the election outcome.

However, such a statement, despite its "extreme and illogical inference" can be traced back to an accurate statement of fact; the incumbent did vote against the adoption of the budget. Moreover, the candidate could claim (and probably successfully so) that his statement represented no more than his "opinion" on the likely ramifications of the incumbent's voting

record.

The lesson to be learned is that if a questionable statement by a candidate can be either traced back to an accurate statement of fact, or be reasonably inferred as nothing more than an opinion, then no actionable claim exists under a statute which prohibits "false representations" or "false statements of material fact."

(b) "knowingly"

Two of the more important state cases dealing directly with the mental culpability element of a political advertising statute are Daugherty v. Hilary, 344 N.W.2d 826 (Minn. 1984) and Snortland v. Crawford, 306 N.W.2d 614 (N.D. 1981).

In Hilary, the defendant was charged with violating M.S.A. §210A.02 which prohibited a person from "knowingly" making any false claim, stating or implying, that a candidate has the support or endorsement of a major political party when in fact the candidate does not. The defendant candidate in Hilary mailed several thousand documents titled "Official Sample Ballot--Vote for these DFL'ers." (The DFL is the Democratic Farmer Labor Party; a political party of major influence in Minnesota). These documents were strikingly similar in wording and color to the traditional DFL sample ballot. Although the defendant

candidiate was affiliated with the DFL party, the party had endorsed another candidate. Id. at 830.

At the trial, the defendant candidate asserted that she and her campaign staff did not know that the sample ballots falsely implied implied party support or endorsement. Id. at 831. However, the Supreme Court ruled that because the defendant had modeled her "Official Sample Ballot" on past "Official DFL Sample Ballots", and because she was aware of the statute and interpreting case law, but chose to interpret it in a different way, the violation of the statute was "knowingly" despite her insistence that it was not. Id. at 831.

Thus, a candidate cannot merely hide behind a cloak of "subjective good faith," or "I believed my statements were true," or "I didn't know my statements falsely implied" . . . etc. as a complete defense to an election offense charge. Rather, the Hilary court held that the test for "knowingly" is to be left to the trier of fact and shall be determined by the evidence.

The Snortland case represented an effort by the Supreme Court of North Dakota to define what "knowingly" meant in the context of Sec. 16-20-173.3 N.D.C.C. (current sec. 16.1-10-04 N.D.C.C) which states in part:

> "No person shall knowingly sponsor any political advertisement containing false information. . . ."

The Court explicitly stated that the definition of

"knowingly" is not "whether a reasonably prudent person knew or should have known that the statement was false; rather, the sponsor must have had a firm belief, unaccompanied by substantial doubt, in the falsity of the statement." Snortland, 306 N.W.2d at 623. The Court went on to add that "it is clear that the false statement which is made negligently is protected speech." Id. at 623.

Because the North Dakota statute uses a strict "knowingly" standard rather than the New York Times "actual malice" standard, convictions would be more difficult to obtain. According to the Snortland court, if an actual malice standard is used, the plaintiff needs only to show that the "sponsor had a firm belief in the falsity of the statement" in order to obtain a conviction and/or finding of civil liability.

(c) "Burden of proof"

As noted above, only Oregon has statutorily included the burden of proof in its comprehensive statute. Given the fact that both New York Times and Vanasco allude to the constitutional necessity of a "clear and convincing" standard of proof, it is surprising that there are not more state statutes which include the element and more surprising yet that there have been few challenges mounted on this legal ground. However, a recent Nebraska District Court case may change this.

The existing Nebraska political advertising statute, N.R.S. §49-1474(2) states in part that:

> No person shall . . . publish . . . any advertisement . . . knowing such . . . advertisement to contain any false statement of material fact. . . .

This statute was recently, and successfully, challenged in the Lancaster County District Court in the case of DeCamp v. Nebraska Accountability and Disclosure Commission, (unpublished opinion), on the grounds that the statute did not require a guilty finding by the Commission to be based on "clear and convincing" evidence. The Court ruled that because the statute contained no standard of proof requirement and because the Disclosure Commission's rules of practice and procedure also set forth no standard of proof, the statute is unconstitutional. (It should be noted that under the Nebraska scheme, the Disclosure Commission is actually vested wtih the authority to apply criminal sanctions against those candidates or persons it finds in violation or N.R.S. §49-1474(2)).

The Commission argued that a policy manual which was regularly used by the Commission referred to a standard based upon "reliable, probative, and substantial evidence." It appears however, that the Court held that such a standard was either not stringent enough or was too ambiguous to allow for proper judicial review. The Court also added that because First Amendment rights were at stake, the constitutionally required

commission responsible for investigating unfair campaign practice complaints is also empowered to impose sanctions (criminal or civil) on violators, then the statute which authorizes such powers must include a "clear and convincing" evidence standard of proof element within the satute.

(d) Schmitt v. McLaughlin

Minnesota statute §210A.02 was challenged on constitutional grounds in Schmitt v. McLaughlin, 275 N.W.2d 587 (1979). The statute, which remains in effect today, provides:

> No person or candidate shall knowingly, either by himself or by any other person, while such candidate is seeking a nomination or election, make, directly or indirectly, a false claim stating or implying that the candidate has the support or endorsement of any political party, or unit thereof, or of any organization, when in fact the candidate does not have such support or endorsement.

The court, in holding that the statute did not violate the constitutional right to freedom of speech, gave three specific reasons for its ruling. Id. at 590. First, the Court stated that the statute only regulated "false statements." Id. at 590. Second, the Court stated that the statute is directed specifically at false claims of endorsement or support and thus is narrowly drawn to serve a governmental interest in protecting the political process. Id. at 591. Third, the Court stated that because the statute is narrowly drawn, it is not so vague or ambiguous that persons of common intelligence would be unable to

determine what conduct will violate it. Id. at 591.

These three reasons given by the Court for upholding the constitutional validity of M.S.A. §210A.02 ostensibly could be translated into a three-prong test to determine the validity of any political advertising statute. The three-prongs would be:

(1) Does the statute proscribe or regulate only constitutionally unprotected speech? (i.e., "false statements.")

(2) Is the statute narrowly drawn so it: (a) proscribes or regulates "specific behavior", and (b) legitimatley serves the compelling state interest of protecting the political process?

(3) Is the statute so narrowly drawn that it cannot be challenged as vague or ambiguous and thereby any person of common intelligence will be able to determine what conduct will violate it?

The draft statute set out in Part V meets this three-prong test and the other specified requirements previously mentioned.

P A R T I V

WASHINGTON CASE LAW

In Washington, there have been no appellate or supreme court decisions dealing directly with a constitutional challenge to any political advertising statute. However, there are three cases which impact the false political advertising issue.

The first case, Ford v. Hagel, 423 Wn.App. 675, 713 P.2d 736

(1986) clearly implies that Washington courts would be receptive to some form of a false political advertising statute. The Court, in ruling on a defamation action unequivocally stated that "false statements of fact . . . have no constitutional value."

The second Washington case with possible impact is In Re Donohoe, 90 Wn.2d 173, 580 P.2d 1093 (1978). In this case, the Court found that an attorney, as a judicial candidate, knowingly published false statements of fact which were damaging to her opponent, an incumbent judge. Id. at 179. The court upheld a State Bar Association reprimand based on a violation of a section of the Code of Professional Responsibility which provided that a lawyer should not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office. (CPR/DR 8-102(A)(B)). Id. at 180.

The court also stated that "we do not believe that the First Amendment protects one who utters a statement with knowledge of its falsity, even in the context of a judicial campaign." Id. at 181 (Emphasis supplied).

The final Washington case to be discussed is State v. Marchand, 104 Wn.2d 434, 706 P.2d 225 (1985). In Marchand the Washington Supreme Court stated that if a statute implicates constitutional rights, then all elements necessary to make the statute constitutional must be within the statute. Therefore, an

agency may not supply any missing elements when enforcing a statute which involves constitutional rights.

The inference to be drawn from this case with regard to the political advertising issue is that if the false advertising statute does not include a clear and convincing evidence burden of proof in the statute, the Commission responsible for investigating complaints and imposing sanctions cannot claim to validly supply the element by virtue of it being included in its administrative rules or procedures.

P A R T V

PROPOSED MODEL STATUTE

42.17.020 DEFINITIONS

(29) "Actual malice" means with knowledge or with reckless disregard as to its truth or falsity.

(30) "Sponsor" means the candidate, political committee, or other person paying for the advertisement. If a person acts as an agent for another or is reimbursed by another for the payment, the original source of the payment is the sponsor.

(31) "Incumbent" means a person who is in present possession of an elected office.

(23) "Political Advertising" should be changed to "Political Advertisement" to reflect the language of the modified statute. Definition to remain the same.

Note: Additional terms such as "candidate," "election," and "person," are currently defined in 42.17.020.

42.17.530 FALSE INFORMATION PROHIBITED.

(1) It shall be unlawful for a person to sponsor, with actual malice:

(a) a political advertisement which contains false statements of material fact;

(b) a political advertisement which falsely represents that a candidate is an incumbent for the office sought when in fact the candidate is not the incumbent.

(2) It shall also be unlawful for a person or candidate, while such candidate is seeking a nomination or election, to make, either directly or indirectly, with actual malice, a false

claim stating or implying the support or endorsement of any person or organization when in fact the candidate does not have such support or endorsement.

(3) Any violation of this statute, must be proved by clear and convincing evidence.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM February 25, 1991

SUBJECT: Election misconduct bill (CSHB 40( ))

TO: Representative Max F. Gruenberg, Jr.
Attn: Michael Plunkett

FROM: John B. Gaguine JBG
Legislative Counsel

Enclosed is a redo of CSHB 40( ). As you requested, I have expanded the mental standard in paragraph (3) to include reckless disregard of falsity, and have eliminated the part of that paragraph that limited it to "fighting words" and character assassination. Paragraph (4), the new part of this bill, is now gone, as it is subsumed by expanded paragraph (3).

I have also put paragraph (1) back into the bill. My understanding was that you did not want to delete the paragraph if it was not clearly unconstitutional. I do not believe that it is. Messerli v. State, 626 P.2d 81 (Alaska 1980), a copy of which is attached, seems to imply that anonymous political communications can be made illegal, even if they are not paid for. Id. at 87-88. (Messerli had paid for his newspaper ads.) The court did not find that Talley v. California, 362 U.S. 60, 4 L.Ed.2d 559 (1960) (copy also attached), was controlling, possibly because Talley did not deal with anonymous handbilling during a political campaign. Indeed, the Messerli majority did not cite Talley; the case was only cited by Justice Burke in his dissent.

If I may be of further assistance, please advise.

JBG:gc
91-095.glc

Enclosure

cc: Representative Betty Bruckman
Attn: Anne Ziesmer-Hays

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811
(907) 465-3867 or 465-2450
FAX (907) 465-2029

Deliveries to: 240 Main Street
Court Plaza, Room 500
Mail Stop 3101

FEB 22 1991

MEMORANDUM February 15, 1991

SUBJECT: Election misconduct bill (CSHB 40 ( ))

TO: Representative Max F. Gruenberg, Jr.
Attn: Michael Plunkett

FROM: John B. Gaguine JBG
Legislative Counsel

Enclosed is a bill that I hope addresses the constitutional infirmities in AS 15.56.010-(a) (election misconduct in the first degree). The bill repeals paragraph (1), prohibiting anonymous publications about an election. A similar Los Angeles ordinance was held unconstitutional in Talley v. California, 362 U.S. 60, 4 L.Ed.2d 559 (1960). Paragraph (2) (renumbered as (1)) is retained; even though it is virtually identical to AS 15.13.090, it was enacted by the same Act that amended 15.13.090, so I am assuming that there was a specific purpose for having parallel provisions (possibly to avoid the cumbersome enforcement process that APOC must use to enforce AS 15.13).

Paragraph (3) (renumbered as (2)) is also retained. I have concluded that my initial opinion about the constitutionality of this paragraph was wrong; after reviewing the extensive memorandum of the Washington attorney general's office (included in the materials compiled by the Legislative Research Agency) and the lead case cited therein (Vanasco v. Schwartz, 401 F.Supp. 87 (S.D.N.Y. 1975), aff'd mem., 423 U.S. 1041 (1976)), I believe that the paragraph does comport with the First Amendment. "False factual information" appears clear, "which the person knows to be false" goes beyond the constitutionally required actual malice standard, and, because this is a criminal statute whose violation must be proven beyond a reasonable doubt, the standard of proof problem does not exist. (It is possible that the Alaska Supreme Court would rule that Article I, Section 5 of the Alaska constitution protects even knowing falsehoods in political speech, but that seems unlikely.)

Indeed, the paragraph could probably be expanded beyond "fighting words" and damage to reputation and still be constitutional. It is my understanding, though, that you do not desire to expand the paragraph beyond its present scope.

Paragraph (4) (renumbered as (3)), Representative Bruckman's amendment, is also retained. This too could probably be broadened beyond the election pamphlet, and I will be happy to broaden it if you or Representative Bruckman so desires.

If I may be of further assistance, please advise.

JBG:pl
91-089.plm

Enclosure

Alaska State Legislature

Legislative Research Agency

P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 465-3991
Fax: (907) 463-3351

MAR 26 1991

March 26, 1991

MEMORANDUM

TO: Representative Betty Bruckman

FROM: Linda J. Snow
Legislative Analyst

RE: **Truth in Campaign Advertising**

You asked if it is a crime in other states for political candidates to publish false personal information on a resume or brochure. You also asked if Alaska had ever required candidates to swear to the truthfulness of statements published in voter pamphlets.

Background

False statements about a political candidate's record is part of the larger issue of false campaign advertising. In most states, the greater concern is libelous and slanderous campaign statements about a candidate's opponent, and many state laws address both concerns together.

Political speech tends to have more constitutional protection than other forms of speech[1]. Many challenges to the constitutionality of truth in campaign speech laws have passed through the courts, and it is difficult to word a law such that it does not draw challenge. A decision in *New York Times vs. Sullivan* resulted in the "actual malice" standard for claims of false campaign statements.

"Actual malice" demands that the candidate deliberately spoke the falsehood with prior knowledge of its falseness. However, this standard of "actual malice" is difficult to prove. Interpretation and opinion of the speaker must be considered in determining the truth of a statement. Does the statement have some kernel of truth and is merely a distortion of that truth? We offer an anecdotal example of the difficulty. A government-oriented publication selected a certain state legislator (from another state) as the least ethical

---

[1]According to Alison Reed, project manager in election services, national office of the League of Women Voters, under most states' employment laws, an employee can be fired for falsifying a resume, yet an elected official cannot be impeached (equivalent of being fired) for the same reason.

legislator in that state. In a subsequent campaign brochure, the legislator stated that he had been chosen as a "legislator of note" by this publication.

Attachment A contains several articles and reports that address the broader issue of falsehood in campaign statements. Not every paper addresses candidates' statements about their background, but the theories discussed apply to that issue. The background report by the office of the Washington Attorney General is particularly helpful in formulating law, as it discusses particular wording, and presents a model statute.

Statutes in Other States

Attachment B contains a survey of the 50 states' campaign advertising laws performed by the National Conference of State Legislatures. Also included are current statutes from Massachusetts, Ohio, Oregon, Utah and Washington. The survey reports that 21 states have passed laws prohibiting false campaign statements. Seven states have adopted fair campaign practices codes. The candidate can take a voluntary oath to uphold that code. The statutes in seven states, including Alaska, pertain only to written statements. In most states, violation of this statute is a misdemeanor, although it is a felony in Indiana. Some states provide only civil penalties, which could include voiding an election.[2]

Alaska Statute (AS 15.56.010) addresses false statements in printed campaign advertising. However, because subsection (3)(B) includes the word "and," this statute pertains only to statements about other candidates. Alaska Statute 15.56.010 is included as Attachment C.

Other Regulation

The U. S. Fair Campaign Practices Commission dealt with this subject on the federal level; however, that agency is now defunct. According to a representative of the Federal Election Commission, if political advertisements include a disclaimer, the federal government doesn't care what they say.

Because of the difficulty in applying state laws to political campaigns, many representatives of state and national organizations we contacted during our research advocate a watch dog role for the press, the public and the opposing candidates. These representatives feel political statements should be questioned and investigated by interested or affected parties such as the public and opposing candidates.

---

[2]According to Graham Johnson, executive director of the Washington State Public Disclosure Commission, civil penalties can be used in Washington to void an election through the courts.

Past Requirements in Alaska

According to staff of the Alaska Division of Elections, candidates are not currently required to swear to the truthfulness of statements submitted for inclusion in the voter pamphlet. However, at one time candidates were required to swear to take such an oath, as evidenced by the signature page of the 1978 election pamphlet statement form attached. Alaska Statute 11.56.200 makes willful falsification of a sworn statement a class B felony. We have not been able to determine when and why the practice of requiring a sworn statement was discontinued. Seven former Division of Elections' employees with whom we spoke had no recollection of the existence of such a requirement.

We hope this information is useful to you. If you need further assistance, please feel free to contact this agency.

Attachments

Chapter 55. Election Offenses, Corrupt Practices and Penalties.

Section
10. Undue influence by force
20. Undue influence by offer
30. Publication without identification
40. Publication of false statement
50. Improper possession of ballot
60. Counterfeiting of ballot
70. Refusal to allow employees time off
80. Improper disclosure of vote
85. Divulging ballot count; penalty
90. Writing of false statement
100. Voting in false name
110. Undue influence of election official
120. Improper change of election returns
130. Improper delay in sending of election materials
140. Voting more than once
150. Improper subscription to petition
160. Improper distribution and printing of ballots
170. False swearing
180. Improper influence of election by election officials
190. False count by election officials
200. Concealment of returns by election officials
210. General penalty for misdemeanor
220. General penalty for felony
230. Penalty for corrupt practice
240. Time limitation
245. Voting after disqualification
250. Definition of "person" and "election"

Sec. 15.55.010. Undue influence by force. A person who directly or indirectly uses or threatens to use force, coercion, violence or restraint or who inflicts or threatens to inflict damage, harm, or loss upon or against any person to induce or compel the person to vote or refrain from voting for a candidate in an election or for any election proposition or question, is guilty of a corrupt practice and upon conviction is punishable as for a misdemeanor. (§ 11.02 ch 83 SLA 1960)

Am. Jur., ALR and C.J.S. references. — 18 Am. Jur., Elections, §§ 330 to 350.
Constitutionality of corrupt practices acts, 69 ALR 377.
29 C.J.S. Elections §§ 83 et seq., 323 et seq.

Sec. 15.55.020. Undue influence by offer. A person who gives or promises to give, or offers any money or valuable thing to a person with the intent to induce him to vote for or refrain from voting for a candidate at an election or for an election proposition or question, is guilty of a corrupt practice and upon conviction is punishable as for a misdemeanor. (§ 11.03 ch 83 SLA 1960)

Sec. 15.55.030. Publication without identification. A person who knowingly prints or circulates, or has written, printed, or circulated, a letter, circular, bill, placard, poster, or other publication relating to an election or to a candidate at an election or to an election proposition or question without the same bearing on its face, the name and address of the author, printer, and publisher, is guilty of a corrupt practice and upon conviction is punishable as for a misdemeanor. (§ 11.04 ch 83 SLA 1960)

AS15.55.010-250 WAS REPEALED IN 1980 AND REPLACED BY AS 15.56.

CANDIDATE'S NAME Terry Martin ELECTION DISTRICT 8F

STATEMENT OF INFORMATION REGARDING ISSUES

THIS STATEMENT MUST BE TYPEWRITTEN (DOUBLE-SPACED) AND MAY NOT CONTAIN MORE THAN 200 WORDS. (PLEASE NOTE THAT EACH WORD WILL COUNT AND THAT NO MORE THAN 200 WORDS ARE PERMITTED ACCORDING TO AS 15.57.020.)

Let's build Alaska; make it a great State. With new positive thinking legislative leadership we can have business, union, education, and the State government working together so that all able bodied persons are off unemployment rolls and enjoying the fruits of their personal efforts. Terry Martin advocates: 1) Stop inflation every way possible, especially by decreasing government spending and allowing the working people more of their personal income for family needs. 2) Move the Capital as soon as possible. 3) As an elected official, to do what the voters want regardless of personal feelings. 4) Jobs, jobs, jobs, for Alaskans by encouraging business in Alaska. 5) Land for the citizens of Alaska to homestead as our did our forefathers. 6) Court system which protects the public interest, not the criminal. 7) D-2 land bill in congress should be changed to benefit

(IF ADDITIONAL SPACE IS NEEDED, PLEASE SUBMIT THE REMAINDER OF YOUR STATEMENT ON ANOTHER SHEET.)

PLEASE COUNT AND TOTAL NUMBER OF WORDS USED: 200

These are the biographical and information statements as I request them to be printed in the "Election Pamphlet"; however, I understand that these forms will be returned to me for final review prior to publication. To the best of my knowledge, these statements are true and correct. Enclosed is a check (or money order) made out to the State of Alaska in the amount of ____ for the cost of one page of space.

Terrence H Martin
(Signature of Candidate)

Subscribed and sworn before me this 13TH day of July, 1978.

Virgil [illegible]
(Notary Public or Postmaster)

(SEAL)

Commission expires: 8/4/1980

REMEMBER TO ENCLOSE A 4 x 5 PHOTOGRAPH!

Campaigning Ad Nauseam

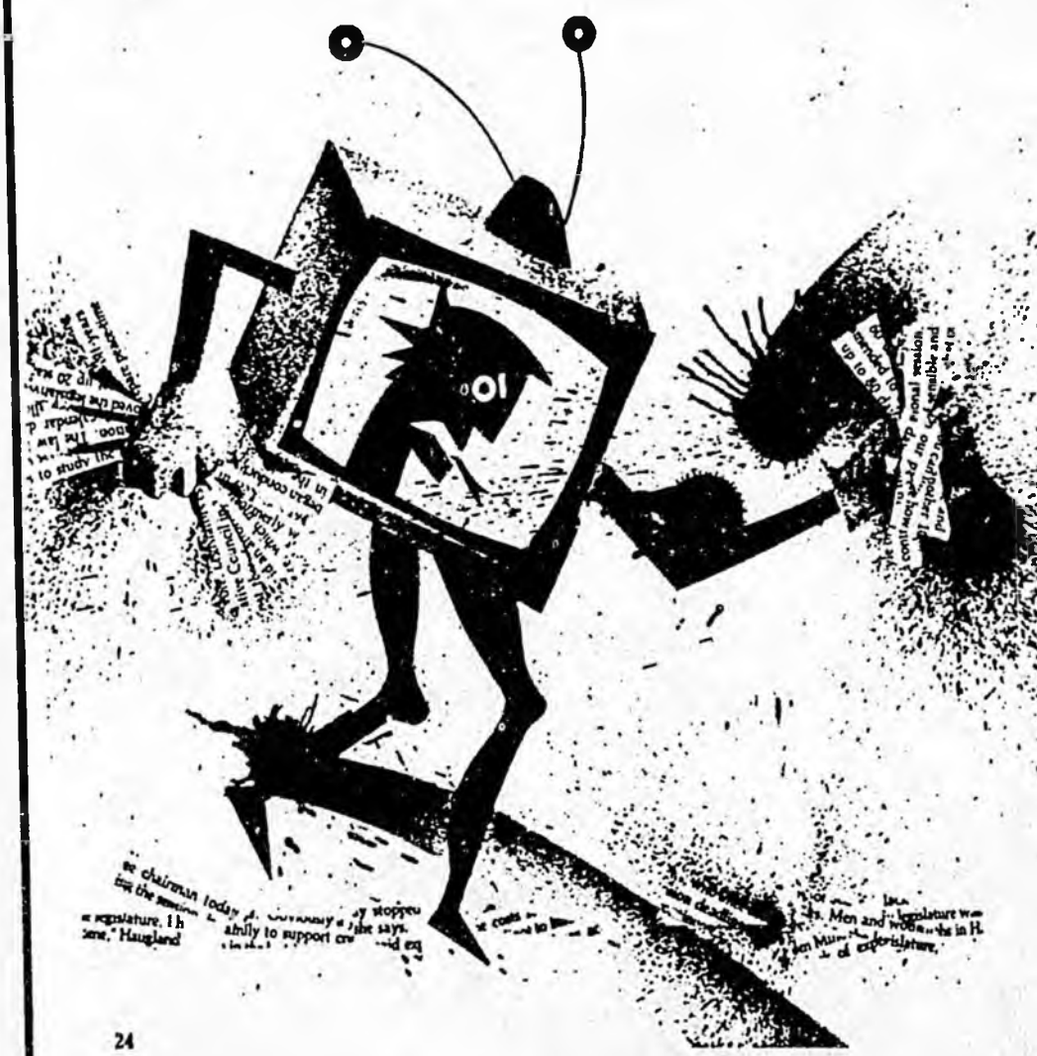
Nasty political advertising is making the electorate cynical and the political process trivial. Can states get it under control?

Susan Biemesderfer

"Campaigns should be to inform the public, not nauseate them."

Susan Biemesderfer specializes in election issues for NCSL.

This may be U.S. Senator John Danforth's opinion about campaigns, but strategists in 1990 are more likely to be worried about losing votes than sickening voters. Danforth has introduced a bill aimed at curbing political attack ads, but its passage appears less likely than the continued proliferation of negative campaign ads at the federal, state and local levels.



If 1989's nastiest races are any indication, the decade's first political season promises to bloom with more controversy. For example:

- New Jersey's gubernatorial race last year turned into a fierce match of television jabs thrown by Congressmen Jim Florio and Jim Courter. Now-Governor Florio's initial attack depicted Courter with a Pinocchio -like nose, alleging he had misrepresented his legislative record; Courter's response charged that Florio took money from corrupt unions and showed Florio's nose growing while Courter's nose simultaneously shrank;
- In Virginia, newly elected Governor Douglas Wilder held on to a diminishing lead over an opponent who ran television ads that showed a woman weeping as the announcer talked about a bill introduced by Wilder that allowed for the questioning of rape victims about their private lives;
- David Dinkins defeated Ed Koch for the New York City mayor's seat despite Koch's charges that Dinkins engaged in shady financial dealings; and
- In Cleveland, Senator Michael White won a tight mayor's race in which he was labeled a "slumlord" and called his opponent a "master of sleaze."

So far, this year's state primaries have sustained the negative ad trend. Texas gubernatorial candidate Ann Richards has already wrestled with allegations from other Democrats that she used illegal drugs; in California's Democratic primary, Dianne Feinstein emerged as the party's candidate for governor in a race where, as reported by *Newsweek*, "a single 30-second spot" could "move 10

recent New Jersey proposals designed to discourage negative campaigning have "eventually died." He traces the lack of legislative support to lawmakers' skepticism about the legality of such measures.

Some of that skepticism is rooted in legislators' knowledge of a 1975 ruling that struck down New York's prohibition against campaign misrepresentations. In *Vanasco vs. Schwartz*, a case that went all the way to the U.S. Supreme Court, sections of the New York election code were found to be "repugnant to the right of freedom of speech."

The *Vanasco* case stemmed from complaints filed against two candidates for the New York Assembly in 1974. Roy Vanasco, an unsuccessful Republican candidate, had distributed campaign literature that allegedly misrepresented his party affiliation as "Republican-Liberal" and falsely implied he was an incumbent. A successful Democratic-Liberal candidate in another Assembly district, Joe Ferris, was accused that same fall of misrepresenting his opponent's voting record. Under the authority of New York's statutory prohibition against distributing false campaign literature, the New York Board of Elections ordered both candidates to surrender their campaign literature. The two candidates joined forces to file suit against the Board. The court's decision in their favor held that any state regulation of campaign speech must be premised on the "actual malice" standard applicable to public figures since the U.S. Supreme Court's landmark libel ruling in *New York Times vs. Sullivan*.

"It is that standard – the requirement that false campaign information be of libelous, malicious nature – that makes our state law such a challenge to enforce," says Graham Johnson, executive director for the Washington State Public Disclosure Commission. The commission has been charged with the delicate task of discerning where "actual malice" may be the root of false statements made in the heat of campaign combat. Washington's prohibition against false campaign statements has been amended in light of the *Vanasco* ruling, making it, in Johnson's opinion, "all but impossible to prove a violation has occurred. It hasn't happened yet with a state legislative race. The circumstances of campaigns are unique and not well documented, and proving malicious intent on the part of a candidate is an almost insurmountable task."

An alternative approach to dealing with negative ads is the use of "fair campaign practices" codes. These codes are on the books in seven states and are generally signed voluntarily by candidates. Typically, fair campaign codes include language similar to that found in Washington's provision, wherein candidates vow not to participate in "personal vilification, defamation and other attacks on any opposing candidate or party." And while such codes have at least occasionally raised the consciousness of candidates and voters, they are generally regarded as good-faith but meager attempts to temper negative ads.

"The options we're left with, then," says New Jersey Assemblyman Bob Franks, "are either ignoring the problem or doing our best to pass a law that will survive the courts' scrutiny." Franks has introduced a bill that would require a candidate to appear in any campaign ad that mentions the opposing candidate; in a print ad referencing another candidate, the attacking candidate's photograph would have to appear. Because the bill doesn't require that any judgment be made about the ad producer's intent and imposes an affirmative act on the part of the candidate – rather than restricting the content of the candidate's speech – proponents are optimistic about its chances to get around constitutional hurdles. A similar bill has been introduced in the Florida House of Representatives.

Both the Florida and New Jersey bills resemble the legislation proposed in Congress by Senators John Danforth and Ernest Hollings. "If a candidate wants to sling mud at his opponent," says Danforth, "the public should be able to see the candidate's dirty hands." Media consultant Roger Ailes counters Danforth with claims that the bill violates the First Amendment. "If we're going to start with censorship in this country," Ailes argues, "we ought to start with child pornography and political commercials ought to be far down the list."

These measures, if passed, are certain to face the scrutiny of judges with watchful eyes on constitutional freedoms. Still, some legislators persist in their efforts to tone down negative campaign ads. "The sentiment of the American people today when they look at politics," insists Danforth, "is nausea." ■

Negative Campaigning Is Here to Stay

By WILLIAM ENDICOTT

A thick little pocket guide to the various sessions at the National Conference of State Legislatures' annual meeting last month reflected the kinds of issues that are bedeviling lawmakers from coast to coast.

There were panels covering everything from abortion to the savings and loan crisis.

But self-preservation never being far from the minds of most legislators, the session that drew one of the biggest crowds dealt with an issue that has never before shown up on the NCSL agenda.

It was standing-room-only for an hour-and-a-half discussion of negative political campaigning, which addressed the question, "How much is too much?"

Whatever constitutes "too much," it's obvious we haven't gotten there yet. All one has to do is look at some of the commercials from campaigns of the 1960s, when television came into its own as a campaign tool, to see that negative advertising is not a new phenomenon in U.S. politics.

But a subtle change has taken place in the way political consultants assess negative ads.

Once, consultants might have counseled their candidates that nasty ads could produce a backlash. Now, the candidates are being persuaded that negative ads grab more viewers and therefore work better than positive ads.

Why should legislators be dabbling in such an issue, which is fraught with all sorts of First Amendment implications?

"Because they are incumbents and more often than not, incumbents are on the receiving end of negative ads," said Graham Johnson, executive director of the Washington State Public Disclosure Commission. "They'd like to get a handle on it."

The fact that such a topic could find its way onto the agenda here suggests the problem not only is of growing concern but that legislators expect it to get much worse before it gets better.

That's too depressing to contemplate. As repugnant as negative ads are, however, most states have found that efforts to regulate them are difficult at best and can have a chilling effect on the free expression of political thought and ideas.

An NCSL survey of political reform efforts in all 50 states concluded that while the true merits of negative advertising are arguable, there is an inarguable political reality now faced by candidates for public office: Negative ads are here to stay.

Seven state legislatures, including California, have endorsed a fair campaign practices code which typically contains a clause that the candidate will not participate in "personal vilification, defamation and other attacks on any opposing candidate or party." But the codes generally are voluntary and not enforceable.

Twenty-one states have passed laws prohibiting false campaign statements. In most cases, however, they are so weak as to be meaningless or have been gutted by the courts.

Key provisions of a tough New York law, for instance, were struck down as unconstitutional in a ruling that has become the leading opinion on campaign falsity statutes. It held that any state regulation of campaign speech must be premised on the "actual-malice" standard applicable to public figures in libel cases.

Try proving actual malice. "What? My ad contains inaccuracies about my opponent? A careless mistake by my staff. I'm so sorry. No malice intended."

In short, the NCSL survey found that despite widespread criticism that negative ads demean the electoral process and deter voters from participating, the constitutional issues raised when trying to regulate the free speech of candidates are difficult, if not impossible, to overcome.

All this is quite pleasing to political consultants who make their living off crafting such ads, rationalizing their use and being contemptuous of those who would, as they put it, "sanitize" the political process.

"Negative media and the negative component of an argument are part of politics," Democratic consultant David Axelrod of Chicago told the audience here. "...Media consultants did not create the atmosphere of cynicism that exists in this country."

Maybe not. But consultants certainly play on that cynicism, as even Axelrod had to concede, and their negative spots resonate a lot more loudly because of it.

It's too bad some of that creativity is not channeled toward elevating political debate.

William Endicott is chief of the McClatchy News Service's capitol bureau.

Los Angeles Daily Journal
Sept 20, 1990

Ellensburg, WA
(Kittitas Co.)
Daily Record
(D. 6,000)

NOV - 5 1990

Allen's P. C. B Est. 1888

REPORT FROM OLYMPIA

200

The media's role

By ADELE FERGUSON

"You wrote something not long ago asking what role the media should play in election campaigns," said Graham Johnson, executive director of the state Public Disclosure Commission, "and I've been meaning to get back to you on that."

The thing that is plaguing the PDC more and more, he said, is complaints about false political advertising.

People don't seem to understand, said Johnson, that all the PDC is supposed to do is give visibility to sources of money in politics.

"The courts say there is virtually no role for government to play in controlling political rhetoric. There can be a law protecting citizens from blatant lies, but 99.9 percent of it is somebody's exaggerated, skewed, with only a grain of truth in it, but there is no way, by force of law, that we can do anything about that."

The media can, said Johnson.

"Where I think the media really has a role is doing the truth squad thing," he said. "Kind of like the way the Seattle Times has started doing it. You're not restrained like a government agency. You don't have to worry about length of time, due process and hearings, all that legal garbage.

"You can take a situation and look into it, and report on it in a matter of hours or days, while with government, and all its procedural motions and protections, it would take weeks or months."

If newspapers, in particular, really wanted to do a service, said Johnson, they should look into the claims made by candidates and proponents and opponents of issues. A "this is what they say" and "this is the real story" treatment.

Johnson said he'd been reading about the various issues on the ballot, "and statements and claims are being made that may be true and may not. My point is, I really do believe we could look to the media for some help."

I agreed with him some truly outrageous things have been said, but there are some real problems with rebuttal.

Every candidate proclaims his/her honesty, integrity, leadership, hard work, compassion, dedication, willingness to listen, love for the environment, concern for the poor, knowledge of government, accessibility, bla bla bla.

A lot of these claims are made in brochures by other than the candidate, i.e., the governor and other state officials, congressmen, etc. Each praises his own party's candidates, and it doesn't matter if it's baloney, the name of the game is getting or keeping the majority, getting or keeping courthouse power. If Diogenes were made a proof reader on some of this stuff, he'd have a stroke.

And is it our, the media's responsibility, to check out all the votes claimed by incumbents, or should the opponent do that? If we do it, we could be accused of bias against incumbents, because challengers usually have no such record.

As for issues, yes, we should be making both sides prove or explain their claims. I suspect there will be a lot more of that in future elections.

Letters welcome

The Daily Record welcomes letters to the editor from Kittitas County readers. Letters should be held to 300 words or less and, if possible, typed. Longer letters are subject to condensation. We encourage readers to make use of this "public forum" to voice opinions — pro or con — on any issue.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

April 25, 1989

MEMORANDUM

TO: Representative David Finkelstein

ATTN: Ileen Self

FROM: Theresa Tanoury
Legislative Analyst

RE: Code of Fair Campaign Practices in Montana
Research Request 89.371

You requested information on the effectiveness of the 1979 Code of Fair Campaign Practices in Montana (Montana Statute 13-35-301--attached). The code protects Montana citizens' constitutional right to a "free and untrammeled choice" of elected officials.

The Montana Commission of Campaign Practices is responsible for providing the code to all local, county, and state candidates. (The commission also promulgates regulations and assesses civil penalties for violations by all candidates required to file disclosures claims.) Signing the code is voluntary, although Commissioner Delores Colberg states that no candidate has ever refused to sign the code.

Recent campaigns in Montana are considered much "cleaner" than campaigns prior to the 1979 adoption of the code.[1] During the 1988 election, the "dirtier" campaigns were over ballot issues (one committee versus another committee) and in the U.S. Senate race (candidates are not subject to the code).

---

[1]Personal Communication with Gregory J. Petesch, Code Commissioner & Director Legal Services, Montana Legislative Council, April 24, 1989.

MONTANA CODE ANNOTATED

Adopted by Chapter 1, Laws of 1979

Gregory J. Petesch
Code Commissioner
&
Director Legal Services

Staff Attorneys

John MacMaster
H. David Cogley
Lee Heiman
Jim Lear
Valencia Lane
Mary Kelly McCue
Eddye McClure, Legal Reseacher
Doug Sternberg, Paralegal

Indexers

Nadine E. Wallace
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Kevin Hayes

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Kathy Thompson

Systems and Programming
Tom Mulvaney
Gregg Wheeler
Leo La Salle, Typesetting

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1987

I will conduct my campaign in the best American tradition, discussing the issues as I see them, presenting my record and policies with sincerity and frankness, and criticizing without fear or favor the record and policies of my opponent and his party which merit such criticism.

I will defend and uphold the right of every qualified American voter to full and equal participation in the electoral process.

I will conduct my campaign without the use of personal vilification, character defamation, whispering campaigns, libel, slander, or scurrilous attacks on my opposition or his personal or family life.

I will not use campaign material of any sort which misrepresents, distorts, or otherwise falsifies the facts, nor will I use malicious or unfounded accusations which aim at creating or exploiting doubts, without justification, as to the loyalty and patriotism of my opposition.

I will not make any appeal to prejudice based on race, sex, creed, or national origin.

I will not undertake or condone any dishonest or unethical practice which tends to corrupt or undermine our American system of free elections or which hampers or prevents the full and free expression of the will of the voters.

Insofar as is possible, I will immediately and publicly repudiate support deriving from any individual or group which resorts, on behalf of my candidacy or in opposition to that of my opponent, to the methods and tactics that I have pledged not to use or condone."

History: En. Sec. 1, Ch. 475, L. 1979.

13-35-302. Candidates to be given opportunity to subscribe to campaign practices code — publicity. (1) The commissioner of campaign practices shall prepare a form which contains the code of fair campaign practices provided for in 13-35-301 and a place for a candidate to sign the form and to indicate that the candidate endorses, subscribes to, and pledges to abide by the code.

(2) Each candidate required to file statements or reports with the commissioner shall be sent a copy of this form. Signing the form is voluntary, and a failure or refusal to sign is not a violation of the election laws. A form shall be sent for each election as soon as feasible. The signed form shall be returned to the commissioner.

(3) The commissioner shall supply the secretary of state, the county registrars, and the city and town clerks with forms. Any candidate not required to file with the commissioner but wishing to subscribe to the code may obtain the form from the commissioner, the secretary of state, a county registrar, or a city or town clerk and may sign the form and deliver it to the commissioner.

History: En. Sec. 2, Ch. 475, L. 1979.

CHAPTER 36

CONTESTS

Part 1 — General Provisions

13-36-101. Grounds for contest of nomination or election to public office.
13-36-102. Time for commencing contest.
13-36-103. Court having jurisdiction of proceedings.