ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672
11035 HOUSE STATE AFFAIRS

BERZON, Circuit Judge, with whom REINHARDT, KOZINSKI, and KLEINFELD, Circuit Judges, join, and O'SCANNLAIN, Circuit Judge, joins as to Part III only, dissenting:

This case is proof positive that hard cases make bad law, and that when the case is *very* hard--meaning that competing legal and moral imperatives pull with impressive strength in opposite directions--there is the distinct danger of making *very* bad law.

The majority opinion in this case suitably struggles with the difficult First Amendment issues before us concerning whether the posters and website at issue are or are not First Amendment protected speech. The legal standard the majority applies, however, is, in my view, insufficiently cognizant of underlying First Amendment values, for reasons that are largely explained in Judge Kozinski's dissent, and for additional reasons that I develop below.

Moreover, the majority, in an offhand way, also decides two evidentiary issues that, I can say with some confidence, would not be decided so summarily, and would probably not be decided in the same way, were this a less wrenching case on its facts. Keeping one's eyes on the broader picture is not always easy when people's lives--in this case the lives of medical professionals--are being severely disrupted because they are performing constitutionally protected activities in a perfectly lawful manner at the behest of people who want their services and are entitled to have them. As judges, though, we need to recognize that we are *not* writing for this day and place only, and that rulings that appear peripheral in the present context will take on great significance as applied in another.

I
The First Amendment and True Threats

1. *Clarifying the issue:* The reason this is a hard First Amendment case becomes somewhat obscured in all the factual detail and quotation of precedent that we as judges engage in. The essential problem--one that, as far as I am aware, is unique in the plethora of "threat" cases and perhaps more generally in First Amendment jurisprudence--is that the speech for which the defendants are being held liable in damages and are enjoined from reiterating in the future is, on its face, clearly, indubitably, and quintessentially the kind of communication that is fully protected by the First Amendment.

The point is not simply that the two posters and the Nuremberg files contain no *explicit* threats that take them outside the free speech umbrella. We are not talking simply about ambiguous or implicit threats that depend on context for their meaning, such as the Ryder trucks in *United States v. Hart*, 212 F.3d 1067 (8th Cir.2000). Rather, the pivotal issue for me is that what the communications in this case *do* contain has all the attributes that numerous cases and commentators have identified as core factors underlying the special protection accorded communication under our Constitution.

***1102** The posters and website are all public presentations on a matter of current moral and political importance; they provide information to the public on that matter and propose a--peaceful, legal--course of action; and they were presented with explicit reference to great moral and political controversies of the past. Cases that are a virtual First Amendment "greatest hits" establish that these kinds of expressions--those that provide information to the public (particularly when directed at publicly-available media), publish opinions on matters of public controversy, and urge others to action--are the kinds of speech central to our speech-protective regime, and remain so even when the message conveyed is, in substance, form, or both, anathema to some or all of the intended audience. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self- government."); *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) (The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (The First Amendment "attempt[s] to secure the widest possible dissemination of information from diverse and antagonistic sources."); *Id.* at 271, 84 S.Ct. 710 ("The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered."); *Thornhill v. Alabama*, 310 U.S. 88, 102, 60 S.Ct. 736, 84 L.Ed. 1093 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."); *Thomas v. Collins*, 323 U.S. 516, 537, 65 S.Ct. 315, 89 L.Ed. 430 (1945) (" 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts."); *Terminiello v. City of Chicago*, 337

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U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) (Speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.").

Tested against these most basic premises, there can be no doubt that the documents upon which the damages judgment and injunction in this case were based were, on their face, "expression[s] of grievance and protest on one of the major public issues of our time," and, as such, documents that "would seem clearly to qualify for ... constitutional protection." *New York Times*, 376 U.S. at 271, 84 S.Ct. 710. The posters and website could not and would not have been proscribed, as "true threats" or otherwise, had there been no (1) history of similar--although not at all identical--publications put out by other people that were followed by murders-by other people, not members of either of the two defendant organizations--of health professionals who performed abortions; and (2) repeated advocacy by these defendants of the proposition that violence against abortion providers can be morally justified, advocacy that all concede was, standing alone, itself protected by the First Amendment. *See Brandenburg v. Ohio*, 395 U.S. 444, 447-48, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) ("[T]he mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.") (quoting ***1103** *Noto v. United States*, 367 U.S. 290, 297-98, 81 S.Ct. 1517, 6 L.Ed.2d 836 (1961)). [FN1] The precise question before us is therefore whether that context is sufficient to turn a set of communications that contain speech at the core of the First Amendment's protections into speech that can be proscribed pursuant to an injunction and compensated for through damages.

FN1. In so stating--and elsewhere in this opinion--I do not address the constitutional viability of a cause of action for putting another in harm's way by publicizing information that makes it easier for known or suspected potential assailants to find an intended victim. There was no such cause of action in this case, as Judge Kozinski observes, and I express no view upon whether or under what circumstances such a cause of action could be stated under the law, including under the First Amendment.

2. *An analogy:* Stated in those terms, the issue bears a close resemblance to that faced by the courts with regard to First Amendment limitations on defamation actions, beginning with *New York Times Co. v. Sullivan*. Like "true threats," false speech has long been understood as a category of communication that contains few of the attributes that trigger constitutional speech protection and so great a likelihood of harming others that we refer to the speech as being beyond the protection of the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Like "true threats," false, defamatory speech can severely disrupt peoples' lives, both by affecting them emotionally (as does apprehension of danger) and by impairing their social ties, their professional activities, and their ability to earn a living (as does the perceived need to protect oneself from physical harm).

The Supreme Court since the 1960s has developed a set of discrete principles designed *not* to provide false speech with constitutional protection, but to erect, on an ascending scale depending upon the perceived value of the particular kind of speech to the common dialogue that the First Amendment is designed to foster, doctrinal protections within defamation law that minimize self-censorship of truthful speech. Those protections are based upon realistic assessment of the vagaries of litigation and the fear of crippling damages liability. [FN2]

FN2. Similarly, the First Amendment's overbreadth doctrine extends some protection to speech that is without First Amendment value in order to limit self-censorship of speech that does possess this value. *See Massachusetts v. Oakes*, 491 U.S. 576, 581, 109 S.Ct. 2633, 105 L.Ed.2d 493 (1989).

For example, *New York Times* observed that "[a]llowance of the defense of truth ... does not mean that only false speech will be deterred," because "[u]nder such a rule, would be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." 376 U.S. at 279, 84 S.Ct. 710; *see also Gertz v.*

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Robert Welch, Inc., 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) ("[T]o assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise ... this Court has extended a measure of strategic protection to defamatory falsehood.") (internal citation omitted). Without a federal constitutional requirement focusing on the speaker's state of mind with regard to the truth of what he was saying (as well as careful scrutiny bythe courts of any jury verdict based purely upon speech), the Court concluded, there would be a distinct danger that fear of defamation liability would "dampen[ ] the vigor and limit[ ] the variety of public debate," to the detriment of First Amendment values. *Id.* The problem has been treated as one of balancing the very real injury caused by unwarranted ***1104** damage to reputation against the dangers to the system of free expression worked by rules of liability that are easy to misperceive or to misapply in particular instances. And the Court's answer to this problem has, as noted, been far from unitary. Instead, the balance has been struck with regard to subcategories of defamation cases, according to the nature of the communication, the nature of the parties and, to some degree, the purpose of the speech. [FN3]

FN3. *See New York Times*, 376 U.S. at 279-80, 84 S.Ct. 710 (a public official may not recover 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"); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (opinion of Warren, C.J., concurring in the result) (*New York Times* standard applies to defamation cases brought by public figures); *Gertz*, 418 U.S. at 347-49, 94 S.Ct. 2997 (*New York Times* standard not required for cases brought by private figure plaintiffs; instead, the states may only not "impose liability without fault" for the defamation of a private figure plaintiff--although a different standard may apply if "the substance of the defamatory statement [does not] make[ ] substantial danger to reputation apparent"--but the states "may not permit recovery of presumed or punitive damages" without proof of actual malice); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (opinion of Powell, J.) (states may allow private figure plaintiffs to recover, without proof of actual malice, presumed or punitive damages for defamatory speech "involving no matters of public concern.").

Our problem here is similar. Any "true threats" within the three communications at issue were encased in documents and public events that promoted--at least for those listeners not "in the know"--precisely the kind of "debate on public issues [that] should be uninhibited, robust, and wide- open, and that ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks...." *New York Times*, 376 U.S. at 270, 84 S.Ct. 710. True, the targeted medical professionals and clinics were not public officials, but they were engaged in activities that the defendants, rightly or wrongly, regarded as both morally reprehensible and a matter for eventual governmental proscription through the political process (presumably through a constitutional amendment). Moreover, as both the majority and Judge Kozinski recognize, the posters and website remained core First Amendment speech even though--quite aside from any coded threat of physical harm--they exposed the targeted plaintiffs to other, nonviolent but still extremely disturbing, interference with their daily lives (in the form of unwanted public exposure and inflammatory rhetoric directed at them, their families, and their customers, both at home and at work) and even if they induced fear in the plaintiffs that people *unconnected with the defendants* might harm them. [FN4]

FN4. I discuss below the constitutional importance of the latter requirement--that any proscribed threat communicate the intention of the speaker or his or her agents.

Under these circumstances, the question for me becomes devising standards that, like the constitutional defamation standards that vary with the strength of the protection of the communication, rely not on an unitary "true threats" standard, as does the majority, but on considerations that lessen the danger of mistaken court verdicts and resulting self-censorship to a greater or lesser degree depending upon the nature of the speech in question and the role of speech of that nature in the scheme of the First Amendment. [FN5]

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FN5. I note that there is one way in which the speech here differs from defamation: False, defamatory speech, even on matters of public concern, does not have *any* significant First Amendment value. *R.A.V.*, 505 U.S. at 383, 112 S.Ct. 2538. Although "true threats" also lack such value as a general matter, a "true threat" that includes only facially- protected speech nonetheless *does* have First Amendment value, because it not only is threatening but also has another meaning--the literal, facially-protected meaning--which here falls within the heart of First Amendment speech. For this and other reasons, the categories of defamatory speech and the rules applicable to them cannot rigidly determine the analysis applicable in threats cases.

***1105** 3. *Some constitutional parameters:* Judge Kozinski, in his dissent, makes one important suggestion toward this end with which, for all the reasons already canvassed, I fully agree: He suggests that "statements communicated directly to the target are much more likely to be true threats than those, as here, communicated as part of a public protest." Kozinski dissent at 7162. As a first cut at separating out the kinds of allegedly threatening communications that are central to First Amendment values and therefore must be tested by particularly stringent criteria before they can be prohibited, these two criteria--the public nature of the presentation and content addressing a public issue (which can include matters of social or economic as well as political import for the individuals involved, *see Bartnicki v. Vopper*, 532 U.S. 514, 535, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001); *Thornhill*, 310 U.S. at 102-03, 60 S.Ct. 736)--are critical.

In a rare instance, a threat uttered in the course of a public political protest might conceivably exceed the bounds of protected speech. *United States v. Kelner*, 534 F.2d 1020 (2d Cir.1976), is illustrative. (I am not aware of any case in this circuit in which a defendant was, as in *Kelner*, punished or held liable for a threat uttered in the course of public protest activity--a gap in itself telling with regard to the importance and novelty of this case.) In *Kelner*, a member of the Jewish Defense League stated at a press conference held in New York just before Yassir Arafat was scheduled to be in the city that "We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive.... We are planning to assassinate Mr. Arafat.... Everything is planned in detail .... It's going to come off." *Id.* at 1021. The press conference was broadcast on television that evening. [FN6] *Id.* The Second Circuit upheld the defendant's conviction for uttering the threat, over the objection that the speech was simply an extreme statement of opposition to Mr. Arafat, protected under the First Amendment as hyperbolic public discussion of a public issue. *Id.* at 1024-28.

FN6. During the press conference, Mr. Kelner, the defendant, "was seated in military fatigues behind a desk with a .38 caliber 'police special' in front of him," next to "another man ... dressed in military fatigues." *Id.* The gun and uniform seem to me simply a prop and costume designed to enhance the communication of seriousness of purpose, not proof that the defendant was involved contemporaneously in actual violence.

In doing so, the Second Circuit recognized that where the asserted threat "is made in the midst of what may be other protected political expression," courts must be vigilant to permit liability or conviction only in circumstances in which the danger to free expression is minimal; where that is the case, "the threat itself may affront such important social interests that it is punishable." *Id.* at 1027. The criteria the Second Circuit suggested to police the dividing line were that "the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." *Id.* Measured against these criteria, *Kelner* held that, although politically motivated and designed to convey a public position of protest to Mr. Arafat's ***1106** policies, the speech in question was not protected speech. *Id.* at 1028.

Kelner 's criteria for adjudging the protection accorded alleged threats uttered in the course of public communications on public issues seem appropriate to me--and, as I show below, consistent with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982)--with one exception, an addition, and some explication:

First, the exception: I would not include the imminence or immediacy of the threatened action as

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a prerequisite to finding a true threat delivered as part of a public speech, if all of the other factors were present. The immediacy requirement calls to mind the standard the Supreme Court erected for proscription of inciting speech in *Brandenburg*. But as the majority can be read to recognize and as Judge Kozinski well explains, the separate constitutional category of unprotected speech for threats does not include statements that induce fear of violence by third parties.

Where there is no threat, explicit or implicit, that the speaker or someone under his or her control intends to harm someone, a statement inducing fear of physical harm must be either (1) a prediction or warning of injury, or (2) an inducement or encouragement of someone else to cause the injury. The former is, as Judge Kozinski suggests, clearly entitled to protection under the First Amendment as either informative or persuasive speech. The latter kind of statement may or may not be protected. Whether it is or not must be governed by the strict inducement standard of *Brandenburg* if the more than fifty years of contentious development of the protection of advocacy of illegal action is not to be for naught. *See* *Brandenburg*, 395 U.S. at 447-48, 89 S.Ct. 1827 (overruling *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927)), and holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *see also id.* at 450-454, 89 S.Ct. 1827 (Douglas, J., concurring) (recounting the history of the "clear and present danger" doctrine for adjudging the constitutionality of restrictions upon advocacy of illegal action).

One can, however, justify a somewhat different standard for judging the constitutionality of a restriction upon threats than for a restriction upon inducement of violence or other illegal action. There is a difference for speech-protective purposes between a statement that one oneself intends to do something and a statement encouraging or advocating that someone else do it. The latter will result in harmful action only if someone else is persuaded by the advocacy. If there is adequate time for that person to reflect, any harm will be due to another's considered act. The speech itself, in that circumstance, does not create the injury, although it may make it more likely. The Supreme Court has essentially decided that free expression would be too greatly burdened by anticipatory squelching of advocacy which can work harm only indirectly if at all. *See* *Kelner*, 534 F.2d at 1027 n. 9 ("Short of [advocacy that is close, direct, effective and instantaneous in its impact] the community must satisfy itself with punishment of the one who committed the violation of law or attempted to do so, not punishment of the person who communicated with him about it.") (quoting Thomas Emerson, *The System of Freedom of Expression* 404-05 (1970)); *see also* *Ashcroft v. Free Speech Coalition*, 535 U.S. ----, 122 S.Ct. 1389, 1403, 152 L.Ed.2d 403 (2002) (because "the Court's First Amendment cases draw vital distinctions between words and deeds," the ***1107** government may not punish speech because it increases the chance that someone other than the speaker will commit an unlawful act).

A true threat, in contrast, implies a firmness of purpose by the person speaking, not mediated through anyone else's rational or emotional reaction to the speech. Threatening speech thereby works directly the harms of apprehension and disruption, whether the apparent resolve proves bluster or not and whether the injury is threatened to be immediate or delayed. Further, the social costs of a threat can be heightened rather than dissipated if the threatened injury is promised for some fairly ascertainable time in the future--the "specific" prong--for then the apprehension and disruption directly caused by the threat will continue for a longer rather than a shorter period. So, while I would police vigorously the line between inducement and threats--as the jury instructions in this case did, [FN7] although the majority opinion is less clear on this point--I would, where true threats are alleged, not require a finding of immediacy of the threatened harm.

> FN7. The jury in this case was instructed that "the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence is protected speech under the First Amendment," and that "[y]ou are not to consider any evidence that the three statements allegedly 'incite' violence against plaintiffs."

Second, the addition: Although this court's cases on threats have not generally set any state of mind requirements, I would add to the *Kelner* requirements for proscribable threats in the public protest context the additional consideration whether the defendant subjectively intended the specific victims to understand the communication as an unequivocal

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threat that the speaker or his agents or coconspirators would physically harm them. [FN8] Especially where the plaintiffs in such circumstances are relying *only* on surrounding context and are doing so to overcome the literal import of the words spoken, impairment of free public debate on public issues through self-censorship is a distinct possibility unless there is convincing proof that the literal meaning of the words was not what the defendants intended to convey.

> FN8. In *Kelner*, the jury was instructed that it needed to find that "Kelner 'intended the words as a threat against Yassir Arafat and his lieutenants.' " 534 F.2d at 1025. The *Kelner* court rejected a different intent requirement, namely, an intent to carry out the threatened action. *Id.* at 1025-27. The majority erroneously concludes that the dissenters would require that to find a "true threat," the speaker must have had the latter sort of intent--that is, the speaker must "actually intend to carry out the threat." *See* Majority Op. at 1075. To the contrary, there has been no intimation in either dissent that the speaker need have the intention, or the ability, to do so. Rather, I propose the inclusion of a "specific intent" requirement with regard to the speaker's intent *to threaten*-that is, a requirement that the judge or jury determine whether the speaker intended to place the listener in fear of danger from the speaker or his agents.

The subjective intent requirement for alleged threats delivered in the course of public protest comports with Supreme Court precedent, both directly and by analogy. Although the Supreme Court has yet to outline fully the constitutional limitations applicable to proscription of threats, in its most direct look at the subject the Court expressed "grave doubts" that a person could be liable for threatening expression solely on the basis of an objective standard. *Watts v. United States*, 394 U.S. 705, 707-08, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). A few months later, in *Brandenburg*, the Court held that in an incitement case, the plaintiff or the government must not only prove that a statement "is likely to incite or produce" ***1108** imminent lawless action, but must also prove that the statement "is directed to inciting or producing" such action. 395 U.S. at 447, 89 S.Ct. 1827. This latter requirement is a subjective intent prerequisite, as it turns the speaker's liability in an incitement case on how the speaker intends others to understands his words. *See also Hess v. Indiana*, 414 U.S. 105, 109, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (speech cannot be punished when no evidence exists that "words were intended to produce" imminent disorder).

With regard to this subjective intent requirement, there is no meaningful distinction between incitement cases and threat cases such as this one--that is, cases involving public protest speech, especially where the alleged threat, on its face, consisted entirely of advocacy. The First Amendment protects advocacy statements that are likely to produce imminent violent action, so long as the statements are not directed at producing such action. To do otherwise would be to endanger the First Amendment protection accorded advocacy of political change by holding speakers responsible for an impact they did not intend.

Similarly, a purely objective standard for judging the protection accorded such speech would chill speakers from engaging in facially protected public protest speech that some might think, in context, will be understood as a true threat although not intended as such. Unsure of whether their rough and tumble protected speech would be interpreted by a reasonable person as a threat, speakers will silence themselves rather than risk liability. Even though the Supreme Court has stated that protected political speech "is often vituperative, abusive, and inexact," speakers wishing to take advantage of these protected rhetorical means may be fearful of doing so under the majority's purely objective approach. *Watts*, 394 U.S. at 708, 89 S.Ct. 1399; *see also Rogers v. United States*, 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring). [FN9]

> FN9. The majority opinion does not appear to embrace any such subjective intent standard as a *constitutional* requirement, but does suggest that any such requirement was met here through the instruction on FACE's statutory elements. The jury, however, was specifically instructed several times, quite emphatically, that there is *no* subjective intent requirement in adjudging whether or not a statement is a "true threat." In closing argument, counsel for plaintiffs also informed the jury that subjective intent was not relevant. Further, in a separate instruction devoted to the case's various intent issues, the trial judge reminded the jury that it *did* have to find some form of

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intent when it considered the RICO charges against the defendants and when it considered punitive damages, but did not state that the jury had to find intent when considering whether the defendants violated FACE.

The very next instruction concerned the FACE cause of action and stated, ungrammatically and nearly incoherently, that the plaintiffs must prove that the defendant "made the threat of force to intimidate ... the plaintiff's ... ability to ... provide reproductive health services." Although "intimidate" was defined, correctly, as "place a person in reasonable apprehension of bodily harm," the FACE instruction *left out* the statute's clear motive or purpose requirement--that to be liable the defendant must act "because that person is or has been, or in order to intimidate such person ... from ... providing reproductive health services," 18 U.S.C. § 248(a)(1), substituting a confused and confusing locution. A jury specifically and repeatedly admonished not to take into account the defendants' subjective intent would not likely understand the obscure FACE instruction as a requirement that it should do so.

There was also a RICO cause of action with separate elements. While the RICO instruction required, in addition to a true threat, an "intent of depriving a plaintiff of his or her ... protected right to provide abortion services," that is not equivalent to requiring an intent to communicate that the speaker or his or her confederates would physically injure the plaintiff.

***1109** When the district court issued the injunction against the defendants, the court, for reasons it does not explain, relied on a different definition of threat than the one it instructed the jury to use. In contrast to the definition relied upon by the jury, the definition used for purposes of the injunction correctly incorporated the subjective intent requirement mandated by the First Amendment. *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F.Supp.2d 1130, 1155 n. 1 (D.Or.1999). In addition, the district court found that the defendants did intend to threaten. As a result, the injunction comes close to conforming on its face to the dictates of the First Amendment. The injunction still falls short, however, because the district court did not state that a threat must be unequivocal, nor did it find the posters to be unequivocal threats. As I explain below, any definition of threats that does not include the unequivocal requirement provides too little protection for public political speech. [FN10]

FN10. Part of the injunction fails to comply with the First Amendment for an additional reason. The injunction not only prevents the defendants from further distributing the posters, it also prevents them from possessing the posters or their equivalents. In effect, this latter part of the injunction regulates the type of written materials that the defendants may possess in the privacy of their homes, directly contradicting the Supreme Court's holding in *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969):

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Id. at 565; *see also Free Speech Coalition*, 122 S.Ct. at 1403 ("First Amendment freedoms are most in danger when the government seeks to control thought. ").

The majority nonetheless upholds the injunction against possession of the posters, distinguishing *Stanley* on the basis that "the posters in this case are quite different from a book; the 'wanted'--type posters themselves--not their ideological content--are the tool for threatening physicians. In this sense, the posters' status is more like conduct than speech." Majority Op. at 1087. But, whatever else they may be, the posters are speech--they express ideas through the use of words and pictures.

The majority also asserts that the "First Amendment interest in retaining possession of the threatening posters is *de minimis*, while ACLA's continued possession of them constitutes part of the threat." *Id.* at 1087. This summation ignores the fact that the posters do have First Amendment value--they express ideas about one of the most contentious political and moral issues of our time. And confined to the defendants' homes, the posters do not place anyone in

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> apprehension of danger or disrupt their lives; they only influence "the moral content of [the defendants'] thoughts." *Stanley*, 394 U.S. at 565, 89 S.Ct. 1243. As such, the First Amendment value of the posters is not outweighed by any competing considerations.

Third, the explication: "Unequivocal" cannot mean literal: Ryder trucks, in the United States in the 1990s, and burning crosses, in the United States in the twentieth and twenty-first centuries, have unambiguous meanings that the individuals targeted will be hurt (at least unless they do what the perpetrator of the threat wants them to do, whether it be stop performing abortions or move out of town). Instead, "unequivocal" means to me unambiguous, given the context. As such, the requirement is essentially a heightened burden of proof, requiring that a threatening meaning be clearly and convincingly apparent. And in determining whether that proof standard has been met, I would continue to apply the objective standard the majority embraces, based on our cases, in determining whether the speech in fact communicates an intent to harm specific individuals.

***1110** This case, I repeat, is uniquely difficult because to perceive a threat, one must *disregard* the actual language used and rely on context to *negate* the ordinary meaning of the communication. Further, the actual language is, in its own right, core First Amendment speech, speech that to a naive reader communicates protected information and ideas. So the crux of the plaintiffs' cause of action (once one accepts that only statements that evince an intention by the speaker or his or her agents to carry out the threat can be actionable) is really an assertion that the defendants were using Aesopian language or could be understood as doing so, and that the context in which the speech must be viewed provides the necessary evidence of the defendants' true, albeit coded, meaning. [FN11]

> FN11. The term "Aesopian language" developed in Tsarist Russia to refer to language that, like Aesop's fables, disguises the true meaning of speech by the use of metaphors, symbols and analogies, in order to avoid censorship.

The first set of contextual evidence involves the poster /~murder / poster / murder pattern the majority principally relies upon. Had the murders--or any murders, or any serious violence--been committed by the defendants and had the plaintiffs known that, the inference from the poster/murder pattern that the publication by them of posters similar to those previously followed by a murder might be a strong one. [FN12] The inference would be stronger had the defendants also put out the earlier posters and had the plaintiffs known that. Neither is the case.

> FN12. One defendant had been convicted of serious violence some years before the posters and website were published, so I except him from this part of the discussion.

Plaintiffs' main submission to fill this gap was extensive evidence concerning the defendants' opinions condoning the use of violence against medical professionals who perform abortions, including general statements to that effect and particular statements concerning the people who murdered the doctors depicted on the previous posters, stating that their actions were justified and that they should be acquitted. Plaintiffs' closing argument, for example, went on for pages and pages about defendants' meetings and writings concerning the "justifiability of the use of force."

This evidence is certainly of some pertinence as to what the defendants may have intended to do. [FN13] It is more likely that someone who believes in violence would intentionally threaten to commit it. It is also pertinent to what persons in the plaintiffs' position-that is, persons involved in the abortion controversy and alert to the division of opinion within it--would likely understand concerning defendants' communication. Individuals who believe in violence are not only more likely to *threaten* to commit it but also actually to commit it, and so defendants' views might well influence plaintiffs' perception of their speech. And since the defendants would know that, defendants' *public* statements approving the use of violence against doctors who perform abortion are relevant to whether reasonable speakers in defendants' position would expect their communications to be understood as threats.

> FN13. I note that on the instructions actually given to the jury, it is not easy to perceive the pertinence of much of this evidence. In particular, apart from extensive evidence of

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> defendants' public statements concerning violence against abortion providers, there was also a great deal of evidence concerning their statements in meetings among anti-abortion activists. The jury was instructed that although speech can be a "true threat" no matter what defendants' subjective intent, that intent is nonetheless pertinent context. I am not sure I see why, but since I would make subjective intent directly relevant, the point is not of great importance to this dissent.

***1111** At the same time, heavy reliance on evidence of this kind raises profound First Amendment issues of its own. One can not read plaintiffs' closing argument in this case without fearing that the jury was being encouraged to hold the defendants liable for their abstract advocacy of violence rather than for the alleged coded threats in the posters and website, the instructions to the jury to the contrary notwithstanding. And while advocacy evidence may make both an intent to threaten and a perception that there was a threat more likely, that is not unequivocally so. People do not always practice what they preach, as the stringent incitement standard recognizes. If we are serious about protecting advocacy of positions such as defendants' sanctioning of violence, as we are constrained to be, then permitting that protected speech to be the determinative "context" for holding other facially protected, public protest speech--the posters and website in this case--to be a "true threat" seems to me simply unacceptable under the First Amendment.

Finally, I note that the approach I've outlined here fully comports with *Claiborne Hardware*. *Claiborne Hardware* applied an "extreme care" standard in determining "liability on the basis of a public address-which predominantly contained highly charged political rhetoric." 458 U.S. at 926-927, 102 S.Ct. 3409. It went on to note that "[i]n the passionate atmosphere in which the speeches were delivered, they *might* have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended." *Id.* at 927, 102 S.Ct. 3409 (emphasis added). After reviewing the actual words used in context, however, the Court concluded that "Evers' addresses did not exceed the bounds of protected speech." *Id.* at 929, 102 S.Ct. 3409. As I read the opinion, it held, essentially, that the supposed threats were not on their face unequivocal and were not made unequivocal by any contextual factors. So here.

I would therefore hold that under the special rules I would apply to public protest speech such as that in this case, plaintiffs' judgment cannot stand because, after a proper review of the record, we would have to conclude that there was no unequivocal, unconditional [FN14] and specific threat. [FN15]

> FN14. "Unconditional" refers to the degree of determination contained in the threat, not whether it is "conditioned" in the sense that the target could avoid the harm by bowing to the speaker's will.

> FN15. I note as well that the majority, while it articulated a *de novo* review standard with respect to the true threat standard it did apply, did not in fact review the record with an eye to First Amendment concerns such as those I have discussed, nor did it include the intent issue within its review. (Actual malice, a state of mind standard, is precisely the issue upon which the Supreme Court has closely scrutinized the record in defamation cases. *See, e.g.*, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989)).

II
Federal Law Enforcement Officers' Testimony Regarding Threats

I also disagree with the majority's conclusion that permitting law enforcement officers to testify as to their opinions about the meaning and import of the posters at issue was within the district court's discretion. The government may not seek to persuade a jury that certain speech contains characteristics that place it outside the realm of constitutionally protected speech by providing in testimony, as opposed to in a criminal indictment, its "nonjudicial determination" on the ultimate legal ***1112** issue to be decided. *Hill v. Rolleri*, 615 F.2d 886, 890 (9th Cir.1980).

The district court permitted the officers to repeat in testimony the warnings that the officers gave the plaintiffs after the release of the posters, purportedly in order to show the plaintiffs' state-of-mind in response to the posters. Under this rationale, the

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testimony had very little, if any, relevance to the issues before the jury, and, especially in light of the First Amendment concerns the testimony raises, the resulting prejudice greatly outweighed its minimal probative value. The district court, therefore, abused its discretion in failing to exclude this testimony under Fed.R.Evid. 403. [FN16]

FN16. Rule 403 provides:
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

1. *The testimony:* The district court permitted the plaintiffs to call to testify an FBI agent, with 25 years experience, and two United States Marshals, one with 26 years and the other with 14 years experience. The following testimony was given:

"I told her that I was in receipt of *threat information* in the form of a flyer."
"That I had received a copy of a list called the Deadly Dozen List, which listed 13 doctors, who perform abortions, and that it was *threatening in nature* ...."
"I told her that I thought that her teachers, the teachers of her children, should know about *this threat,* as well, in order to maintain the security of the children."
"I told her that the children should be aware of--of *the threat.*"
"I told him that he was on *a threat list* ...."
"I told her that if she received *additional threats* or wanted protection, these were the numbers to contact ...."
"And we discussed the reasons we believed that *the threat was serious* .... We discussed the escalation in the incidents over the prior couple of years. We talked about the murder of Dr. Gunn in Florida. We talked about shootings involving Dr. Tiller in Kansas. We talked about shootings involving Dr. Christ. We talked about Michael Bray and his affiliation with the American Coalition of Life Advocates."
"Well, because of *the nature of the threats,* and--I asked Dr. Hern to--he had a bulletproof vest. I thought it would be a good thing if he wore that."

(emphases added). The testimony not only revealed the individual law enforcement officers' opinions of the meaning of the posters, but also informed the jury about the opinion of "headquarters," as follows:

"I told him ... that *I had been given instructions* to notify--*to immediately notify him,* so that he could take some personal precautions for his safety."
"I was contacted by my *headquarters in Washington, D.C.* ... I advised her that the Marshal's Service was offering her protection, because her name appeared on the list, and stated that if she wanted protection, I would forward the request to our headquarters, who would then forward it to *the Department of Justice.*"
"*I was directed by my headquarters to immediately contact Dr. Warren Hern, because he was listed on the--the document. But, additionally, I was directed to contact all of the clinics in the district of Colorado." The officer further testified that he did contact all of the clinics in Colorado.*
***1113** "*[H]eadquarters was taking this threat very seriously.*"
"I explained to Dr. Hern that Michael Bray had been a conspirator in--or involved in a conspiracy to blow up several abortion clinics. And because of his affiliation, in addition to the other things we discussed, that *my headquarters believed that this was [a] serious threat, and something that-- that we had to act on immediately.*"

(emphases added).

My major concern here involves the First Amendment repercussions of allowing testimony by government employees as to the government's opinion concerning whether speech is outside the First Amendment's protections. In keeping with traditional Rule 403 analysis, however, I first explain why the testimony did not serve to elucidate any of the issues properly before the jury and then turn to the prejudicial effect the testimony had on the defendants' First Amendment rights.

2. *Basic Rule 403 analysis:* The majority holds the law enforcement testimony probative because it has "some tendency to show the physicians' state of mind when they found out they were named on 'wanted'--type posters...." Majority Op. at 1082. Under the definition of a true threat that the majority uses (and under the one I would adopt, *see* Part I, *supra*) the *plaintiffs'* state of mind is relevant only to the extent that it tends to show "whether a reasonable person would foresee" that the plaintiffs would interpret the posters as threats. Majority Op. at 1074. The officers' testimony concerning the warnings muddled rather than illuminated the inquiry into the question how a reasonable lay person would understand the posters, as that testimony revealed the officers'

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reaction to the posters, not the plaintiffs'. The true threat standard focuses on how "those to whom the maker communicates the statement" would "interpret[ ]" it, not on the government's determination of whether a threat was made. *See id.* So the officers' reaction to the posters is largely irrelevant. Further, to the extent the testimony did tend to show the plaintiffs' state of mind, it suggested what the plaintiffs' reaction may have been to the officers' warnings or to the combination of learning about the posters and receiving the warnings, not simply to the posters themselves.

During the testimony of one of the officers, the district court instructed the jury to consider the testimony only for what it revealed about the state of mind of the recipient of the warnings and not to take the testimony as an "administrative decision" that the posters constituted true threats. To the extent that the officers' testimony did bear on any pertinent issue--which, as I indicated above, is little if at all--the court's limiting instruction did not do much to maintain the jury's focus on this issue, as the court did not repeat the instruction when each of the law enforcement officers testified, nor did the court instruct the jury on this issue before deliberations, despite the defendants' request that the court do so.

It is unlikely that a jury can put aside the opinions of an FBI agent and United States Marshals--and their headquarters--as to the nature of the speech and instead focus solely on how those opinions bore on the plaintiffs' state of mind. *See* United States v. Gutierrez, 995 F.2d 169, 172 (9th Cir.1993) ("[T]he expert testimony of a law enforcement officer ... often carries an aura of special reliability and trustworthiness.") (quoting United States v. Espinosa, 827 F.2d 604, 613 (9th Cir.1987)). On traditional evidentiary grounds alone, such testimony should not be admitted in threats cases.

3. *First Amendment-related prejudice:* Turning now to the issue I find most troubling, *1114 the First Amendment ramifications of the law enforcement officers' testimony:

Admitting testimony by law enforcement officers as to whether certain speech has the primary characteristic of an unprotected category (for instance, is a serious threat, or is obscene, or is false) allows the government not only to prohibit or burden that category of speech (true threats, obscenity, defamation), but also persuasively to shape the jury's determination of what speech falls into the unprotected category. The obvious risk is that the government will use its "aura of special reliability and trustworthiness," Gutierrez, 995 F.2d at 172, to describe as undeserving of constitutional protection speech that in fact is only unpopular with the government. In Watts, the Court looked to the reaction of those to whom the speech was directed to determine how the speech should be taken. 394 U.S. at 708, 89 S.Ct. 1399. Had the Secret Service run to the President to inform him of Watts' speech and warn him of the "threat," the Secret Service's reaction, and the President's resulting fear, presumably would not have been allowed to override the reaction of the actual audience to the speech.

Furthermore, the officers' testimony here quite naturally tended to blur the lines between various categories of speech--true threats, incitement, and perhaps some form of "putting in harm's way"--and therefore risked a jury finding of liability for speech that may not fall within the "threat" category as narrowly defined for First Amendment purposes. The officers testified that they told the plaintiffs the speech was a threat and one that should be taken seriously, but there is no indication that the officers distinguished between a "true" threat--a threat of violence by the speaker--and speech warning that a third party would harm the plaintiffs or speech containing a threatening quality because of its tendency to incite others or to put the plaintiffs in harm's way. Nor did the district court instruct the jury that the officers might use the term "threat" in a way that differed from the type of "threat" that does not receive constitutional protection.

The majority also concludes that the district court properly admitted the officers' testimony "to show the knowledge and intent of ACLA in distributing the posters regardless of the reaction they precipitated." Majority Op. at 1082. Testimony as to the statements made by the officers to the plaintiffs has littlerelevance to the intent and knowledge of the defendants. And, more importantly, the same First Amendment concerns come into play here: Under this rationale, if federal law enforcement officials dislike certain speech, they can take a substantial step towards rendering it unprotected by expressing publicly the view that such speech is threatening, because if the speaker then repeats the speech he does so with knowledge of the reaction it precipitated.

To the extent that our law allows law enforcement officers otherwise to testify directly on ultimate factual and legal questions that the jury must decide, we should draw the line at permitting the use of this persuasive aura in testimony that certain speech is of

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such a nature that it is undeserving of constitutional protection. Permitting such testimony cannot be reconciled with the role of the First Amendment to protect freedom of speech from suppression by the government.

III
Deposition Summaries

The majority approves--quite in passing--the district court's insistence that the parties submit *as evidence* summaries of deposition testimony, not the testimony itself. Majority Op. at 1083. As I read ***1115** Federal Rule of Civil Procedure 32, which governs the admission of deposition testimony, it does not permit the substitution of summaries for actual testimony. Nor is there anything in the Federal Rules of Evidence or this court's case law to the contrary. Rather, it is a fundamental precept of our system for ascertaining facts that a jury is entitled to learn what a witness actually *said*, rather than an inexact rendition presented by counsel (and probably initially drafted by paralegals).

Language can be subtle, ambiguous and malleable. Paraphrases, as any judge reading lawyers' briefs knows, are no substitute for quotation of the actual words spoken by a witness. As often as not, a check of the transcript will reveal that the language the witness actually spoke, in context, may well mean something other than what counsel has represented.

That does not mean that counsel is lying, but that shades of meaning can be critical. "[A]s the childhood game of 'telephone' well demonstrates, words change significantly in the course of their re-telling by third parties." *United States v. Pena-Espinoza*, 47 F.3d 356, 364 (9th Cir.1995) (Reinhardt, J., dissenting). Indeed, the game of "telephone" requires only that a listener repeat the exact language that he or she heard; a summary, in contrast, necessarily requires the more subjective choice of *different* words to convey the general idea communicated by the original language. "There is simply no way to summarize the contents of a transcript without offering to some degree a subjective view of their meaning and import." *Id.* Because that is so, summaries of witnesses' testimony are likely to distort the import of the actual testimony given and so impede the jury's search for truth.

Our legal system recognizes, in various contexts, that the same set of words may frequently lend itself to more than one reasonable interpretation. *See, e.g., Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). There is no reason to believe that a lawyer will not adopt the interpretation most favorable to his or her client, so long as the interpretation is reasonable, even if not perhaps the most reasonable. *See United States v. Leon-Reyes*, 177 F.3d 816, 820 (9th Cir.1999) ("Summaries are normally prepared by an interested party and therefore may not be completely accurate or may be tainted with the preparing party's bias."). In our adversary system, it is the role of the trier of fact--not the advocate--ultimately to determine the meaning of witness testimony.

Further, access to the actual language a witness used--even on a cold record--is often essential to determining the witness's credibility and hence the weight, if any, to be accorded the testimony. Equivocations, hesitations, and internal contradictions may all be smoothed over by summaries that purport to extract the content of a witness's testimony. Requiring counsel to summarize testimony without allowing the trier of fact to have access to the testimony itself necessarily precludes the trier of fact from properly exercising his or her truth-determining role.

The record here provides concrete examples of various ways in which summaries can distort the import of the actual testimony and thereby impair the truth- ascertaining process. For instance, the summary of Michael Dodds' deposition condensed inaccurately the testimony he gave. The summary stated:

> The other physician, on the Deadly Dozen List, from Dodds' region, Dr. Douglas Karpen, is from the Houston, Texas, area. Dodds believes that defendant Donald Treshman provided that name.

What Dodds actually said in his deposition regarding the source of Karpen's name for ***1116** the Deadly Dozen list was "I don't know." [FN17]

> FN17. The district court did not allow Treshman to respond in his closing argument to the plaintiffs' argument based on the summaries because the actual transcripts were not in evidence.

The deposition of Roy McMillan provides an example of testimony that could reasonably be interpreted in either of two ways, but the summary provided the jury with only one interpretation. The summary stated:

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> As for the additional murder of Mr. Barrett [Dr. Britton's escort], McMillan felt that if it was, quote, right for one person, it would be right for someone else, end quote.

A look at McMillan's deposition transcript (which the defendants introduced in rebuttal) sheds a somewhat different light on the quotation included in the summary. In his deposition, McMillan was first asked about a petition in support of Michael Griffin, who killed Dr. Gunn, and then asked about "the second petition which was for Mr. Hill," who killed Mr. Barrett and Dr. Britton. The testimony went as follows:

> [Answer:] This is identical--pretty much identical to the one that was circulated about the first abortionist's termination. And this was--this, the second one was regarding Paul Hill.
>
> Question, and this one was put out by Michael Bray, is that right?
>
> Answer, I am not sure who put it out, but I concurred that if it was right for one person, it would be right for someone else.

Thus, it appears that McMillan likely meant that if a petition in support of Griffin was right, so too was a petition in support of Hill. Either way, the interpretation should have been left entirely to the jury. (It is quite unlikely that this difference in meaning could have substantively affected the verdict, but that conclusion would require a separate inquiry.)

Finally, the record here also contains summary language that although technically accurate may nonetheless have conveyed a subtly different, but potentially important, sense of the speaker or of the events described from the testimony itself. Thesummary of Dawn Stover's deposition began with the sentence:

> Dawn Stover is the associate director of defendant Advocates for Life Ministries....

Here is the excerpt from Stover's deposition transcript:

> Question, are you still the associate director of Advocates for Life Ministries? Answer, I would guess that, but I have been inactive for so long that--I am still affiliated. I still talk to a couple of people in Advocates, but I don't do any directing and haven't done any directing for years. So-- and having a title has never been that big of an issue. Question, was that ever a paid position? Answer, no. Question, so you don't know whether or not your status is currently associate director in terms of the eyes of the organization? Answer, I honestly don't know how they would perceive me as. I don't know, just because I have been inactive for so long, but they may still.

Certainly, the jury reasonably could have found from Stover's testimony that she "is the associate director" of Advocates for Life Ministries, as the summary stated. At the same time, however, the jury might have considered Stover's current role in the organization as quite different depending on which of the above versions of her testimony they heard. One set of words rarely conveys precisely the same meaning as a second, truncated version.

The majority today pays no heed to all these "dangers of witnesses summarizing ***1117** oral testimony." *United States v. Baker*, 10 F.3d 1374, 1412 (9th Cir.1993), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir.2000), and instead notes, without qualification, only that the presentation of deposition testimony "in the form of summaries was within the court's discretion under Rule 611(a)." Majority Op. at 1083. The very first mandate of Rule 611(a), however, requires the trial court to "make the interrogation and presentation [of evidence] effective for the ascertainment of truth." Fed.R.Evid. 611(a)(1). [FN18] For all the reasons just discussed, substituting summaries of testimony for a word-for-word transcript itself can hardly serve as an "effective" mode "for the ascertainment of truth." *See id.*

> FN18. Rule 611(a) provides in its entirety:
> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Moreover, it is Fed. R. Civ. Proc. 32, not Rule 611(a) of the Rules of Evidence, that directly, and with particularity, governs the presentation of deposition testimony. As I read it, Rule 32 decidedly does *not* permit courts to authorize the use of summaries in place of actual testimony.

Rule 32 begins with this general provision:

> At the trial ... any part or all of a deposition, *so far as admissible under the rules of evidence applied as though the witness were then present and testifying*, may be used....

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Rule 32(a) (emphasis added); *see also* Rule 32(b) ("[O]bjection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying."). A witness who is "present and testifying" is doing just that--"testifying," not providing capsule versions of his or her testimony. And using "any part or all of a deposition" does not equate to using a paraphrased, condensed version of a deposition, any more than a course syllabus directing students to read "Hamlet" intends to subsume within that directive the Classic Comics version of "Hamlet."

Rule 32 also specifically addresses the "Form of Presentation" of deposition testimony, giving no indication that a district court may admit a summary of deposition testimony in lieu of the testimony itself. The pertinent section states, in relevant part:

> Except as otherwise directed by the court, a party offering *deposition testimony* pursuant to this rule *may offer it in stenographic or nonstenographic form*, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered.

Rule 32(c) (emphasis added). The rule therefore clearly anticipates the admission of stenographic or nonstenographic forms of *testimony*, not summaries. [FN19] Although ***1118** Rule 32(c) does apply "[e]xcept as otherwise directed by the court," this caveat is most sensibly read to give the court discretion to direct either stenographic or non-stenographic presentation of deposition testimony, not to permit the presentation as "evidence" of summaries that approximate but do not reproduce the language the witness used in *any* form.

> FN19. The rules make clear that "nonstenographic" refers to audio or visual recording. *See, e.g.*, Rule 32 Advisory Comm. Note: ("This new subdivision [c] ... is included in view of the increased opportunities for video-recording and audio-recording of depositions under revised Rule 30(b)."); Fed. R. Civ. Proc. 30(b)(2) ("Any party may arrange for a transcription to be made from the recording of a deposition taken by non- stenographic means."); Rule 30 Advisory Comm. Note ("The primary change in subdivision (b) is that parties will be authorized to record deposition testimony by nonstenographic means without first having to obtain permission of the court or agreement from other counsel."); Rule 30 Advisory Comm. Note ("A party choosing to record a deposition only by videotape or audiotape should understand that a transcript will be required by Rule 26(a)(3)(B) and Rule 32(c) if the deposition is later to be offered as evidence at trial ...."); Rule 26(a)(3) ("[A] party must provide ... the following information regarding the evidence that it may present at trial ...:(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony.").

Bolstering this conclusion regarding Rule 32(c), Rule 28 provides for the taking of depositions in foreign countries "pursuant to a letter of request," and expressly grants the district court the discretion to admit the response to such a letter even if it is not a "verbatim transcript" of the testimony or if it exhibits "any similar departure from the requirements for depositions taken within the United States under these rules." *See* Rule 28(b). The assumption quite obviously underlying Rule 28 is that any report of testimony other than a "verbatim transcript" *is* a "departure from the requirements for depositions taken within the United States under these rules."

More generally, Rule 32 demonstrates an overall preference for the presentation of testimony in the manner that, to the extent practical, best provides the jury with complete information concerning the witness's demeanor. Rule 32(a), for example, clearly favors live testimony over deposition evidence by limiting the use of depositions to three situations: when an adverse party is the deponent; for impeachment purposes; or when the deponent is not available to testify at trial. Rule 32(a)(1)-(3). By so doing, the rule reflects the historical belief that live testimony better enables the jury to adjudge the credibility of a witness and therefore to determine the weight and import ascribed to the witness's testimony. Deposition testimony is itself only second-best.

When the rules do allow the admission of deposition testimony in a jury trial, Rule 32(c) permits a party in some instances to insist upon the presentation of testimony in "non-stenographic form," allowing the jury to hear and/or see the testimony as it was given. Rule 32(c) ("On request of any party in a case tried before a jury, *deposition testimony* offered other than

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for impeachment purposes *shall be presented in nonstenographic form*, if available, unless the court for good cause orders otherwise.") (emphasis added). Rule 32(c), by favoring audio and video recordings over the reading of a cold transcript, therefore establishes a preference for testimony that is the most like live testimony. Under this scheme, the presentation of deposition testimony in stenographic form is third-best.

Such presentation, however, at least allows the jury to hear or read the actual words used by the witness. Deposition summaries, unless accompanied by a transcript of the testimony, deprive the jury of even this opportunity. With Rule 32's clear preference for live testimony, or for testimony most resembling it, it makes little sense to think the rule tacitly allows for this new, fourth-best, form of evidence, so far removed from the in- person live testimony for which it is a substitute. I conclude that Fed. R. Civ. Proc. Rule 32 withholds from district courts the authority to require the substitution of summaries of deposition testimony for the testimony itself, where truth and falsity are at issue, and that the general language of ***1119**Fed.R.Evid. Rule 611 cannot override that determination.

There is nothing in our case law to the contrary. We have, while expressing great caution, allowed summaries of evidence in narrow circumstances, but never as a complete substitute for actual transcripts on material matters of historical fact.

For instance, in *Leon-Reyes*, 177 F.3d at 820, a perjury case, we held that the district court did not abuse its discretion in allowing the use of summaries of testimony from a prior trial in which the defendant had allegedly committed perjury, emphasizing that the district court instructed the jury to consider the summaries only for determining the materiality of the false statements and not for the truth of the witnesses' underlying testimony. *Pena-Espinoza*, 47 F.3d at 360, permitted--although making clear that it did "not wish to condone such procedures"--admission of summaries prepared by the prosecution of telephone call transcripts. The court specifically noted that:

> The transcripts themselves were in evidence and the jury had them to examine during deliberations; the ruling expressly permitted defense counsel to require a reading of the full transcript on cross-examination and to dispute the veracity of the readers' summaries.

Id. Similarly, *Baker*, 10 F.3d at 1411-12, found district court discretion pursuant to Fed.R.Evid. 611(a) to permit a government witness to present summary testimony and a chart estimating, on the basis of testimony at trial, the value of narcotics transactions. Critically, the district court made clear to the jury that the testimony and chart did *not* constitute evidence:

> The [district] court instructed the jury that the summary testimony and exhibits were not evidence, did not represent an opinion of the court or the prosecution on the credibility of witnesses, and were to be disregarded to the extent the jury found them conflicting with the testimony and evidence received at trial.

Id. at 1411. As in *Pena-Espinoza*, the *Baker* court emphasized that this court is "not blind to the dangers of witnesses summarizing oral testimony" and that "such summaries should be admitted under Rule 611(a) only in exceptional cases." *Id.* at 1412.

Thus, when this court has upheld the admission of summary evidence under the abuse of discretion standard, we have done so not as a *substitute* for transcript evidence on matters of historical fact, but either on issues *other* than the truth of the matter testified to or as an assistance to the jury, while also including the actual transcripts in the record for the use of the jury or reviewing courts. And none of our cases discuss the provisions of Fed. R. Civ. Proc. Rule 32, because none of them involved deposition summaries as opposed to summaries of other forms of evidence. [FN20]

> FN20. Although the Fourth, Fifth, and Seventh Circuits have generally approved the use of deposition summaries for the oral presentation of deposition evidence, I have found no case in which it is clear that the pertinent portions of the transcripts were not also admitted as evidence and available for jury review. *See Oostendorp v. Khanna*, 937 F.2d 1177, 1179-80 (7th Cir.1991); *Walker v. Action Indus., Inc.*, 802 F.2d 703, 712 (4th Cir.1986); *Kingsley v. Baker/Beech Nut Corp.*, 546 F.2d 1136, 1141 (5th Cir.1977) (deposition transcripts definitely admitted as evidence).

This is not a case in which the parties reached any agreement as to the summaries presented, so I do not consider whether such an agreement would be permissible. Nor did the defendants agree to the use of summaries at all; instead, they maintained a continuing objection to this procedure. And the district court did not review or ***1120** revise the

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summaries after receiving objections prepared by the defendants, as it had originally planned to do. *Cf. Leon-Reyes*, 177 F.3d at 820 ("Summaries ... must be scrutinized by the trial court to ensure that they are accurate, complete, not unduly prejudicial, limited to the relevant issues, and confined by appropriate jury instructions.").

The district court did allow the defendants to present counter-summaries, colored with argument, and, in rebuttal, to introduce excerpts from the transcripts. Such an adversarial procedure, however, does not ensure that the jury will have before it the evidence necessary to informed decision-making. The party responsible for summarizing the testimony may have little reason to move for the admission of the underlying testimony, precisely because that party may prefer its summary to the testimony itself. Likewise, the adverse party will, hopefully, point out blatant inconsistencies between the summary and the testimony, but may choose otherwise to avoid providing the jury with testimony that largely supports a summary introduced by the other side.

Nevertheless, the fact remains that the jury must have the opportunity to review the actual evidence--the transcripts of the testimony--when deliberating as to the meaning of testimony. It is nonsensical to expect the jury to determine the credibility of witnesses and testimony, the special province of the jury, without providing the jury with access to that testimony. Just as we, as judges, do not read attorneys' paraphrases of statutes when we try to discover what the legislature meant, *see* Fed. R.App. Proc. Rule 28(f), jurors cannot sensibly evaluate the meaning and credibility of words without knowing what those words are.

One final note: The majority presumably finds that the district court has the discretion under Rule 611(a) to require deposition summaries in lieu of the testimony itself in order to "avoid needless consumption of time." Rule 611(a)(2). Because the presentation of deposition summaries, without the agreement of the parties and the admission of the corresponding excerpts, is not "effective for the ascertainment of truth," Rule 611(a)(1), the consumption of time caused by the presentation of actual testimony is not "needless." Moreover, by providing an additional issue for the parties to dispute, the use of summaries is just as likely to increase as to decrease the time spent by counsel and by the court.

I recognize that district courts can and should reasonably limit the amount of time expended on the presentation of deposition testimony. This authority does not, however, give trial courts the discretion to replace such testimony entirely with a Reader's Digest Condensed Books version.[FN21]

FN21. I do not address whether the use of deposition summaries in this case was harmless error, *see Cerrato v. San Francisco Cmty. Coll. Dist.*, 26 F.3d 968, 974 (9th Cir.1994) ("The harmless error standard in civil cases is whether the jury's verdict is more probably than not untainted by the error."), because the majority does not so hold.

IV.
Conclusion

As waves of fervent protest movements have ebbed and flowed, the courts have been called upon to delineate and enforce the line between protected speech and communications that are both of little or no value as information, expression of opinion or persuasion of others, and are of considerable harm to others. This judicial task has never been an easy one, as it can require--as here-- recognizing the right of ***1121** protesting groups to question deeply held societal notions of what is morally, politically, economically, or socially correct and what is not. The defendants here pose a special challenge, as they vehemently condone the view that murdering abortion providers--individuals who are providing medical services protected by the Constitution--is morally justified.

But the defendants have not murdered anyone, and for all the reasons I have discussed, neither their advocacy of doing so nor the posters and website they published crossed the line into unprotected speech. If we are not willing to provide stringent First Amendment protection and a fair trial to those with whom we as a society disagree as well as those with whom we agree--as the Supreme Court did when it struck down the conviction of members of the Ku Klux Klan for their racist, violence--condoning speech in *Brandenburg*--the First Amendment will become a dead letter. Moreover, the next protest group--which may be a new civil rights movement or another group eventually vindicated by acceptance of their goals by society at large--will (unless we cease fulfilling our obligation as judges to be evenhanded) be censored according to

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the rules applied to the last. I do not believe that the defendants' speech here, on this record and given two major erroneous evidentiary rulings, crossed the line into unprotected speech. I therefore dissent.

290 F.3d 1058, 2 Cal. Daily Op. Serv. 4198, 2002 Daily Journal D.A.R. 5559

END OF DOCUMENT

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DISABILITY LAW CENTER OF ALASKA

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(907) 586-1066 fax

TO: Rep Weyhrauch

FROM: Bob Briggs

DATE: 5/7/03

FAX: 465-2273

No. of pages, including cover sheet: (6)

Comments:

Letter & list of amendments to HB 149

Am on my way back up, will bring 10 copies of this

BBB

-PRIVILEGED AND CONFIDENTIAL-

DISABILITY LAW CENTER OF ALASKA

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May 7, 2003

By hand delivery and via e-mail

Rep. Bruce Weyhrauch
Chairman, House State Affairs Committee
Alaska Legislature
State Capitol, Room 102
Juneau, Alaska
E-mail: <ginny.austerman@legis.state.ak.us>

Re: **HB 149: Notice by 501(c)(3)s of lobbying expenditures; Suggested amendments**

Dear Representative Weyhrauch:

In the spirit of offering potential solutions to the problems I see with House Bill 149, attached please find a refined series of amendments that polishes what was distributed to the committee earlier this morning. These amendments assume the committee accepts the sponsor's substitute bill, with the Amendment #1 that the sponsor has offered. Please disregard my prior handwritten amendments, which were hastily drafted and had a few errors in the details that would have caused further confusion. Please consider the attachment in its place. This amendment has been reviewed in principle within my organization, but has not been released or reviewed by other affected non-profit organizations, who may have doubts of the wisdom of even what is proposed by this amendment. I will circulate these ideas, but make no representation as to their popularity.

The starting part for the rationale for this series of amendments is my belief that first and foremost, the officers, employees and other agents of non-profit corporations should be and are accountable to their board of directors, and for membership organizations, to their members. The sponsor of HB 149 alluded to the conduct of a very small number of non-profit corporations who, it is said, raise money for one purpose but then spend that money for a diametrically different purpose, without accountability for the misrepresentation.

I am doubtful that Alaska can shoulder the asserted failure of the federal IRS to police the conduct of a small number of apparently errant 501(c)(3) non-profits. However, the bill sponsor's search for accountability might be served by giving a 501(c)(3) the option of demonstrating accountability to its membership and board of directors by changing the reporting requirement to give a corporation one of three options: (1) a newspaper notice (similar to the original bill); (2) a mailed notice; or (3) an e-mailed notice. The sponsor's substitute bill would exempt corporations that

MEMBER OF THE NATIONAL ASSOCIATION OF PROTECTION & ADVOCACY SYSTEMS

file APOC reports, likely under the rationale that the reporting rules under APOC laws and regulations are good enough. I believe it is only fair – and in accord with principles of equal protection – that the reports prepared under this bill shall be no less, and no more, specific than is required under laws and regulations governing lobbying reports filed with APOC. While my amendments do not say this specifically, it would be sufficient for purposes of future application of the act for the committee members to express their views on this point in describing what is, in their view, "reasonable specificity."

Second, the likelihood of "prior restraint" on exercise of Free Speech/Free Petition rights is reduced if the reporting requirement is changed to a *post-communication* requirement. For ease of administration, my amendment simplifies the reporting requirement to two easily understood time deadlines for reporting of lobbying activity: either July 31 (for lobbying activities conducted between January 1 and June 30), or January 31 (for lobbying activities conducted between July 1 and December 31). These times were chosen so that reports will be required while lobbying activity is relatively fresh in the memory of those involved, but hopefully not so frequently as to present an onerous burden on the reporting non-profit organizations.

Third, to make this bill more palatable to small non-profits with very modest budgets, I suggest increasing the reporting threshold from $500 to $2,000. Others may have a better threshold figure to suggest.

Finally, because I believe the primary accountability for corporate activity rests with the boards of directors and members of 501(c)(3) nonprofits, the bill would delete the requirement that the reports affirmatively be made "public" at the expense and effort of a reporting corporation. Instead, it is suggested that a member of the public investigating the conduct of a particular 501(c)(3) may obtain a copy of the organization's Form 990, any APOC reports filed on the organization's behalf (or by the organization's lobbyist), any federal lobbying reports the organization may have filed, and any documents required to be made available for public inspection under other federal statutes or regulations.

Corporate reports required by this bill may be subject to public disclosure under federal law or regulations, such as the Taxpayer Bill of Rights 2, Pub. L. 104-268, 100 Stat. 1452, or the Tax and Trade Relief Extension Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681. I understand that the IRS has recently adopted regulations to implement the corporation disclosure requirements of these acts, although I have not studied the regulations themselves. To the extent that the reports required by HB 149 are also required to be made available to the public under other statutes or regulations, I have included a provision in HB 149 that would require the corporation to keep a copy of the lobbying report (i.e., a copy of the newspaper publication, the report to its members, or the report to its board of directors) on hand in the organization's headquarters files for two years after the publication or delivery of the notice. However, under

the amendments I have drafted, there would be no independent right (under this bill) of public access to lobbying reports prepared under this bill, except perhaps for those reports that a corporation chooses to publish in a newspaper (which by their publication would have not claim of right of confidentiality).

I have not analyzed the question of whether there is a right of privacy or confidentiality in the conduct of lobbying activity by 501(c)(3) non-profit organizations, but the issue does occur to the lawyer's mind. I know that Alaska legislators generally treat communications from constituents confidentially in many instances, and I do not pretend to understand the full landscape on that subject. APOC reports, for example, require a fairly innocuous description of the subjects of lobbying activity, without requiring public disclosure of actual lobbying communications. I believe this level of disclosure serves the public purpose of ensuring candidness in communications with legislators and their staff. Thus if this committee passes a bill that requires disclosure of lobbying activity with more specificity than is required in APOC filings, there does arise the question of whether such a requirement invades a right of confidentiality or privacy, or violates equal protection. These are issues that perhaps better taken up in the House Judiciary Committee.

These amendments are suggested in the spirit of assisting in addressing the concerns raised by the bill sponsor, although it is not clear to me that there is a systemic problem that truly needs to be addressed. These amendments are focused on reducing the burden of the reporting requirement, reducing any "chilling" effect on the exercise of free speech and free petition rights, while still trying to enhance accountability of 501(c)(3) lobbying activity. However, in the absence of a clearly demonstrated legislative problem that is well-documented (rather than vague allusions) I believe treating 501(c)(3) lobbying activity differently than other corporations still raises significant equal protection concerns that even the amendments I have suggested may not completely remove.

Very truly yours,

Bob Briggs

Robert B. Briggs, staff attorney

Encl.

Cc: (w/ encl.)
Members, House State Affairs Committee
Rep. Kelly Wolf
Dave Fleurant, executive director, DLC-Anchorage

AMENDMENT TO
SPONSOR'S SUBSTITUTE TO HOUSE BILL NO. 149 (Version H)

AMENDMENT NO. _____ OFFERED BY: _____

At page 1, line 2, delete "public"

At page 1, line 9, delete "public"

At page 1, lines 11-13, delete "a copy of the newspaper's certificate of publication with a copy of the notice published and the dates of publication within seven days after the last publication of the notice" and insert "written evidence of satisfaction of this section."

At page 1, line 13, delete "public"

At page 1, lines 13-14, delete "is required to be conducted by publication" and insert "may be evidenced by"

At page 2, line 1, delete "$500" and insert "$2,000"

At page 2, line 4, after "specificity, the" insert "lobbying"

At page 2, lines 4-5, delete "proposed, the proposed budget, the location, and the time period in which the lobbying activity has occurred or will occur" and insert "conducted, that has been either"

At page 2, line 6, delete "(2) of the notice" and insert "(i) published

At page 2, lines 6-7, delete "; (3)" and join text with preceding sentence

At page 2, line 7, delete "judicial district" and insert "Alaska judicial district"

At page 2, lines 10-11, delete "and (4) within 15 days before or after the lobbying expenditure occurs." And insert the following:

"(ii) delivered by mail or electronic means to the members of the corporation or, if the corporation is not a membership organization, to its board of directors;

(2) For lobbying expenditures incurred between January 1 and June 30 of a calendar year, the notice provided under subsection (1) shall be published or delivered no less than thirty days after July 1 of the same calendar year. For lobbying expenditures incurred between July 1 and December 31 of a calendar year, the notice provided shall be published or delivered no less than thirty days after January 1 of the succeeding calendar year.

(3) Each corporation subject to this Act shall maintain in its corporate headquarters a true and correct copy of each notice provided under subsection (1) for a period of not less than two calendar years after publication or delivery."

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May 6, 2003

By hand delivery and via e-mail

Rep. Bruce Weyhrauch
Chairman, House State Affairs Committee
Alaska Legislature
State Capitol, Room 102
Juneau, Alaska
E-mail: <ginny.austerman@legis.state.ak.us>

Re: **HB 149: Newspaper notice by non-profit corporations of lobbying expenditures**

Dear Representative Weyhrauch:

I am writing to respectfully urge a "no" vote on House Bill 149, either in its present form or in the form of a committee substitute (with or without an amendment) that was discussed on May 1. I apologize for not being able to attend the May 1 hearing due to other commitments. I have reviewed the KTOO archived audiotape, however, and these comments address the remarks given during that hearing.

The bill sponsor's testimony about the federal interpretation of "substantial lobbying activity" was, I believe, a bit off the mark.[1] I am aware of a 1955 circuit court of appeals case that determined that an organization which had spent less than 5% of its budget on "propaganda" had not engaged in "substantial" propaganda activity, which is proscribed by the same provision of the Internal Revenue Code as is lobbying.[2] This 1955 case found spending under 5% was "not substantial," but I am unaware of any case which has firmly set a percentage figure on what is considered to be "substantial." There may be a federal regulation on this subject, but I have not discovered it, and so I would say in this area there is uncertainty in the law.

MEMBER OF THE NATIONAL ASSOCIATION OF PROTECTION & ADVOCACY SYSTEMS

[1] The comments of this letter should not be taken or relied upon as legal advice. Any reader of this letter should consult legal counsel before making decisions on this subject.

[2] 26 U.S.C. § 501(c)(3), construed in Seasongood v. Commissioner, Internal Revenue, 227 F.2d 907 (6th Cir. 1955)(holding that expenditures of "something under" 5% of budget on propaganda did not constitute "substantial part" of organization's activities). But see Krohn v. U.S., 246 F.Supp. 341, 347-48 (D.Colo. 1965)(questioning the wisdom of the percent approach to defining "substantial" as espoused in Seasongood).

On the other hand, a 1976 revision of the tax code has provided some certainty in a different way. In 1976, Congress passed the "Lobbying by Public Charities Act," codified at 26 U.S.C. §501(h), which appears to provide a "safe harbor" of sorts for 501(c)(3)s who want to help shape legislation, but do not want to change their essential charitable, educational or public service nature. Under that Act, some but not all 501(c)(3) corporations[3] may file a simple election form – Form 5768[4] – to give notice of intent to lobby. The form must be signed and postmarked within the first taxable year to which it applies. The form is operative thereafter for each tax year until it is revoked; a revocation is operative for the succeeding tax year after submission.

501(c)(3)s who elect to file a Form 5768 gain substantial protections under the Lobbying for Public Charities Act. First, any electing organization may be able to safely spend up to 20% of its budget without losing its 501(c)(3) status – this is substantially more than the 5% that has been represented as the threshold for engaging in "substantial lobbying activity." Second, any technical violations of the rules result in payment of an excise tax – not loss of 501(c)(3) status. Third, corporate managers or directors of an electing 501(c)(3) corporation are insulated from personal liability to pay excise tax penalties if a corporation is found to have violated the thresholds. See 26 U.S.C. § 501(h). In operation, the Act permits 501(c)(3)s to a least try to "be a player" in the legislative arena, one that often directly affects the lives of the people the corporations are organized to serve.[5]

I believe the U.S. Congress decided to establish some clear guidelines on 501(c)(3) lobbying because these organizations are an important part of the fabric of our society, perform many valuable services to our citizens (at a cost that is cheaper than government), and the views of these corporations on proposed legislation are important, and should be heard. I believe the same holds true for the Alaska Legislature.

HB 149 proposes what is in essence a special state surcharge or "tax" on 501(c)(3)s that choose to be involved in state legislative matters, albeit an indirect tax that is paid to newspaper organizations around the State. The result of this bill is, in my opinion, very likely a violation of

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[3] Churches, church auxiliaries, and members of churches or church auxiliaries appear to be disqualified from electing under Section 501(h). See enclosure.

[4] See http://www.irs.gov/pub/irs-pdf/f5768.pdf.

[5] See generally, Gail M. Harmon, et al., "*Being a Player: A Guide to the IRS Lobbying Regulations for Advocacy Charities* (Alliance for Justice 2000); Bob Smucker, *The NonProfit Lobbying Guide: Advocating Your Cause – and Getting Results* (Independent Sector Press, Jossey-Bass Publishers 1991); Independent Sector, *Tax-Exempt Organizations' Lobbying and Political Activities Accountability Act of 1987: A Guide for Volunteers and Staff of NonProfit Organizations* (Washington, D.C. January 1988); for other publications on this subject, see the Independent Sector website, http://www.independentsector.org/.

the Free Speech, Free Petition, and equal protection clauses of the Alaska and federal constitutions[6] if the same notice requirements are not imposed on all who exert influence on the legislative process.[7]

The bill sponsor's proposed amendment to exempt corporations that file APOC reports lessens the impact of the bill, but the bill still threatens to silence smaller non-profits – whose very voice the Legislature may want to hear most.

The bill sponsor also discussed an amendment that would eliminate the end-of-year reporting requirement to the Department of Revenue. This amendment may be in recognition that the existing APOC reporting requirements are essentially the same. The amendment would avoid a duplicative filing requirement.

If the committee passes this bill, the committee should adopt the sponsor's substitute, with the amendment discussed by the bill sponsor. With these revisions, the resulting bill would contain less of a "prior restraint" on the exercise of free speech than the original version proposes. However, I remain doubtful about the constitutionality of the sponsor's substitute bill (with or without the suggested amendment).

We are concerned that the bill's effect will be to chill the modest efforts of smaller Alaskan 501(c)(3)s to give input to the Legislature. These are the organizations whose voices should be heard, whose board memberships are filled by community leaders from business, trade, education, government, and the professions, who represent a cross-section of Alaska.

---

[6] Art. XIV, § 1, U.S. CONST.; Art. I, §§ 1, 5, and 6, ALASKA CONST.

[7] The U.S. Supreme Court and other courts have found that lobbying registration acts, which may require a registration fee, may prohibit campaign contributions by lobbyists, or may require some form of post-communication reporting of lobbying activity, are not a violation of the Constitution. E.g., Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983)(upholding Section 501(c)(3) of the IRC); United States v. Harriss, 347 U.S. 612 (1954)(upholding Federal Regulation of Lobbying Act); Florida League of Professional Lobbyists, Inc. v. Meggs, 87 F.3d 457 (7th Cir. 1996), cert. denied, 519 U.S. 1010 (1996)(upholding Florida law regulating lobbying). The Supreme Court has ruled that lobbying activity is a First Amendment activity. Eastern R. Conf. v. Noerr Motors, 365 U.S. 127, 137-38 (1961)("In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. . . . The right to petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."). However, *pre-communication* impediments to lobbying activity, other than registration, may constitute a "prior restraint" on First Amendment freedoms that invokes strict constitutional scrutiny. As was said in Regan, "[g]enerally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. *Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech.* . . . "[A]lthough *government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech]*, it need not remove those not of its own creation." 461 U.S. at 547, 549, quoting Harriss, 448 U.S. at 316 (Rehnquist, C.J.).

These are people who know their communities, know what works and what doesn't work. Their voice should be strengthened, not silenced.

For these reasons, we urge a "no" vote on HB 149, either in its original form or in the sponsor's substitute, with or without the amendment suggested by the bill's sponsor. The goals behind this bill are laudable goals – truth in advertising, truth in legislative advocacy, full disclosure by 501(c)(3)s. However, we believe this bill takes the wrong approach. As always we will work with the bill sponsor to discuss our views of any alternative approaches that are suggested.

Very truly yours,

Bob Briggs

Robert B. Briggs, staff attorney

Encl. (IRS Form 5768)

Cc: (w/ encl.)
Members, House State Affairs Committee
Rep. Kelly Wolf
Dave Fleurant, executive director, DLC-Anchorage

Form **5768**

(Rev. December 1996)

Department of the Treasury
Internal Revenue Service

Election/Revocation of Election by an Eligible Section 501(c)(3) Organization To Make Expenditures To Influence Legislation

(Under Section 501(h) of the Internal Revenue Code)

For IRS Use Only ▶

Name of organization	Employer identification number
Number and street (or P.O. box no., if mail is not delivered to street address)	Room/suite
City, town or post office, and state	ZIP + 4

1 Election—As an eligible organization, we hereby elect to have the provisions of section 501(h) of the Code, relating to expenditures to influence legislation, apply to our tax year ending ..... and all subsequent tax years until revoked.
(Month, day, and year)

Note: *This election must be signed and postmarked within the first taxable year to which it applies.*

2 Revocation—As an eligible organization, we hereby revoke our election to have the provisions of section 501(h) of the Code, relating to expenditures to influence legislation, apply to our tax year ending .....
(Month, day, and year)

Note: *This revocation must be signed and postmarked before the first day of the tax year to which it applies.*

Under penalties of perjury, I declare that I am authorized to make this (check applicable box) ▶ ☐ election ☐ revocation on behalf of the above named organization.

(Signature of officer or trustee)	(Type or print name and title)	(Date)

General Instructions

Section references are to the Internal Revenue Code.

Section 501(c)(3) states that an organization exempt under that section will lose its tax-exempt status and its qualification to receive deductible charitable contributions if a substantial part of its activities are carried on to influence legislation. Section 501(h), however, permits certain eligible 501(c)(3) organizations to elect to make limited expenditures to influence legislation. An organization making the election will, however, be subject to an excise tax under section 4911 if it spends more than the amounts permitted by that section. Also, the organization may lose its exempt status if its lobbying expenditures exceed the permitted amounts by more than 50% over a 4-year period. For any tax year in which an election under section 501(h) is in effect, an electing organization must report the actual and permitted amounts of its lobbying expenditures and grass roots expenditures (as defined in section 4911(c)) on its annual return required under section 6033. See Schedule A (Form 990). Each electing member of an affiliated group must report these amounts for both itself and the affiliated group as a whole.

To make or revoke the election, enter the ending date of the tax year to which the election or revocation applies in item **1** or **2**, as applicable, and sign and date the form in the spaces provided.

Eligible Organizations.—A section 501(c)(3) organization is permitted to make the election if it is not a disqualified organization (see below) and is described in:

1. Section 170(b)(1)(A)(ii) (relating to educational institutions),
2. Section 170(b)(1)(A)(iii) (relating to hospitals and medical research organizations),
3. Section 170(b)(1)(A)(iv) (relating to organizations supporting government schools),
4. Section 170(b)(1)(A)(vi) (relating to organizations publicly supported by charitable contributions),
5. Section 509(a)(2) (relating to organizations publicly supported by admissions, sales, etc.), or
6. Section 509(a)(3) (relating to organizations supporting certain types of public charities other than those section 509(a)(3) organizations that support section 501(c)(4), (5), or (6) organizations).

Disqualified Organizations.—The following types of organizations are not permitted to make the election:

a. Section 170(b)(1)(A)(i) organizations (relating to churches),

b. An integrated auxiliary of a church or of a convention or association of churches, or

c. A member of an affiliated group of organizations if one or more members of such group is described in **a** or **b** of this paragraph.

Affiliated Organizations.—Organizations are members of an affiliated group of organizations only if **(1)** the governing instrument of one such organization requires it to be bound by the decisions of the other organization on legislative issues, or **(2)** the governing board of one such organization includes persons (i) who are specifically designated representatives of another such organization or are members of the governing board, officers, or paid executive staff members of such other organization, and (ii) who, by aggregating their votes, have sufficient voting power to cause or prevent action on legislative issues by the first such organization.

For more details, see section 4911 and section 501(h).

Note: *A private foundation (including a private operating foundation) is not an eligible organization.*

Where To File.—Mail Form 5768 to the Internal Revenue Service Center, Ogden, UT 84201-0027.

adopted 5/7/03

23-LS0354\H.1
Craver
5/1/03

AMENDMENT ~~#~~ 1

OFFERED IN THE HOUSE BY REPRESENTATIVE WOLF

TO: SSHB 149

Page 1, lines 2 - 3:

Delete "**and an annual report of lobbying expenditures to the Department of Revenue**"

Page 1, lines 7 - 8:

Delete "**, civil penalty, annual report**"

Insert "**, civil penalty**"

Page 2, lines 17 - 23:

Delete all material.

Reletter the following subsections accordingly.

O. UPDATE: THE FINAL REGULATIONS ON THE DISCLOSURE REQUIREMENTS FOR ANNUAL INFORMATION RETURNS AND APPLICATIONS FOR EXEMPTION

by
Michael Seto and Toussaint Tyson

1. Introduction

The Internal Revenue Service ("Service") has published final regulations (T.D. 8818) concerning the public disclosure requirements pursuant to IRC 6104(d)(IRC 6104(e) prior to redesignation as (d) under the Tax and Trade Relief Extension Act of 1998) for tax-exempt organizations other than private foundations. The term tax-exempt organization is defined as any organization that is described in IRC 501(c)(including 501(e) and (f) organizations, which are described under 501(c)(3)) and (d), and is exempt from taxation under IRC 501(a). Private foundation means a private foundation as defined in IRC 509(a).

Taxpayer Bill of Rights 2 ("TBOR2"), P.L. 104-268, 110 Stat. 1452, amended IRC 6104. The Service issued proposed regulations ((REG-246250-96), 62 Fed. Reg. 50533 (1997)(proposed Sept. 26, 1997) on the public disclosure requirements for exemption applications and annual information returns to implement the TBOR2 amendments. After consideration of all written comments from the public and the changes made in the Tax and Trade Relief Extension Act of 1998, P.L. 105-277, 112 Stat. 2681 ("the 1998 Act"), the Service issued final regulations, which became effective on June 8, 1999. (See Announcement 99-62, Internal Revenue Bulletin 1999-25).

This article discusses the new public disclosure rules as explained in the final regulations. This article also provides a brief summary of the public disclosure law prior to TBOR2, background to TBOR2, and the 1998 Act.

2. Brief Summary of the Disclosure Law Prior to Taxpayer Bill of Rights 2 and the Tax and Trade Relief Extension Act of 1998

IRC 6104(d) and IRC 6104(e) governed the disclosure of exemption applications and annual information returns by all tax-exempt organizations described in sections 501(c) or (d). IRC 6104(e) dealt with the disclosure of these documents by tax-exempt organizations except for the annual information returns of private foundations. IRC 6104(d) specifically dealt with the disclosure of this item. These two provisions required that all tax-exempt organizations described in IRC 501(c) or 501(d) allow public inspection of their exemption applications, any letter or other document issued by the Service concerning such applications, and annual information returns. The covered documents are subject to public inspection at the tax-exempt organization's principal office (and certain regional or district offices). Certain returns filed by tax-exempt organizations are not subject to public inspection.

For a detailed discussion, see the 1997 CPE, Publicity and Disclosure of Form 990, at pp. 5-15, ("1997 CPE"), and Notice 88-120, 1988-2 C.B. 454.

3. Changes to the Disclosure Law Under the Taxpayer Bill of Rights 2 and the Tax and Trade Relief Extension Act of 1998

TBOR2, enacted in 1996, amended IRC 6104(e) by expanding the disclosure requirements. (The changes made by TBOR2 and the proposed regulations issued thereunder were discussed in detail in the 1999 CPE, The Proposed Regulations on the Disclosure Requirements for Annual Information Returns and Applications for Exemption, at pp. 243-259). Thereafter, Congress enacted the 1998 Act which extends all the disclosure requirements that apply to public charities and other tax-exempt organizations to private foundations. In addition, the 1998 Act repeals IRC 6104(d) and redesignates the amended IRC 6104(e) as new IRC 6104(d) (hereinafter referred to as "amended IRC 6104(d)").

The final regulations issued under the amended IRC 6104(d) became effective on June 8, 1999, and apply to all tax-exempt organizations other than private foundations. The Service plans to extend the new disclosure regulations to apply to private foundations. During the meantime, tax-exempt private foundations must continue to comply with the disclosure requirements of IRC 6104(d), Regs. 301.6104(d)-1 and IRC 6104(e) as in effect prior to the 1998 Act.

4. The Final Regulations - Overview

The final regulations address five major areas:

- the documents that a tax-exempt organization must disclose in response to a request for information;
- the manner of disclosing these documents;
- the manner of providing copies and conditions that may be placed on in-person or written requests for copies of the documents; and the amount, form, and time of payment of any fees a tax-exempt organization may charge for the copies;
- how an organization can make its application for tax exemption and annual information returns "widely available"; and

- the standards that apply in determining whether a tax-exempt organization is the subject of a harassment campaign and on the procedures for obtaining relief.

5. Documents Subject to Disclosure

Regs. 301.6104(d)-3(b)(3) and (4) describe the documents that all tax-exempt organizations other than private foundations must disclose. These documents include applications for tax exemption and annual information returns.

A. Exemption Applications

An exemption application includes any prescribed application forms (Forms 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code ("Form 1023"), 1024, Application for Recognition of Exemption under Section 501(a) ("Form 1024"), or letter applications). See Regs. 301.6104(d)-3(b)(3)(i). It also includes the following:

- all documents and statements the Service requires an applicant to file with the form;

- any statement or other supporting document submitted by an organization in support of its application (for example, a legal brief supporting an application, or a response to questions from the Service during the application process); and

- any letter or other document issued by the Service concerning the exemption application (such as a favorable determination letter or a list of questions from the Service about the application).

If no form is prescribed for an organization's exemption application, the application for tax exemption includes the following:

- the application letter and copy of the articles of incorporation, declaration of trust, or other similar instrument that sets forth the permitted powers or activities of the organization;

- the organization's bylaws or other code of regulations;

- statements describing the character of the organization, the purpose for which it was organized, and its actual activities;

- the organization's latest financial statements showing assets, liabilities, receipts and disbursements;

- statements showing the sources of the organization's income and receipts and their disposition; and

- any other statements or documents the Service required the organization to file with, or that the organization submitted in support of, the application letter. See Regs. 301.6104(d)-3(b)(3)(ii)(A)-(F).

B. Disclosure Exceptions Relating to Exemption Applications

An exemption application does not include any application for tax exemption filed by an organization that has not yet been recognized, on the basis of the application, by the Service as exempt from taxation for any taxable year. Also it does not include any application for tax exemption filed before July 15, 1987, if the organization filing the application did not have a copy of the application on July 15, 1987. Finally, it does not include any material, including the material listed in Regs. 301.6104(a)-1(i) and information that the Service would be required to withhold from public inspection, that is not available for public inspection under IRC 6104. See Regs. 301.6104(d)-3(b)(3)(iii)(A)-(C).

C. Annual Information Returns

An annual information return includes an exact copy of any return filed with the Service by a tax-exempt organization pursuant to IRC 6033. Examples of an information return include Forms 990, Return of Organization Exempt From Income Tax ("Form 990") and 990-EZ, Short Form Return of Organization Exempt From Income Tax ("Form 990-EZ"). It also includes any amended return filed with the Service after the date the original return is filed.

The copy must include all information furnished to the Service on the Form 990 (or any version thereof) and Form 1065, U.S. Partnership Return of Income, as well as all schedules, attachments and supporting documents. Examples of schedules, attachments and supporting documents include Schedule A of Form 990 (containing supplementary information on IRC 501(c)(3) organizations), Part V of Form 990, and Parts I and II of Schedule A of Form 990 (showing compensation paid to specific persons). However, an organization is not required to

disclose the name or address of any contributor to the organization. See Regs. 301.6104(d)-3(b)(4)(i).

D. Disclosure Exceptions Relating to the Annual Information Return

An information return does not include Schedule A of Form 990-BL, Information and Initial Excise Tax Return for Black Lung Benefit Trusts and Certain Related Persons; Form 990-T, Exempt Organization Business Income Tax Return; Form 1120-POL, U.S. Income Tax Return For Certain Political Organizations; or the return of a private foundation (Form 990-PF, Return of Private Foundation and Form 4720, Return of Certain Excise Taxes on Charities and Other Persons Under Chapters 41 and 42 of the Internal Revenue Code). See Regs. 301.6104(d)-3(b)(4)(ii). Also Schedules K-1 that are filed by religious and apostolic organizations described in IRC 501(d) are specifically excluded from disclosure. See IRC 6104(d)(3)(A).

A tax-exempt organization does not have to allow public inspection of any return after the expiration of 3 years from the date the return is required to be filed (including any extension of time that has been granted for filing such return) or the date the return is actually filed, whichever is later. If an organization has filed an amended return, however, the amended return must be made available for inspection and copying for a period of 3 years beginning on the date it is filed with the Service. See Regs. 301.6104(d)-3(b)(4)(iii).

E. Request for Parts of Exemption Application or Annual Information Returns

A tax-exempt organization must comply with a request for all or part of its annual information returns or application for exemption. A request for a copy of less than the entire application or return must specifically identify the requested part(s) or schedule(s). See Regs. 301.6104(d)-3(d)(2)(ii)(B).

6. Manner of Disclosure for In-Person Requests for Public Inspection

A tax-exempt organization must make the applicable documents available for public inspection at its principal, regional, or district offices during regular business hours. See IRC 6104(d)(1)(A) and Regs. 301.6104(d)-3(d)(1)(i). During the inspection, the tax-exempt organization may have an employee present in the room. The inspecting individual is allowed to take notes freely and may make photocopy of the documents for a reasonable fee. If he provides his own photocopying equipment, the organization must allow him to photocopy the documents without charge. See Regs. 301.6104(d)-3(c)(1).

A. Tax-Exempt Organization That Has No Permanent Offices, or No Office Hours or Limited Hours

A tax-exempt organization that does not maintain a permanent office must permit public inspection of the requested documents within a reasonable amount of time after receiving a request for inspection (normally not more than 2 weeks). It must permit public inspection to occur at a reasonable location of its choice and at a reasonable time of day. Alternatively, the tax-exempt organization may mail a copy of the requested documents to the requester within two weeks of receiving the request. It may charge the requester for copying and actual postage costs only if the requester consents to the charge. See Regs. 301.6104(d)-3(c)(2).

A tax-exempt organization that has a permanent office, but has no office hours or has very limited hours during certain times of the year, must respond to requests made during those periods when office hours are limited or not available as though it were an organization without a permanent office. See Regs. 301.6104(d)-3(c)(2).

7. In-Person Requests for Copies of Documents

While the tax-exempt organization must make its documents available for public inspection without charge, if the individual requests copies of the documents, it may charge a reasonable fee for such service. A fee is reasonable if it is no more than the per-page copying charge stated in Regs. 601.702(f)(5)(iv)(B), which is the amount charged by the Service for providing copies. (Currently, that amount is $1.00 for the first page and .15 for each subsequent page; see Announcement 99-62, Internal Revenue Bulletin 1999-25). The tax-exempt organization may require the individual making the request to pay the fee before providing copies of the documents. See Regs. 301.6104(d)-3(d)(3)(i).

The tax-exempt organization must respond to questions from any individual concerning the fees it charges for providing documents. For example, if an individual is requesting certain documents from a tax-exempt organization, it must inform that individual of the charge for copying such documents. See Regs. 301.6104(d)-3(d)(3)(iv).

The tax-exempt organization must accept payment in cash or money order. It may accept credit cards, personal checks or other forms of payment in lieu of the aforementioned. See Regs. 301.6104(d)-3(d)(3)(ii)(A).

A. Cannot Comply Due to Unusual Circumstances

Absent unusual circumstances, an in-person request for copies of the covered documents must be fulfilled on the day the request is made. If the tax-exempt organization cannot provide the requested documents on the same business day due to unusual circumstance, then it must provide the documents no later than the next business day following the day that the unusual circumstances cease to exist or the fifth business day after the date of the request, whichever occurs first. Unusual circumstances include, but are not limited to, the following:

- Receipt of a volume of requests that exceeds the tax-exempt organization's capacity to make copies;
- The requests are made shortly before the end of regular business hours, and they require an extensive amount of copying of the documents;
- The requests are made on a day when the tax-exempt organization's managerial staff capable of fulfilling the requests is conducting special duties, such as student registration or attending an off-site meeting, rather than its regular administrative duties. See Regs. 301.6104(d)-3(d)(1)(ii).

B. Agent Used To Handle In-Person Requests For Copies of Documents

A tax-exempt organization may retain a local agent, within reasonable proximity of the applicable principal, regional or district office, to process in-person requests for copies of its documents. An agent must provide the copies within the time and under the conditions that apply to the tax-exempt organization itself. See Regs. 301.6104(d)-3(d)(1)(iii). For example, when an individual makes an in-person requests to have copies of the documents, the tax-exempt organization must immediately provide him the name, address, and telephone number of its local agent. Thereafter, the tax-exempt organization in not required to respond to him further.

C. Failure to Comply

Should the tax-exempt organization or its agent fail to provide the documents as required under IRC 6104(d), the responsible person of the tax-exempt organization may be liable for penalties pursuant to three provisions, IRC 6652(c)(1)(C) and (D), failure to allow public inspection of annual returns and exemption applications, and IRC 6685, willful failure to allow public inspection of annual returns and exemption applications. See Regs. 301.6104(d)-3(d)(1)(iii) and (f)(3), and Announcement 99-62, Internal Revenue Bulletin 1999-25.

8. Written Requests for Copies of Documents

A tax-exempt organization must honor a written request for a copy of the documents that the organization is required to provide under amended IRC 6104(d) if the request

- is addressed to, and delivered by mail, electronic mail, facsimile, a private delivery service (as defined in IRC 7502(f)) to the principal, regional or district office of the organization; and

- sets forth the address to which the copy of the documents should be sent. 301.6104(d)-3(d)(2)(i).

The tax-exempt organization must provide the copies within 30 days from the date it receives the request. If it requires payment for the requested documents in advance, it must provide the documents 30 days from the date it receives the payment.

A. Date of Receipt and Delivery of Requested Documents

In the absence of contrary evidence, a mailed request or payment for documents is considered to be received by the tax-exempt organization seven days after the date of the postmark. Requests transmitted to the organization by electronic mail or facsimile are considered received the day the request is successfully transmitted. Copies are considered provided on the date of the postmark or private delivery mark (or if sent by certified or registered mail, the date of registration or the date of the postmark on the sender's receipt).

If an individual making a request consents, a tax-exempt organization may provide a copy of the requested document by electronic mail. In such case, the material is provided on the date the organization successfully transmits the electronic mail. See Regs. 301.6104(d)-3(d)(2)(ii)(A).

B. Reasonable Fee Charged For Providing Copies of the Requested Documents

The same rules pertaining to in-person requests also govern the amount of the fee a tax-exempt organization may charge respond to requests for copies in writing. See section 7 above. See Regs. 301.6104(d)-3(d)(3)(i). However, in addition to money order, it must accept certified check, and either personal check or credit card. See Regs. 301.6104(d)-3(d)(3)(ii)(B).

If the tax-exempt organization does not require prepayment and a requester does not enclose payment with a request, it must obtain consent from that requester before providing

copies for which the fee charged for copying and postage exceeds $20. See Reg. 301.6104(d)-3(d)(3)(iii).

C. Agent Used to Handle Written Requests for Copies of Documents

As with in-person requests (see sub-section 7B above), a tax-exempt organization may retain an agent to process written requests for copies of its documents. The agent must provide the copies within the time and conditions that apply to the tax-exempt organization itself.

If the tax-exempt organization itself receives the request, and then forwards it to the agent, the deadline for response is the day the tax-exempt organization received the request, not when the agent received the request. Where the tax-exempt organization transfers a written request to its agent, it is not required to respond to the individual further. Should its agent fails to provide the copies to the individual as provided by IRC 6104(d), the responsible person for the tax-exempt organization maybe liable to penalties pursuant to the three provisions described in sub-section 7B above.

9. Manner of Disclosure by Regional and District Offices

A tax-exempt organization's regional or district office must satisfy the same rules as the principal office concerning the disclosure of its exemption application and annual information returns. However, the regional or local office need not make the annual information return available for inspection or to provide copies until thirty days after the date the return is required to be filed (including any extension) or is actually filed, whichever is later. See Regs. 301.6104(d)-3(e).

A. Definition of a Regional and District Office

A regional or district office is any office of a tax-exempt organization, other than its principal office, that has the following characteristics:

- Paid part-time or full-time employees;
- Whose aggregate number of paid hours are normally at least 120. See Regs. 301.6104(d)-3(b)(5)(i).

The above not withstanding, a site is not considered a regional or district office if:

- The only services provided at the site further exempt purposes (such as day care, health care or scientific or medical research); and
- The site does not serve as an office for management staff, other than managers involved solely in managing the exempt function activities at the site. See Regs. 301.6104(d)-3(b)(5)(ii).

10. Disclosure Requirements of a Tax-Exempt Organization's Local or Subordinate Organizations

A. Exemption Applications

If a local or subordinate organization ("subordinate") is covered by a group exemption letter, it must make available for public inspection and furnish in response to requests for copies the following:

- the exemption application submitted to the Service by its parent or central organization ("parent") to obtain the group exemption letter; and

- any additional documents submitted to bring the subordinate organization under the group exemption letter. See Regs. 301.6104(d)-3(f)(1).

If the parent organization provides the Service a list or directory of subordinate organizations covered by the group exemption letter, the local or subordinate need only provide the exemption application and the pages of the list or directory that specifically refer to it. See Regs. 301.6104(d)-3(f)(1).

B. Annual Information Returns

If a local or subordinate organization does not file its own annual information return because it is affiliated with a central organization that files a group return pursuant to Regs. 1.6033-2(d), it must make the central organization's annual information returns available for public inspection and provide copies thereof to requesters, as the case may be. However, if the group information return includes separate schedules for each subordinate organization, a subordinate organization may omit those schedules relating only to the other subordinate organizations. See Regs. 301.6104(d)-3(f)(2).

C. Manner of Disclosure By Subordinate Organization

A local or subordinate organization must allow inspection or provide copies of documents, upon request, within a reasonable time, not normally more than two weeks, and at a reasonable time of day. The subordinate organization may mail a copy of the applicable documents to the requester within the aforementioned time frame in lieu of inspection. It may charge the requester for copying and actual postage costs, provided the requester consents. The same rules pertaining to response to written requests for copies of documents by a tax-exempt organization also govern its local or subordinate organization (see section 8 above).

11. Making Exemption Applications and Annual Information Returns Widely Available for Public Inspection

A tax-exempt organization is not required to comply with requests for copies of its exemption application or annual information returns if it has made the requested documents "widely available." The tax-exempt organization must nevertheless continue to allow public inspection of the aforementioned documents even if it has made them widely available. See Regs. 301.6104(d)-4(a).

A. Definition of "Widely Available"

(1) Posting on the Internet

A tax-exempt organization makes its annual information returns or application for tax exemption widely available by posting them on its World Wide Web page on the Internet or by having the applicable form posted, as part of a database of similar documents of other tax-exempt organizations, on a Web page established and maintained by another entity. The final regulations do not define an "other entity" that will establish or maintain the envisioned database. The World Wide Web page must:

- clearly inform readers that the documents are available and provide instruction for downloading;

- exactly reproduce the image of the exemption application and annual information returns as they were originally filed with the Service, excluding any information not subject to public disclosure, when the documents are accessed and viewed, downloaded, viewed and printed in hard copy from the World Wide Web page;

- allow anyone with access to the Internet to access, download, view and print the document without special computer hardware or software required for that format (other than software that is readily available without charge) and without payment of a fee to the tax-exempt organization or to another entity maintaining the World Wide Web page. See Regs. 301.6104(d)-4(b)(1) and (2)(i)(A)-(C). (One format that currently meets this criteria is Portable Document Format (.pdf)); see Public Announcement 99-62, Internal Revenue Bulletin 1999-25).

In order for the documents to be "widely available" within the meaning of Regs. 301.6104(d)-4, the entity that maintains the World Wide Web page must have procedures that ensure the reliability and accuracy of the documents posted. It must take reasonable precautions to prevent alteration, destruction or accidental loss of the document when posted on the page. Should a posted document be altered, destroyed or lost, the entity must correct or replace the document. See Regs. 301.6104(d)-4(b)(2)(iii).

(2) Other Methods of Making Documents Widely Available

There are currently no other prescribed methods of making exemption applications and annual information returns widely available. The Service nevertheless may prescribe additional

methods, other than Internet posting, that a tax-exempt organization may use to make its documents widely available. See Regs. 301.6104(d)-4(c).

(3) Notice to Requesters

Where a tax-exempt organization has posted its exemption application and/or annual information on the Internet in the manner prescribed by Regs. 301.6104(d)-4(b)(2), it must notify any person requesting a copy where the documents are available, such as the address on the World Wide Web. In response to an in-person request, the tax-exempt organization must provide the notice immediately; if a written request, it must provide the notice within seven days of receiving the request. See Regs. 301.6104(d)-4(d).

B. Transition Rule for Tax-exempt Organizations That Posted Their Documents on the Internet Before the Effective Date of These Regulations

A tax-exempt organization that posted its exemption application and annual information returns on the World Wide Web page on or before April 9, 1999, in a manner consistent with regulation project REG-246250-96 (1997-2 C.B. 627)(see Regs. 601.601(d)(2)), will be treated as complying with the Internet posting requirements prescribed in Regs. 301.6104(d)-4(b)(2), as discussed above, until June 8, 2000. This transition rule is effective only if the documents can be accessed, downloaded, viewed and printed without payment of a fee to the tax-exempt organization or to the entity maintaining the World Wide Web page. See Regs. 301.6104(d)-4(b)(2)(ii).

12. Tax-Exempt Organizations Subject to Harassment Campaigns

A tax-exempt organization that is the subject of a campaign of harassment via the request of many copies of annual returns or exemption applications is not required to fulfill such requests, provided it receives a harassment determination letter from the Service. Specifically, the district director of the key district (or such person as the Commissioner may designate) in which the tax-exempt organization's principal office is located must determine that it is the subject of a harassment campaign and that compliance with the requests would not be in the public interest. See the amended IRC 6104(d)(4) and Regs. 301.6104(d)-5. There is a two part inquiry: (1) whether there is a harassment campaign; and (2) whether compliance with such requests would not be in the public interest.

A. Harassment Defined

A prerequisite for a harassment campaign is the receipt by a tax-exempt organization of a "group of requests" for its exemption application and annual information returns. The final regulations do not quantify how many or how few requests constitute a "group of requests" or specify the time period over which a "group of requests" is measured. However, the final regulations include four examples that provide considerable guidance on this matter. See Regs. 301.6104(d)-5(f).

But Regs. 301.6104(d)-5(c) specifically provides that a tax-exempt organization may disregard any request for copies of all or part of an exemption application or annual information returns beyond the first two received within any 30-day-period or the first four within any one-year-period from the same individual or the same address. The tax-exempt organization may follow this rule regardless of whether the district director has determined that it is subject to a harassment campaign.

A group of requests may constitute a harassment campaign if the relevant facts and circumstances indicate that the requests are part of a single coordinated effort to disrupt the operations of the tax-exempt organization. See Regs. 301.6104(d)-5(b). Facts and circumstances that indicate the tax-exempt organization is the subject of a campaign of harassment include the following:

- a sudden increase in the number of requests;
- an extraordinary number of requests made through form letters or similarly worded correspondence;
- evidence of a purpose to deter significantly the organization's employees or volunteers from pursuing the organization's exempt purpose;
- requests that contain language hostile to the tax-exempt organization;
- direct evidence of bad faith by organizers of the purported harassment campaign;
- evidence that the organization has already provided the requested documents to a member of the purported harassing group; and
- a demonstration by the tax-exempt organization that it routinely provides copies of its documents upon request. See Regs. 301.6104(d)-5(b).

The regulations suggest that one indicator is not determinative of a harassment campaign. See example 2 in Regs. 301.6104(d)-5(f), which highlights this.

B. Determination Procedure

A tax-exempt organization may apply for a determination that it is the subject of a harassment campaign by submitting a signed application to the district director for the Key District where its principal office is located. The application must contain the following:

- a written statement giving the organization's name, address, and employer identification number;
- the name, address and telephone number of the person to contact regarding the application; and
- description, in detail, of the facts and circumstances that the organization believes support a determination that it is subject to a harassment campaign.

The tax-exempt organization may suspend compliance with any request it reasonably believes to be part of a harassment campaign, provided that it files its application within ten business days from the day it first suspends compliance with the requests. See Regs. 301.6104(d)-5(f), example 3. The tax-exempt organization may continue the suspension until it receives a response from the Service. See Regs. 301.6104(d)-5(d).

If the district director determines that the tax-exempt organization is the subject of a harassment campaign and it is not in the public interest to comply with the requests, the organization is not required to comply with the requests for copies that it reasonably believes are part of the campaign. This determination may be subject to other terms and conditions imposed by the district director. See Regs. 301.6104(d)-5(e). A revenue procedure clarifying this procedure is being drafted at the time of this writing.

C. Suspension of Penalties

Liability for penalties under IRC 6652(c)(1)(C), IRC 6652(c)(1)(D) or IRC 6685 are suspended during the consideration of a request for a harassment campaign determination. Where the district director determines that the tax-exempt organization is not the subject of a harassment campaign, the tax-exempt organization must fulfill the requests within thirty days of receiving the determination. See Regs. 301.6104(d)-5(e).

If the district director determines that the tax-exempt organization did not have a reasonable basis for requesting a determination that it is a subject of a harassment campaign or a reasonable belief that a particular request was part of the campaign, the person (as defined by IRC 6652(c)(4)(C)) remains liable for any penalties that result from not providing the copies of the requested documents in a timely fashion. See Regs. 301.6104(d)-5(e). For specific examples, see Regs. 301.6104(d)-5(f).

13. Conclusion

The final regulations (T.D. 8818) provides considerable guidance to Service personnel trying to administer the law and tax payers trying to comply with the law. Any IRC 6104(d) disclosure questions should be directed to Michael Seto at (202) 622-2253, or to Toussaint Tyson at (202) 622-8363.

HB 149

Subject: Whitepaper: Limitations on Lobbying Activities: Guidelines for 501(c)(3) Organizations
Date: Wed, 14 May 2003 16:59:43 -0800
From: Tammy Kempton <tammy_kempton@admin.state.ak.us>
Organization: Alaska Public Offices Commission
To: Chris Knight <chris_knight@legis.state.ak.us>

Chris --
I think you might find this paper more helpful then the article I was originally going to send. This one goes into some detail about the election a 501(c)(3) has to make to use the expenditure test instead of the substantial test.
Tammy

http://www.centeronline.org/knowledge/whitepaper.cfm?ID=1782&

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office, organizations can engage in a relatively significant amount of lobbying activity if carefully conceived and managed." So begins Jeffrey Tenenbaum's, Attorney with Venable Baetjer Howard & Civiletti, overview of lobbying activities as they pertain to 501(c)(3)s.

Limitatior

By: Jeffrey S. Tenenbaum Esq.
Source: Center Collection
Published: May 2002

Nonprofit organizations that qualify for federal income tax exemption under Section 501(c)(3) of the Internal Revenue Code (the "Code") have the most favorable tax status, but they also have the most restrictions on government affairs activities. To maintain their 501(c)(3) tax-exempt status, these organizations must avoid all political campaign activities and must keep lobbying within permissible limits. While there is an absolute prohibition on 501(c)(3) organizations participating or intervening in any political campaign on behalf of or in opposition to candidates for public office, 501(c)(3) organizations can engage in a relatively significant amount of lobbying activity if carefully conceived and managed.

The Lobbying Election

The definition of activities considered to constitute "lobbying," as well as the extent to which a 501(c)(3) organization may conduct such activities before incurring penalties, varies depending on whether the organization has chosen to make the "election" under Section 501(h) of the Code. Most informed 501(c)(3) organizations that lobby choose to make the election, and, consequently, are governed by a special "expenditures" test, rather than the "substantiality" test governing nonelectors.

In stark contrast to the very vague and sparse rules governing nonelectors, the expenditures test provides mathematical methods to concretely determine the extent to which an electing organization may engage in lobbying without incurring penalty taxes or losing 501(c)(3) status. Congress enacted the expenditures test and related rules (found in Sections 501(h) and 4911 of the Code) to relieve the uncertainty of the substantiality

test.

Other key advantages of "electing" are the numerous exceptions provided for what is considered lobbying, the imposition of penalty taxes for excessive lobbying instead of the immediate loss of tax exemption, a safe harbor (margin for error) for organizations that exceed the lobbying limits in a given year, an exclusion for lobbying time "donated" by volunteers (including board members), and a lower Internal Revenue Service ("IRS") audit risk.

The lobbying election is made by filing, at any time, the simple one-page Form 5768 with the IRS. Note that the lobbying election is *not* available to 501(c)(3) organizations that constitute "supporting organizations" (*i.e.*, those public charities, such as many associations' related foundations, that receive their public charity status through their support of a 501(c)(4), (c)(5), or (c)(6) organization that itself meets one of the public support tests). The following rules and definitions apply only to 501(c)(3) organizations that make the lobbying election.

Definition of Lobbying

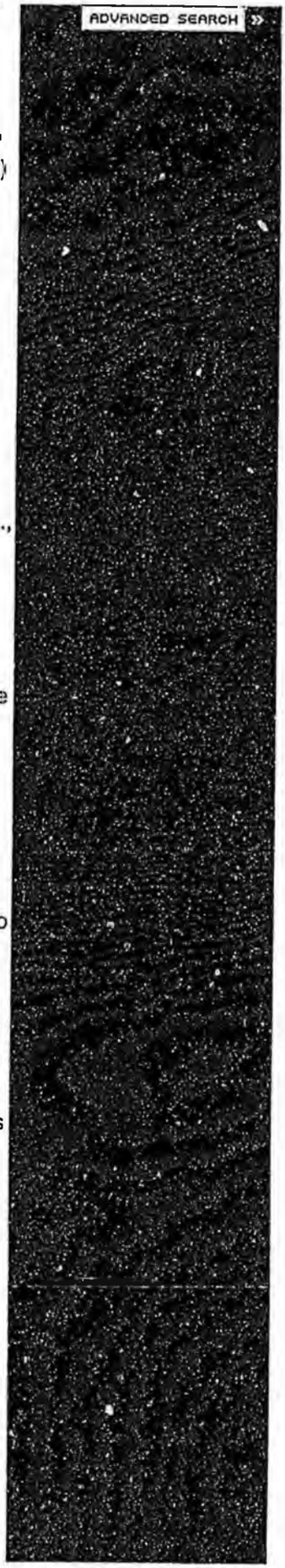
To be considered lobbying, a communication must *refer to and reflect a view* on a specific legislative proposal or legislation that has been introduced before a legislative body (federal, state or local). Actions by executive, judicial or administrative bodies (e.g., regulations) are excluded from the definition of lobbying. Lobbying may either be direct or grassroots. Grassroots lobbying is more limited than direct lobbying. Direct lobbying is any attempt to influence legislation through a communication with any member or employee of a legislative body, or with any other governmental official who may participate in the formulation of legislation, if the principal purpose is to influence legislation. The communication must refer to specific pending or proposed legislation and reflect a view on the legislation. A communication made to the general public on the subject of a public referendum, ballot initiative, or similar election will be considered direct lobbying if the communication reflects a view on the subject of the vote. Direct lobbying also includes communications by an association to its members directly encouraging them to engage in direct lobbying. When directed solely to members, a communication is not lobbying if it only indirectly encourages members to engage in lobbying.

Grassroots lobbying is defined, except with regard to a limited category of mass media communications (for which special rules apply), to include only those communications to the general public that:

1. Refer to specific pending or proposed legislation.
2. Reflect a view on that legislation.
3. Encourage the recipient to take action with respect to such legislation (this third element is often referred to as a "call to action").

It includes communications to members directly encouraging them to urge nonmembers to lobby. An organization generally engages in grassroots lobbying when, directly or through its members, it urges that the public contact legislators, or provides the public with the address, telephone number, electronic mail address, etc. of a legislator or a petition or tear-off postcard, or even merely identifies legislators who will vote on the item referred to.

For both direct and grassroots lobbying, all costs of researching, preparing, planning, drafting, reviewing, copying, publishing, and mailing a direct or grassroots lobbying communication - including amounts paid as current or deferred compensation for employees' services attributable to these activities - must be counted as lobbying expenditures. In addition, the allocable portion of administrative, overhead and other general expenses attributable to these activities also must be treated as lobbying expenditures. However, if the primary purpose for incurring an expenditure is a non-lobbying purpose (and if the "fruits" of the expenditure are, in fact, used for such a non-lobbying purpose), then no portion of the expenditure needs to be allocated to lobbying. See below for a discussion of cost allocation between lobbying and non-lobbying purposes. Also see below for a discussion of the use of non-lobbying



material in connection with a subsequent lobbying communication.

Exclusions from Definition of Lobbying
Certain activities are excluded from the definition of lobbying:

1. Lobbying does not include providing technical assistance or advice to a governmental body or committee in response to its unsolicited written request (note two caveats: (a) cannot be a request from merely an individual member of that body or committee, and (b) the response must be made available to every member of the requesting body or committee).

2. Lobbying does not include self-defense activities - communications with legislators concerning decisions which may affect the organization's existence, powers and duties, 501(c)(3) status, or tax deductibility of contributions.

3. Lobbying does not include making available the results of nonpartisan analysis, study or research, defined as a full and fair exposition of a particular subject that may advocate a view so long as the presentation of the relevant facts is sufficient to enable readers to reach independent conclusions (*e.g.*, presenting information on both sides of a legislative controversy in a balanced and objective manner) (note two caveats: (a) grassroots lobbying communications which *directly* encourage action do not qualify under this exception, and (b) in order to take advantage of this exception, distribution of studies, reports, etc. may not be limited to, or directed toward, persons interested *solely* in one side of a particular issue).

4. Lobbying does not include examining and discussing broad social, economic, and similar policy issues whose resolution would require legislation - even if such legislation is pending - so long as the organization's discussion does not address the merits of the specific legislation.

5. Lobbying does not include communicating with a government official or employee other than (a) a communication with a member or employee of a legislative body that would otherwise constitute lobbying, or (b) a communication with the principal purpose of influencing legislation.

6. Lobbying does not include communications between an organization and its members (broadly defined) about pending or proposed legislation, unless the communications directly encourage the members to attempt to influence legislation (or directly encourage the members to urge nonmembers to attempt to influence legislation). Note that this exclusion will apply so long as a majority of the communication's recipients are members.

Communications which fall into one of these six categories will not constitute "lobbying" even if they advocate a view on proposed or pending legislation.

Subsequent Use Rule
In certain narrowly defined circumstances, the subsequent *grassroots* lobbying use of "advocacy communications or research materials" (those materials that refer to and reflect a view on specific legislation, do not directly encourage grassroots lobbying, but do not otherwise satisfy the exception for nonpartisan analysis, study, or research) that originally contained no lobbying communications may cause the original expense incurred in developing the materials to be treated as a lobbying expenditure. This could occur most frequently with respect to certain nonpartisan analysis, study, or research reports that are initially created without any accompanying lobbying messages, but are later used in connection with grassroots lobbying communications. In such event, the "subsequent use" rule may convert the original expense (in its entirety) into a grassroots lobbying expenditure. However, there are two broad safe harbors in which the subsequent use rule will not apply - one relates to the primary purpose of the original materials and the other relates to the timing of the subsequent use.

Under the primary purpose safe harbor, the subsequent use rule will not apply if the

organization can demonstrate that the primary purpose of the original materials (i.e., the primary purpose for incurring the original expense) was a non-lobbying purpose. Where the organization makes a substantial distribution of the materials in their non-lobbying form either prior to or contemporaneous with the grassroots lobbying distribution, the IRS will presume a non-lobbying primary purpose. In the case of "nonpartisan analysis, study, or research," whether the distribution is substantial will depend upon the particular facts and circumstances, including normal distribution patterns of similar materials. In the case of other "advocacy communications or research materials," the non-lobbying distribution must be at least as extensive as the grassroots lobbying distribution.

Under the timing of subsequent use safe harbor, the determinative factor is the amount of time between when the organization paid the original expenses and when the subsequent use occurred. All expenses paid more than six months before the subsequent use are protected from the application of the subsequent use rule.

The subsequent use rule will not cause any communications or research materials to be considered direct lobbying communications.

Limitations on Permissible Lobbying

Under the expenditures test, an organization can quantify exactly how much lobbying it may engage in each year. A sliding scale specifies the amount an organization may expend on all lobbying activities in relation to the amount it spends on most of its other activities (*i.e.*, expenditures in furtherance of the organization's tax-exempt purposes). Under Section 4911(c)(2) of the Code, the maximum allowable annual lobbying is the sum of:

1. 20% of the first $500,000 of an organization's exempt purpose expenditures, plus
2. 15% of the second $500,000 of such expenditures, plus
3. 10% of the third $500,000 of such expenditures, plus
4. 5% of the remainder of such expenditures,

with a cap of $1 million in annual lobbying expenses.

On top of this cap, there is a further restriction that an organization may not spend more than 25% of its permitted lobbying total on grassroots lobbying.

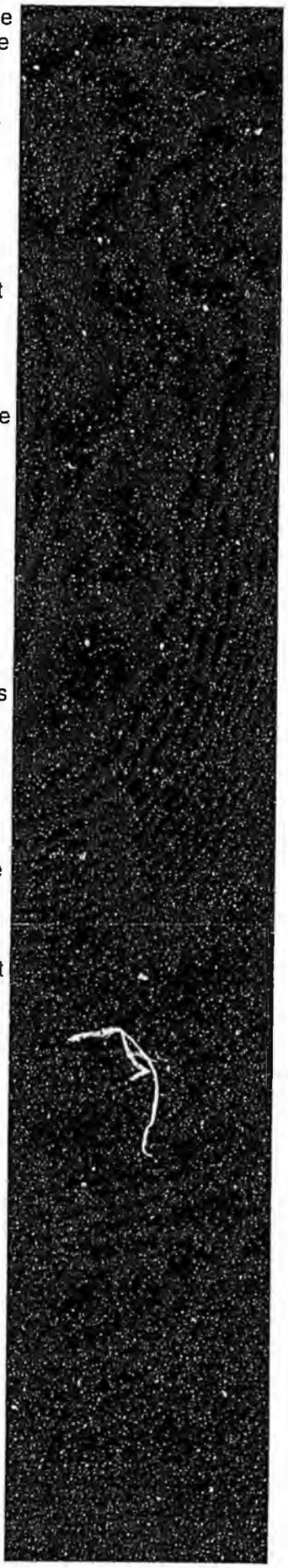
It is important to note that lobbying expenditures include, among other things, the value of the allocable portion of staff time attributable to lobbying; such salary allocations must be substantiated through the use of time records (see below).

If annual limits are exceeded, a 25% excise tax is imposed on the amount of "excess" lobbying expenditures (*i.e.*, 25% times the greater of the amount by which lobbying expenditures exceeded the allowable total limit *or* by which grassroots lobbying expenditures exceeded the allowable grassroots limit).

An organization's 501(c)(3) status will be revoked *only* if the sum of total lobbying expenditures or total grassroots lobbying expenditures over a four-year period exceeds 150% of the four-year sum of the maximum permissible amounts - a considerable safe harbor. Note that a 501(c)(3) organization that loses its tax exemption because of excessive lobbying or prohibited political campaign activities cannot then convert to a 501(c)(4) organization.

Because the extent of an organization's lobbying is measured only by expenditures (and not, for example, by time expended), lobbying efforts by members (volunteers) - including unpaid officers and directors - on behalf of an association that do not incur expense by the association are not subject to any limitation and are not counted toward the association's lobbying totals. If the association incurs expenses (*e.g.*, travel expenses) in connection with its members' lobbying efforts, only those expenses (and nothing more) will be counted toward its lobbying totals.

Affiliated organizations



The expenditures test contains methods of aggregating the lobbying expenditures of related organizations in order to prevent the creation of numerous entities to avoid the lobbying limitations. Where two or more 501(c)(3) organizations are members of an "affiliated" group and at least one of the members has made the 501(h) election, the calculations of lobbying and exempt purpose expenditures must be made by taking into account the expenditures of the entire group. If these expenditures exceed the permitted limits, each of the electing member organizations must pay a proportionate share of the penalty excise tax, with the nonelecting members (if any) treated under the substantiality test. Generally, two organizations are deemed to be "affiliated" where (1) one organization is bound by decisions of the other on legislative issues pursuant to its governing instruments (*e.g.*, Articles of Incorporation, Bylaws), or (2) the governing board of one organization includes enough representatives of the other (an "interlocking governing board") to cause or prevent action on legislative issues by the first organization. Where a number of organizations are "affiliated" (such as in the case of certain association-chapter structures), all of them are treated as one group of affiliated organizations. However, if a group of autonomous organizations controls an organization but no single organization in the controlling group alone can control that organization, the organizations are not considered an affiliated group by reason of the interlocking directorates rule.

Lobbying Records and Cost Allocation

Under Code Section 501(h), detailed disclosure as part of the annual Form 990 filing and thorough recordkeeping are required. It is the responsibility of the association to maintain documentation of its direct and grassroots lobbying expenditures. If an activity has mixed (direct and grassroots) lobbying or both lobbying and nonlobbying aspects, the association will be expected to allocate the expenditures, pursuant to the rules set forth below. (See also the discussion of the primary purpose test above.) Employee time records, financial reports, invoices from outside suppliers (*e.g.*, printing bills), postage receipts, and other documentation of expenditures should identify those spent on direct and grassroots lobbying, and should allocate expenditures for mixed lobbying (direct and grassroots) and mixed purpose (lobbying and nonlobbying) activities.

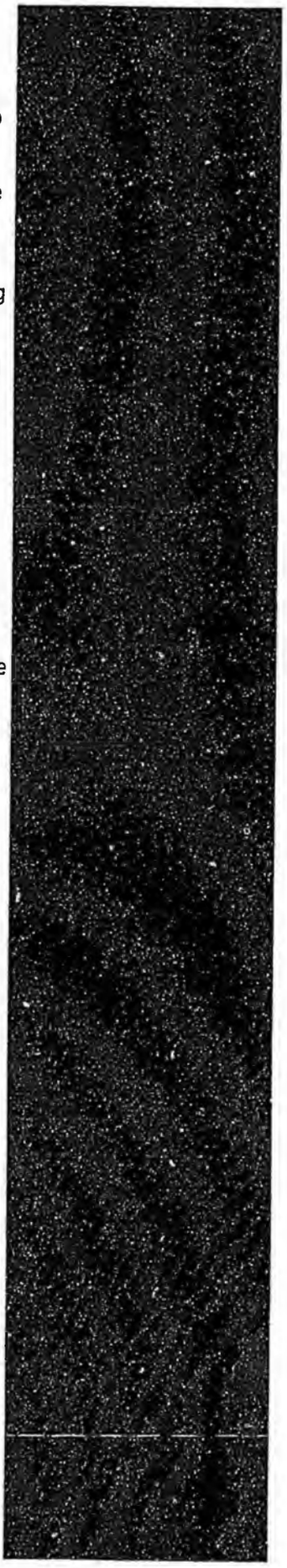
As stated above, all amounts paid or incurred for, or in connection with, direct and grassroots lobbying communications - including amounts paid or incurred as current or deferred compensation for employees' services attributable to lobbying, as well as the allocable share of overhead expenses attributable to lobbying - are included within the organization's total "lobbying expenditures."

A mixed grassroots and direct lobbying communication must be treated as a grassroots communication except to the extent that the organization demonstrates that the expenditure was incurred "primarily" for direct lobbying purposes, in which case a reasonable allocation must be made between the direct and grassroots lobbying purposes served by the communication.

For lobbying communications that also serve bona fide non-lobbying purposes, there are two alternate allocation rules. Which rule is used depends upon whether the communication is sent primarily to members or non-members. The rules are generally more favorable for member communications.

For communications that are sent primarily to bona fide members (i.e., communications sent to more members than non-members), the organization must make a reasonable allocation between the amount expended for the lobbying purpose and the amount expended for the non-lobbying purpose. Including as a lobbying expenditure only the amount expended for the specific sentence or sentences that encourage the recipient to action is not considered a reasonable allocation.

For communications that are not sent primarily to bona fide members, all costs attributable to the lobbying portion and to those parts of the communication that are on the same specific subject as the lobbying message must be included as lobbying expenditures. Whether or not a portion of a communication is on the same specific subject as the lobbying message will depend upon the surrounding facts and circumstances. In general, a portion of a communication will be on the same specific



subject as the lobbying message if that portion discusses an activity that would be directly affected by the legislation that is the subject of the lobbying message. Moreover, discussion of the background or consequences of either the legislation or of an activity directly affected by the legislation also will be considered to be on the same specific subject as the lobbying communication.

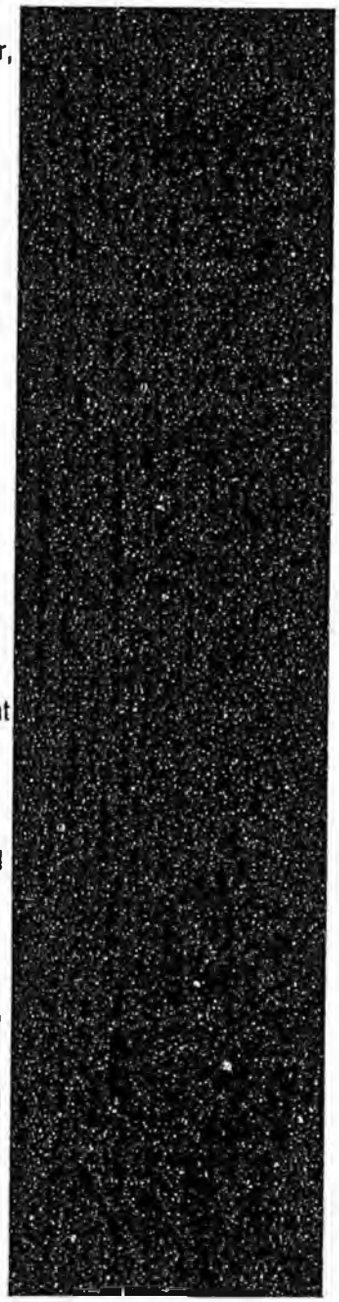
Transfers Treated as Lobbying
A transfer of money or property by a 501(c)(3) organization to an individual or entity will be treated as a lobbying expenditure if it is earmarked for that purpose. A transfer of money or property by a 501(c)(3) organization for less than fair market value to a non-501(c)(3) organization that lobbies will be treated as a lobbying expenditure unless it is a "controlled grant" or unless certain other exceptions apply. Also see below for a discussion of transfers by private foundations to 501(c)(3) public charities that lobby.

Private Foundations
501(c)(3) organizations that are private foundations are subject to excise tax on any amounts paid or incurred (i) in an attempt to influence legislation, or (ii) in an attempt to influence the outcome of any public election or to carry on certain voter registration drives. The definition of lobbying, and the exceptions thereto, are similar to the definitions and exceptions described above. As long as a private foundation does not earmark a grant for lobbying, it may make a general purpose grant to a 501(c)(3) public charity that lobbies without incurring penalty tax liability. A private foundation also may make a grant to support a specific public charity project that includes lobbying, so long as the grant is not earmarked for lobbying and so long as it is not larger than the amount budgeted by the grantee for the nonlobbying portion of the project.

Conclusion
Associations exempt from tax under Section 501(c)(3) must keep lobbying activities within specified limits. Grassroots lobbying is limited more than direct lobbying. To avoid incurring liability for excise taxes or loss of tax-exempt status, care should be taken to ensure compliance with the expenditures test under Section 501(h) and to enable such associations to take advantage of the opportunities provided by these rules.

Due to the numerous exceptions to the definition of lobbying for 501(c)(3) organizations, properly planned and structured, it is frequently possible for 501(c)(3) organizations to conduct all desired government affairs activities within the confines of the 501(c)(3) structure. This option should be thoroughly explored before any structural organizational changes are made, such as the establishment of an affiliated entity (*e.g.*, as a 501(c)(4) organization) to conduct lobbying activities.

Jeffrey S. Tenenbaum Esq., Partner
Venable, Baetjer, Howard & Civiletti
Can be reached at: jstenenbaum@venable.com
FIND SIMILAR



1300 Pennsylvania Ave. NW Washington, DC 20004 USA
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CONTACT US THE FACILITY

Tammy Kempton <Tammy_Kempton@admin.state.ak.us>
Juneau Office Administrator
APOC
Admin

AARP Alaska

APR 16 2003

Honorable Bruce Weyhrauch, Chair
House State Affairs Committee
Alaska Capital, Room 102
Juneau, AK 99801-1182

April 16, 2003

RE: HB 149 (Wolf) –Oppose

Dear Chair Weyhrauch:

On behalf of the AARP members in Alaska, we encourage you and your colleagues on the House State Affairs Committee to oppose HB 149, authored by Representative Kelly Wolf.

Although AARP would not be covered by the bill as it is currently written (AARP is a 501 (c)(4) corporation because we are a lobbying organization and we do pay taxes), we are concerned that HB 149 would dampen the ability of non-profit organizations to respond in a timely manner to proposed legislation, pronouncements from the Governor, etc. For example, the Governor surprised us when he announced that he would recommend that the Legislature eliminate the Longevity Bonus for 18,000 older Alaskans. The next morning AARP began to muster our members through direct mail. We easily would have gone over the $500 limit within 24 hours.

If HB 149 had been in effect, we would have had to post a public announcement in the newspaper 14 days before we planned to spend $500 in a lobbying effort. From past experience, we know that non-profits often must decide to purchase a newspaper ad or buy radio time (usually costing over $500) and the ad often runs within 48 hours. HB 149 would eliminate the opportunity for non-profits to participate in the legislative process in a timely manner. It would also force non-profits to spend an inordinate amount of money on public notices in newspapers.

In addition, HB 149 would probably violate the United States Constitution and would be ruled as such in a lawsuit. As a former President of the Alaska Bar Association, it would be helpful if you could offer some counsel on this issue.

Non-profits like AARP that use either a staff lobbyist or a contract lobbyist submit monthly and quarterly reports to APOC. This information is available to anyone who wishes to view it. All our lobbying expenditures are available for scrutiny to the public, the media, and the legislative and executive branch.

3601 C Street, Suite 1420 | Anchorage, AK 99503 | 907-341-2277 | 907-341-2270 fax | 1-877-434-7598 TTY
James G. Parkel, President | William D. Novelli, Executive Director and CEO | www.aarp.org

We do not know the original intent of Representative Wolf when he introduced this bill. We do know that this bill should not go forward.

AARP recommends a "NAY" vote on HB 149.

Should you have any questions about our position, please feel free to contact Marie Darlin (907.586.3637), Coordinator of the AARP Capital City Task Force; Patrick Luby (907.762.3314), AARP Legislative Representative; or me (907.245.5259).

Thank you for your consideration.

Sincerely,

Marguerite Stetson

Marguerite Stetson
AARP Alaska
Executive Council Member for Advocacy
3009 Northwood Street
Anchorage, AK 99517-1871
907.245.5259 voice
907.245.5279 fax
ffmas@aurora.uaf.edu

cc: Vice-Chair Jim Holm
Representative Nancy Dahlstrom
Representative Bob Lynn
Representative Paul Seaton
Representative Ethan Berkowitz
Representative Max Gruenberg
Marie Darlin
Patrick Luby

Subject: [Fwd: I am against HB 149]
Date: Tue, 06 May 2003 20:47:42 -0800
From: Bruce Weyhrauch <Representative_Bruce_Weyhrauch@Legis.state.ak.us>
Organization: Alaska State Legislature
To: Ginny Austerman <Ginny_Austerman@legis.state.ak.us>

committee file please

Subject: I am against HB 149
Date: Tue, 6 May 2003 22:50:31 EDT
From: AneidaAlexander@aol.com
To: Representative_Ethan_Berkowitz@legis.state.ak.us, Representative_Eric_Croft@legis.state.ak.us, Representative_Bruce_Weyhrauch@legis.state.ak.us
CC: Representative_Nancy_Dahlstrom@legis.state.ak.us, Representative_Paul_Seaton@legis.state.ak.us, Representative_Jim_Holm@legis.state.ak.us, Representative_Bob_Lynn@legis.state.ak.us, Representative_Max_Gruenberg@legis.state.ak.us, Senator_Hollis_French@legis.state.ak.us

I would like for you to know that I am against HB 149.

I see no reason to make these demands of nonprofit groups. I am a member and a ruling elder of First Presbyterian Anchorage. If I understand this bill correctly, the church session (governing body) could not publish an ad for or against pending legislation in the newspaper, even in our own newsletter, without burdensome reporting requirements. We couldn't fly one of our elders or pastors to Juneau to speak to various legislators. What in the world could we do that would require this kind of Big Brother over-sight? By our nature - nonprofits - we can't gain monetarily so for the life of me, I can't understand this bill. Quite frankly, I can only see this as backhanded Christian bashing. Are we that darn scary? If you are that scared of us, wait 'til you meet our God!

Lest you think that I'm just one of those foaming-at-the-mouth Bible thumpers, I also belong to a number of service and social organizations that this bill, if passed, would impact.

I have passed this information on to all of the members of these groups, urging them to write to their representatives and to encourage their friends and associates to do the same.

Thank you for your time.

Sincerely,
Aneida Alexander
3321 Monticello Ct.
Anchorage AK 99503
562-7854

Subject: [Fwd: HB 149]
Date: Tue, 06 May 2003 20:46:36 -0800
From: Bruce Weyhrauch <Representative_Bruce_Weyhrauch@Legis.state.ak.us>
Organization: Alaska State Legislature
To: Ginny Austerman <Ginny_Austerman@legis.state.ak.us>

file for committee

Subject: HB 149
Date: Tue, 6 May 2003 19:23:02 -0800
From: "Taber" <taber@bbbsfairbanks.org>
To: "Representative Bruce Weyhrauch" <Representative_Bruce_Weyhrauch@legis.state.ak.us>

Hello Representative Weyhrauch-

I am writing to you in your capacity as Chair of the House State Affairs Committee to ask you to take no action on HB 149 or its proposed CS, regarding non-profit lobbying, after it is heard again in your committee on May 7th. We at Arctic Alliance for People (a network of human service providers and non-profits serving the Interior) believe it is an ill-conceived and unnecessary piece of legislation that doesn't warrant further consideration and time on the part of the committee.

Non-profits communicate valuable information to decision-makers about the impact of proposed legislation on their clients - often citizens who would have difficulty communicating on their own. That important communication would be seriously hampered by this bill. The IRS, I believe, is plenty scary enough when it comes to lobbying limitations - and APOC regulations already cover paid lobbyists and significant lobbying in terms of public disclosure. Let's not legislate unnecessary inequities in a state that prides itself on "equal treatment" of its citizens.

Thanks for your time and attention.

Taber Rehbaum
Legislative Committee Chair
Arctic Alliance for People
Fairbanks, Alaska

HCW 5/16/03

Senate Bill 149
Timber First! in Alaska's Forests

Alaska Conservation Voters
Alaskans Building a Better Future

810 N St, Ste 203, Anchorage Alaska 99501 / Ph. 907.258.6171 / Fax 907.258.6177
PO Box 22151, Juneau Alaska 99802 / Ph. 907.463.3366 / Fax 907.463.3312 / www.acvoters.org

To: Representatives
From: Matt Davidson
Date: May 16, 2003

SB 149 makes dramatic changes to the management and purposes of Alaska's designated state forests and forested lands. Under SB 149 logging will be given a priority over all other forest resources and users. SB 149 ignores the importance of fishing, tourism, community uses, wildlife, and recreation in an unnecessary attempt to boost logging on state lands.

SB 149 is ill conceived and puts our forest resources at risk. Please oppose SB 149.

1. **Makes logging the primary purpose for state forests.** Under SB 149 only other uses that are *compatible* with logging will be considered as part of forest planning. The current "multiple use" management is the correct way for the state to manage our resources.
2. **Limits information about other uses before the creation of new state forests.** Under SB 149 the Governor will not be required to consult with the Department of Fish and Game or other agencies before recommending the creation of new state forests. Under SB 149 the proposed new *million-acre state forest* will be logging first, regardless of valuable fisheries, tourism, watershed, subsistence, or cultural resources.
3. **Disregards other resources in individual Forest Land Use Plans:** Limits consideration of site-specific impacts on fisheries, wildlife, and tourism in individual logging plans. Instead the bill proposes considering logging impacts the general "area plans." These plans are not written to make recommendations to protect watersheds, fish and wildlife habitat from potential logging. The bill doesn't recommend timely changes to these plans to consider these uses.
4. **Limits the ability of the state to protect fish habitat:** Unless the Commissioner makes a finding of "compelling state interest," logging buffers cannot be increased about the minimum to safeguard salmon habitat. "Compelling state interest" not defined anywhere in Statute making it unlikely buffers would ever be expanded beyond the minimum.
5. **Special value-added manufacturing timber sale areas expanded to include lands not compatible with substantial logging.** We strongly support increasing local processing of Alaska's timber, however, expanding the lands eligible for the "high value added" program violates the public understanding of the uses of these lands during the development of the regional area plans. Many important "community use" areas should not be eligible for any widespread logging.
6. **Pulping of timber is added to the "high value-added list for special contracts.** Pulping of Alaska's forests is not the highest use of these resources. The 40-year pulp mill era in Southeast Alaska drove many small local mills out of business and had dramatic impacts on fish and wildlife habitat.

Stand up for sound and balanced planning on our forested lands and oppose SB 149.

Alaskans building a better future.

United Way of Anchorage

May 13, 2003

TO: Representative Bruce Weyhrauch, Chair
House State Affairs Committee

FROM: Fred Jenkins, Executive Vice President

SUBJECT: Written Testimony CS for HB 149 (STA) Work Draft dated 5/12

Typically United Way of Anchorage does not involve itself in legislation, but when we see a bill that adversely impacts the nonprofit sector as a whole, we step forward. My reading tells me this is the type of bill that would adversely impact the nonprofit sector. I urge you not to move this bill forward.

Lobbying is a legal activity for nonprofits and they report this activity on their annual IRS Form 990 tax returns. That information is a matter of public record.

This bill has several features which are questionable:

The requirement for publication in a newspaper of two written notices 15 days before or after is a costly measure that will drain already scarce resources from nonprofit service provision. It is also an onerous and unnecessary requirement for an activity that is the right of every nonprofit and citizen to pursue under law.

The $1,000 minimum expense that triggers the requirement for notice is likely to mandate notice for any lobbying effort and would likely restrict many nonprofits from the activity since the cost for notices would quickly become prohibitive.

It is unclear how a budget of $1,000,000 triggers this requirement and whether it is fair to exempt organizations with a smaller budget from the requirement.

The bill sets forth requirements that likely are unreasonable limits to nonprofits' rights to free speech and expression of opinion. If the legislation is passed, legal challenges are likely and will add further costs to the State and nonprofit sector.

Budget cuts in this session are already restricting nonprofits' ability to deliver needed services in their communities. This legislation unnecessarily requires nonprofits to allocate additional resources to administration. This does not make good fiscal sense in our current environment. I assume there must be a fiscal note that attaches to this bill. How much will it cost for the State to administer this legislation? Is this a high priority given the scarcity of resources available?

I have forwarded copies of this testimony to the other five United Ways in Alaska who with the United Way of Anchorage collectively constitute a federation of over 200 nonprofits. If this legislation moves forward, we will also assemble a group of volunteer attorneys and professional public policy advocates to further examine the bill. It is my belief that all of these folks will actively and vigorously oppose this legislation. I respectfully urge you not to pass this legislation.

701 West 8th Ave., Suite 230
Anchorage, Alaska 99501
p 907.263.3800 f 907.263.3801 www.uway.ak.org

Subject: HB 149
Date: Wed, 14 May 2003 07:11:35 -0800
From: akcompub@arctic.net
To: Ginny_Austerman@Legis.state.ak.us, Representative_Bruce_Weyhrauch@legis.state.ak.us, Representative_Jim_Holm@legis.state.ak.us, Representative_Nancy_Dahlstrom@legis.state.ak.us, Representative_Bob_Lynn@legis.state.ak.us, Representative_Paul_Seaton@legis.state.ak.us, Representative_Ethan_Berkowitz@legis.state.ak.us, Representative_Max_Gruenberg@legis.state.ak.us

Dear Ladies and Gentlemen of the State Affairs Committee

Because of the frequent rescheduling of HB 149, I will not be able to testify in person this morning and thus wish to share through this email the concern I have for the effect this bill will have on the faith communities in the State.

Churches, Synagogues and other religious organizations are engaged in sharing a spiritual message, healing, care and comfort with their own faith communities and with the broader public in their communities. Often, it becomes valuable for the representatives of these faith communities to share with Legislators and with Regulators, information about the work these religious organizations are doing when Legislators or regulators are considering bills or regs dealing in areas which may impact or overlap with the religious activities.

For example, in my capacity as Christian Science Committee on Publication, I represent a broad and growing segment of people in Alaska who are turning to prayer for healing. Over the past several years, this office has had a very good working relationship with the Legislature and, as a result, fair and reasonable language has been added to pending legislation, particularly dealing with health care, that recognize spiritual healing.

The Legislature would have been without the benefit of the valuable input of this office or of other religious organizations that also work closely with the Legislature if, because of excessive administrative or financial burdens, their representatives were precluded from lobbying activity.

We believe existing law already adequately provides oversight of lobbying activity. HB 149, making it more restrictive for non-profits to lobby than for commercial interests, is unnecessary. On the other hand, should the Committee wish to advance this bill, we would ask that you favorably consider exempting religious organizations.

With appreciation for your careful consideration,

Richard L. Block
Christian Science Committee on Publication
360 W Benson Blvd., Suite 301
Anchorage, Alaska 99503
907 562 5183
akcompub@arctic.net

Subject: [Fwd: HB 149- this letter has also been faxed]
Date: Tue, 06 May 2003 20:47:54 -0800
From: Bruce Weyhrauch <Representative_Bruce_Weyhrauch@Legis.state.ak.us>
Organization: Alaska State Legislature
To: Ginny Austerman <Ginny_Austerman@legis.sta ak.us>

committee file please

Subject: HB 149- this letter has also been faxed
Date: Tue, 6 May 2003 17:15:19 -0800
From: "Elyse Guttenberg" <eguttenberg@fairbanksnative.org>
To: <Representative_Bruce_Weyhrauch@legis.state.ak.us>

May 6th, 2003

The Honorable Bruce Weyhrauch
House State Affairs
Alaska State Legislature

Dear Representative Weyhrauch,

I am writing to urge you to help stop HB 149 from moving out of the House State Affairs committee. This bill would effectively put an end to the ability of non-profit agencies in Alaska to speak to any bill that concern the Alaskans they serve. By requiring publication of a notice of intent to expend more than $500 on any lobbying efforts, the legislature would be putting up a road block so steep, that non-profits-and only non-profits-would be prevented from contacting their legislators.

Picture an agency in Nome where the local newspaper, The Nome Nugget comes out weekly. To meet the requirements of HB 149 this agency-lets pick one of the local non-profits, the Christian Pilots Association of Alaska-would need to contact the Nome Nugget twice, waiting as much as three weeks before they could legally be permitted to spend $500 hoping to effect legislation. Since the Christian Pilots Association is an interdenominational group dedicated to transporting pastors, missionaries and lay workers to the Eskimo villages of Northwest Alaska, they might very well want to approach their legislators in Juneau if, for instance there was item in the budget concerning runways, and the maintenance of small airports.

$500 is quickly spent on direct mail to pilots, church groups, and villages, and by the time the Pilots Association complied with the notification requirements, the bill could already have passed out of committee, of even been voted on by the House. In the meantime, the for-profit companies who have concerns of their own would have faced none of these constraints. No time frame. No $500 limit, and their lobbyists would have enjoyed full and immediate access to legislators. HB 149 would have taken the Christian Pilots Association, or the Iditarod National Historic Trail, or the non-profit Kawerak Family Services which offers help to neglected children, and placed them in a separate and special category, denying them the right to contact their legislators without prior constraints.

Again, I urge you to stop this bill without allowing it to move out of committee. It is the people of Alaska, those with the most need for the services provided by our non-profits, who have the most to lose, and the most to gain by your thoughtful actions.

[Fax: HB 149- this letter has also been faxed]

Thank you again,

Elyse Guttenberg
Director, Planning and Development
Fairbanks Native Association
201 First Avenue, Suite 220
Fairbanks, AK 99701
(907) 452-1648 ext. 230

HB

157

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: March 5, 2003

FURTHER REFERRALS: Judiciary Finance

Date of Committee Action: May 8, 2003

The STATE AFFAIRS Committee considered: **HB 157**

HOUSE BILL NO. 157 **ELIMINATE APOC**

"An Act eliminating the Alaska Public Offices Commission; transferring campaign, public official, and lobbying financial disclosure record-keeping duties to the division of elections; relating to reports, summaries, and documents regarding campaign, public official, and lobbying financial disclosure; providing for enforcement by the Department of Law; making conforming statutory amendments; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* [ ] CS for HB 157 (STA)

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office

List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS FISCAL NOTES

List by Dept(s):	FN#	Fiscal	Indet.	Zero
BOU	1			✓
ADM	2	✓		
ADM		✓		

Signing ~~with recommendations~~	Printed Last Name	DP	DNP	NR	AM
Paul R Seaton	SEATON	✓			
	Holm			✓	
Bob Lynn	LYNN	X			
	Dahlstrom			X	
	Berkowitz				✓
	Gruenberg			✓	
Chair: BWeyhrauch	Weyhrauch	X			
Chair:					

HOUSE STATE AFFAIRS COMMITTEE

STATE CAPITOL, ROOM 102
465-2028

COMMITTEE MEMBERS

Rep. Bruce Weyhrauch
Chairman
Room 102
465-2028

Rep. Jim Holm
Vice-Chair
Room 110
465-3466

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4652689

Rep. Nancy Dahlstrom
Room 108
465-4949

Rep. Bob Lynn
Room 415
465-4931

Rep. Harry Crawford
Room 426
465-3438

Rep. Max Gruenberg
Room 112
465-4940

MEMORANDUM

Date: May 9, 2003

To: House Finance Committee

From: Representative Bruce Weyhrauch, Chair

Re: HB 157

The House State Affairs Committee adopted HB 157 version 23-GH1090\I and passed the Bill from committee. The next committee of referral is House Finance.

Barbara R. Craver, Legislative Counsel, has written the State Affairs Committee a memo explaining that an amendment is required by House Finance in order to correct a drafting error. A copy of that memo, as well as the proposed amendment are attached for your convenience.

Bruce B Weyhrauch

Representative Bruce Weyhrauch
Chair

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM May 9, 2003

SUBJECT: Amendment to CSHB 157(STA) "I"
(Work Order No. 23-GH1090\H)

TO: Representative Bruce Weyhrauch
Attn: Ginny Austerman

FROM: Barbara R. Craver
Legislative Counsel

In my review and revision of CSHB 157(STA) version "D", I added AS 24.60.031 to the statutes to be repealed in version "H." I did this because the repeal of AS 15.13.074(d) seemed to make the provisions in AS 24.60 moot. At your request, I have carefully considered the materials provided by the Alaska Public Offices Commission, and researched the issue, and concluded that AS 24.60.031 should not have been repealed by this bill. I am providing a blank amendment to take the repeal of that section out of the bill.

If I may be of further assistance, please advise.

BRC:mdr
03-112.mdr

Enclosure

23-GH1090\I.1
Craver
5/9/03

AMENDMENT

OFFERED IN THE HOUSE

TO: CSHB 157(STA)

Page 1, line 12, following "**prohibition**":

Insert "**in the state election campaign laws**"

Page 19, line 19:

Delete "AS 24.45.116; and AS 24.60.031"

Insert "and AS 24.45.116"

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MEMORANDUM May 7, 2003

SUBJECT: CSHB 157(STA) version "H" (Work Order No. 23-GH1090\H)

TO: Representative Bruce Weyhrauch
Attn: Ginny Austerman

FROM: Barbara R. Craver BRC
Legislative Counsel

Enclosed is version "H" of CSHB 157(STA). This version incorporates all the amendments to version "D" agreed to by the House State Affairs Committee. There are also drafting changes made to the bill. I will briefly outline the changes to version "D" found in this new version on a section by section basis.

Title section. The bill title did not accurately reflect the contents of version "D" as drafted, and the changes to version "H" required additional changes. The particular subjects in this bill include:

- campaign finance;
- changes to definitions used in the regulation of lobbying;
- public official financial disclosure.

The Alaska Public Offices Commission is charged by AS 15.13.030 with overseeing all those topics.

Section 1. AS 15.13.030 in section 1 adds the issuance of written advisory opinions to the duties of the Alaska Public Offices Commission ("commission"). Section 1 of version "D" was deleted by amendment 1-B.

Section 2, 3, & 4. AS 15.13.040(a), (b) and (j) are amended to reflect the simplified reporting of fundraisers under new subsection (m); the changes to the existing statutes found in version "D" are removed by amendment 1-B. A new sentence is added to sec. 2 by amendment #4.

Section 5. AS 15.13.040 is amended to add new subsections as follows:

(*l*) allows the commission to request electronic filing of information under chapter AS 15.13;

(m) allows a simplified report to be filed for contributions and expenditures related to campaign fundraisers; the substance of this subsection was located in sec. 9 of version "D" and was redrafted to make it clearer and more generally applicable; secs. 10,

11, 12 of version "D" were deleted by amendment 5 and sec. 13 of version "D" was deleted by amendment 6.

Section 6. AS 15.13.072(e). This was sec. 14 in version "D"; a drafting change was made to clarify the meaning.

Section 7. AS 15.13.074(g). Amendment 7 replaced current language removed in version "D" sec. 15.

Section 8. AS 15.13.074(h). This section was added in version "H" because there is a cross reference in this section to AS 15.13.116(a)(1)(A). Amendment 10 deleted "a political party" from AS 15.13.116(a)(2). In order to preserve the intent of AS 15.13.074(h)(2), the reference to the other statutory subparagraph is removed and replaced with a reference to "unused contributions to a political party within 90 days after an election."

The legislature should make an explicit amendment to AS 15.13.074(h)(2) if it wishes to extend the effect of amendment 10 to the governor, lieutenant governor, or a group presumed to be controlled by a candidate for governor or lieutenant governor. Under current law the candidate may give unused contributions post election to a political party. The cross reference to AS 15.13.116(a)(1)(A) must be removed from AS 15.13.074(h) to conform to the changes in this bill.

Section 9. AS 15.13.078(b). This is the same as sec. 16 of version "D" with no changes.

Section 10. AS 15.13.110(a). This is the same as sec. 17 of version "D" with minor technical drafting changes.

Section 11. AS 15.13.116(a). This is the same as sec. 18 of version "D" with minor technical drafting changes in the body of subsection (a). Amendment 10 deleted "a political party" from AS 15.13.116(a)(2). In order to conform to this change, but preserve the meaning of AS 15.13.074(h) a new bill section was added. See sec. 8.

Section 12. AS 15.13.374. This is sec. 19 in version "D" with drafting changes to better organize the information without changing the substance. Amendment 11 is incorporated into the changes.

Section 13. AS 15.13.380. This is sec. 20 in version "D" with drafting changes to conform to the drafting manual without changing the substance.

Version "D" in sec. 20, subsection (k) made changes to language that was taken from AS 15.13.380(h). Version "H" deletes those changes. The reason is that (k) applies when a successful candidate is alleged to have violated a provision of AS 15.13, but there has been no decision by the commission that a violation has or has not occurred. In this case the language found in AS 15.13.380(h) provides that the commission shall promptly

dispose of the allegation. The change found in (k) attempts to indirectly add a requirement that the court system give appeals of these matters a priority position on the court calendar. Because (k) relates only to alleged violations and the procedure to be used by the commission, and because the added language does not clearly provide for and apply to appeals of decisions of the commission, it has been deleted.

The changes to (k) would have required notice of an indirect court rule amendment found in section 35 of version "D." The passage of an indirect court rule amendment requires a two-thirds majority vote, and if the vote failed, the changes would not have taken effect. Deleting the changes to (k) allowed the deletion of those other sections for version "H." Changes to the title were also made to reflect these changes.

Sections 14, 15, 16, and 17. These were secs. 21 - 24 in version "D." Minor drafting changes were made. Sec. 25 in version "D" was deleted by amendment 13, and the repeal of AS 24.45.116 is found in sec. 23 of version "H."

Section 18. AS 24.45.171(1). This was sec. 26 in version "D."

Section 19. AS 24.45.171(8). This was sec. 27 in version "D." The changes made by conceptual amendment 1 have been made.

Section 20. AS 24.60.200. This was sec. 28 in version "D." Amendment 17-A changes the amount of the disclosure of income required.

Section 21. AS 24.60.200. This was sec. 29 in version "D."

Section 22. AS 39.50.030(b). This was sec. 30 in version "D." Amendment 17-A changes to dollar amounts were made.

Section 23. AS 39.50.050(a). This was sec. 31 in version "D." Sec. 32 and 33 in version "D" were deleted by amendment 1-B.

Section 24. This is the repealer section that was sec. 34 in version "D." The only changes from version "D" were to add AS 24.45.116 to this section due to amendment 13, and to delete the reference to AS 39.50.200(a)(8)(G) which was repealed in 1999 in sec. 10, ch. 29 SLA 1999. Sec. 35 in version "D" was deleted; see notes to section 13 above. The repeals required a change to the title.

Section 25, 26, and 27. These were secs. 36, 37 and 38 in version "D."

BRC:mdr
03-107.mdr

Enclosure:

23-GH1090\H
Craver
5/7/03

CS FOR HOUSE BILL NO. 157(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act authorizing the Alaska Public Offices Commission to issue advisory opinions; amending campaign financial disclosure requirements; amending the definition of 'administrative action' and 'lobbyist'; amending limits on campaign contributions from nonresident individuals; providing for electronic filing of certain documents with the Alaska Public Offices Commission; allowing a candidate to make a loan to the candidate's own campaign without notifying the commission; amending provisions governing the distribution of unused campaign contributions; providing for expedited consideration of, and modifying procedures for determining, violations of state election campaign laws; amending the time period within which to file an administrative complaint of a violation of state election campaign laws; amending the definition of 'political party' for state election campaigns; amending the requirements for the reporting of financial interests by public officials; repealing the prohibition on campaign

New Text Underlined [DELETED TEXT BRACKETED]

contribution solicitations and acceptances while the legislature is in session and in the capital city; repealing the requirement for civic leagues and organizations to report contributions to influence legislative action; making conforming amendments; and providing for an effective date."

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

* **Section 1.** AS 15.13.030 is amended to read:

Sec. 15.13.030. Duties of the commission. The commission shall

(1) develop and provide all forms for the reports and statements required to be made under this chapter, AS 24.45, and AS 39.50;

(2) prepare and publish a manual setting out uniform methods of bookkeeping and reporting for use by persons required to make reports and statements under this chapter and otherwise assist candidates, groups, and individuals in complying with the requirements of this chapter;

(3) receive and hold open for public inspection reports and statements required to be made under this chapter and, upon request, furnish copies at cost to interested persons;

(4) compile and maintain a current list of all filed reports and statements;

(5) prepare a summary of each report filed under AS 15.13.110 and make copies of this summary available to interested persons at their actual cost;

(6) notify, by registered or certified mail, all persons who are delinquent in filing reports and statements required to be made under this chapter;

(7) examine, investigate, and compare all reports, statements, and actions required by this chapter, AS 24.45, and AS 39.50;

(8) prepare and publish a biennial report concerning the activities of the commission, the effectiveness of this chapter, its enforcement by the attorney general's office, and recommendations and proposals for change; the commission shall notify the legislature that the report is available:

(9) adopt regulations necessary to implement and clarify the provisions

of AS 24.45, AS 39.50, and this chapter, subject to the provisions of AS 44.62 (Administrative Procedure Act)**: and**

(10) consider a written request for an advisory opinion concerning the application of this chapter, AS 24.45, AS 24.60.200 - 24.60.260, or AS 39.50.

* **Sec. 2.** AS 15.13.040(a) is amended to read:

(a) Except as provided in (g) **and (m)** of this section, each candidate shall make a full report, upon a form prescribed by the commission, listing **(1)** the date and amount of all expenditures made by the candidate, **(2)** the total amount of all contributions, including all funds contributed by the candidate, and **(3)** for all contributions in excess of $100 in the aggregate a year, the name, address, principal occupation, and employer of the contributor and the date and amount contributed by each contributor. The report shall be filed in accordance with AS 15.13.110 and shall be certified correct by the candidate or campaign treasurer. **Nothing in this subsection prevents a candidate from reporting all contributions if desired by the candidate.**

* **Sec. 3.** AS 15.13.040(b) is amended to read:

(b) **Except as provided in (m) of this section, each** [EACH] group shall make a full report upon a form prescribed by the commission, listing

(1) the name and address of each officer and director;

(2) the aggregate amount of all contributions made to it; and for all contributions in excess of $100 in the aggregate a year, the name, address, principal occupation, and employer of the contributor, and the date and amount contributed by each contributor; for purposes of this paragraph, "contributor" means the true source of the funds, property, or services being contributed; and

(3) the date and amount of all contributions made by it and all expenditures made, incurred, or authorized by it.

* **Sec. 4.** AS 15.13.040(j) is amended to read:

(j) **Except as provided in (m) of this section, each** [EACH] nongroup entity shall make a full report in accordance with AS 15.13.110 upon a form prescribed by the commission and certified by the nongroup entity's treasurer, listing

(1) the name and address of each officer and director of the nongroup

entity;

(2) the aggregate amount of all contributions made to the nongroup entity for the purpose of influencing the outcome of an election; and, for all such contributions in excess of $100 in the aggregate a year, the name, address, principal occupation, and employer of the contributor, and the date and amount contributed by each contributor; for purposes of this paragraph, "contributor" means the true source of the funds, property, or services being contributed; and

(3) the date and amount of all contributions made by the nongroup entity, and, except as provided for certain independent expenditures in AS 15.13.135(a), all expenditures made, incurred, or authorized by the nongroup entity, for the purpose of influencing the outcome of an election; a nongroup entity shall report contributions made to a different nongroup entity for the purpose of influencing the outcome of an election and expenditures made on behalf of a different nongroup entity for the purpose of influencing the outcome of an election as soon as the total contributions and expenditures to that nongroup entity for the purpose of influencing the outcome of an election reach $500 in a year and for all subsequent contributions and expenditures to that nongroup entity in a year whenever the total contributions and expenditures to that nongroup entity for the purpose of influencing the outcome of an election that have not been reported under this paragraph reach $500.

* **Sec. 5.** AS 15.13.040 is amended by adding new subsections to read:

(*l*) Upon request of the commission, the information required under this chapter shall be submitted electronically.

(m) Notwithstanding (a), (b), and (j) of this section, for any fund raising activity in which contributions are in amounts or values that do not exceed $50 a person, the candidate, group, or nongroup entity shall report contributions and expenditures and supplying of services under this subsection as follows:

(1) a report under this subsection must

(A) describe the fund raising activity;

(B) include the number of persons making contributions and the total proceeds from the activity;

(C) report all contributions made for the fund raising activity that do not exceed $50 a person in amount or value; if a contribution for the fund raising activity exceeds $50, the contribution shall be reported under (a), (b), and (j) of this section;

(2) for purposes of this subsection,

(A) "contribution" means a cash donation, a purchase such as the purchase of a ticket, the purchase of goods or services offered for sale at a fund raising activity, or a donation of goods or services for the fund raising activity;

(B) "fund raising activity" means an activity, event, or sale of goods undertaken by a candidate, group, or nongroup entity in which contributions are $50 a person or less in amount or value.

* **Sec. 6.** AS 15.13.072(e) is amended to read:

(e) A candidate or an individual who has filed with the commission the document necessary to permit that individual to incur election-related expenses under AS 15.13.100 may solicit or accept contributions from an individual who is not a resident of the state at the time the contribution is made if the amounts contributed by individuals who are not residents do not exceed

(1) $20,000 **a calendar year**, if the candidate or individual is seeking the office of governor or lieutenant governor;

(2) $5,000 **a calendar year**, if the candidate or individual is seeking the office of state senator;

(3) $3,000 **a calendar year**, if the candidate or individual is seeking the office of state representative or municipal or other office.

* **Sec. 7.** AS 15.13.074(g) is amended to read:

(g) An individual required to register as a lobbyist under AS 24.45 may not make a contribution to a candidate for the legislature at any time the individual is subject to the registration requirement under as 24.45 and for one year after the date of the individual's initial registration or its renewal. However, the individual may make a contribution under this section to a candidate for the legislature in a district in which the individual is eligible to vote or will be eligible to vote on the date of the election.

An individual who is subject to the restrictions of this subsection shall report to the commission, on a form provided by the commission, each contribution made while required to register as a lobbyist under AS 24.45. **Upon request of the commission, the information required under this subsection shall be submitted electronically.** This subsection does not apply to a representational lobbyist as defined in regulations of the commission.

* **Sec. 8.** AS 15.13.074(h) is amended to read:

(h) Notwithstanding AS 15.13.070, a candidate for governor or lieutenant governor and a group that is not a political party and that, under the definition of the term "group," is presumed to be controlled by a candidate for governor or lieutenant governor, may not make a contribution to a candidate for another office, to a person who conducts a write-in campaign as a candidate for other office, or to another group of amounts received by that candidate or controlled group as contributions between January 1 and the date of the general election of the year of a general election for an election for governor and lieutenant governor. This subsection does not prohibit

(1) the group described in this subsection from making contributions to the candidates for governor and lieutenant governor whom the group supports; or

(2) the governor or lieutenant governor, or the group described in this subsection, from making contributions **of unused contributions to a political party within 90 days after an election** [UNDER AS 15.13.116(a)(2)(A)].

* **Sec. 9.** AS 15.13.078(b) is amended to read:

(b) The provisions of this chapter do not prohibit the individual who is a candidate from lending any amount to the campaign of the candidate. Loans made by the candidate shall be reported as contributions in accordance with AS 15.13.040 and 15.13.110. However, the candidate may not

[(1)] recover, under this section and AS 15.13.116(a)(4), the amount of a loan made by the candidate to the candidate's own campaign that exceeds

(1) [(A)] $25,000, if the candidate ran for governor or lieutenant governor;

(2) [(B)] $10,000, if the candidate ran for

(A) [(i)] the legislature; or

(B) [(ii)] delegate to a constitutional convention;

(3) [(C)] $10,000, if the candidate was a judge seeking retention;

(4) [(D)] $5,000, if the candidate ran in a municipal election [; OR

(2) REPAY A LOAN THAT THE CANDIDATE HAS MADE TO THE CANDIDATE'S OWN CAMPAIGN UNLESS, WITHIN FIVE DAYS OF MAKING THE LOAN, THE CANDIDATE NOTIFIES THE COMMISSION, ON A FORM PROVIDED BY THE COMMISSION, OF THE CANDIDATE'S INTENTION TO REPAY THE LOAN UNDER AS 15.13.116(a)(4)].

* **Sec. 10.** AS 15.13.110(a) is amended to read:

(a) Each candidate, group, and nongroup entity shall make a full report in accordance with AS 15.13.040 for the period ending three days before the due date of the report and beginning on the last day covered by the most recent previous report. If the report is a first report, it **must** [SHALL] cover the period from the beginning of the campaign to the date three days before the due date of the report. If the report is a report due February 15, it **must** [SHALL] cover the period beginning on the last day covered by the most recent previous report or on the day that the campaign started, whichever is later, and ending on **February 1 of that** [DECEMBER 31 OF THE PRIOR] year. The report shall be filed

(1) 30 days before the election; however, this report is not required if the deadline for filing a nominating petition or declaration of candidacy is within 30 days of the election;

(2) one week before the election;

(3) **105** [10] days after **a special, municipal, or municipal run-off** [THE] election; and

(4) February 15 for expenditures made and contributions received that were not reported **previously** [DURING THE PREVIOUS YEAR], including, if applicable, all amounts expended from a public office expense term account established under AS 15.13.116(a)(8) and all amounts expended from a municipal office account under AS 15.13.116(a)(9), or when expenditures were not made or contributions were not received during the previous year.

* **Sec. 11.** AS 15.13.116(a) is amended to read:

(a) A candidate who, after the date of the general, special, municipal, or municipal runoff election or after the date the candidate withdraws as a candidate, whichever comes first, holds unused campaign contributions shall **on February 1 for a general election or within 90 days after a special, municipal, or municipal runoff election** distribute the amount held [WITHIN 90 DAYS]. The distribution may only be made to

(1) pay bills incurred for expenditures reasonably related to the campaign and the winding up of the affairs of the campaign, including a victory or thank you party, thank you advertisements, and thank you gifts to campaign employees and volunteers, and to pay expenditures associated with post-election fund raising that may be needed to raise funds to pay off campaign debts;

(2) make donations, without condition, to

(A) [A POLITICAL PARTY;

(B)] the state's general fund;

(B) [(C)] a municipality of the state; or

(C) [(D)] the federal government;

(3) make donations, without condition, to organizations qualified as charitable organizations under 26 U.S.C. 501(c)(3) if [, PROVIDED] the organization is not controlled by the candidate or a member of the candidate's immediate family;

(4) repay loans from the candidate to the candidate's own campaign under AS 15.13.078(b);

(5) repay contributions to contributors, but only if repayment of the contribution is made pro rata in approximate proportion to the contributions made using one of the following, as the candidate determines:

(A) to all contributors;

(B) to contributors who have contributed most recently; or

(C) to contributors who have made larger contributions;

(6) establish a fund for, and from that fund to pay, attorney fees or costs incurred in the prosecution or defense of an administrative or civil judicial action that directly concerns a challenge to the victory or defeat of the candidate in the election;

(7) transfer all or a portion of the unused campaign contributions to an account for a future election campaign; a transfer under this paragraph is limited to

(A) $50,000, if the transfer is made by a candidate for governor or lieutenant governor;

(B) $10,000, if the transfer is made by a candidate for the state senate;

(C) $5,000, if the transfer is made by a candidate for the state house of representatives; and

(D) $5,000, if the transfer is made by a candidate for an office not described in (A) - (C) of this paragraph;

(8) transfer all or a portion of the unused campaign contributions to a public office expense term account or to a public office expense term account reserve in accordance with (d) of this section; a transfer under this paragraph is subject to the following:

(A) the authority to transfer is limited to candidates who are elected to the state legislature;

(B) the public office expense term account established under this paragraph may be used only for expenses associated with the candidate's serving as a member of the legislature;

(C) all amounts expended from the public office expense term account shall be annually accounted for under AS 15.13.110(a)(4); and

(D) a transfer under this paragraph is limited to $5,000 multiplied by the number of years in the term to which the candidate is elected plus any accumulated interest; and

(9) transfer all or a portion of the unused campaign contributions to a municipal office account; a transfer under this paragraph is subject to the following:

(A) the authority to transfer is limited to candidates who are elected to municipal office, including a municipal school board;

(B) the municipal office account established under this paragraph may be used only for expenses associated with the candidate's serving as mayor or as a member of the assembly, city council, or school

board;

(C) all amounts expended from the municipal office account shall be annually accounted for under AS 15.13.110(a)(4); and

(D) a transfer under this paragraph is limited to $5,000.

* **Sec. 12.** AS 15.13 is amended by adding a new section to read:

Sec. 15.13.374. Advisory opinion. (a) Any person may request an advisory opinion from the commission concerning this chapter, AS 24.45, AS 24.60.200 - 24.60.260, or AS 39.50.

(b) A request for an advisory opinion

(1) must be in writing or contained in a message submitted by electronic mail;

(2) must describe a specific transaction or activity that the requesting person is presently engaged in or intends to undertake in the future;

(3) must include a description of all relevant facts, including the identity of the person requesting the advisory opinion; and

(4) may not concern a hypothetical situation or the activity of a third party.

(c) Within seven days after receiving a request satisfying the requirements of (b) of this section, the executive director of the commission shall recommend a draft advisory opinion for the commission to consider at its next meeting.

(d) The approval of a draft advisory opinion requires the affirmative vote of four members of the commission. A draft advisory opinion failing to receive four affirmative votes of the members of the commission is disapproved.

(e) A complaint under AS 15.13.380 may not be considered about a person involved in a transaction or activity that

(1) was the material subject of an advisory opinion approved under (d) of this section;

(2) is indistinguishable from the description of an activity that was approved in an advisory opinion approved under (d) of this section; or

(3) was undertaken after the executive director of the commission recommended a draft advisory opinion under (c) of this section and before the

commission acted on the draft advisory opinion under (d) of this section, if

(A) the draft advisory opinion would have approved the transaction or activity described; and

(B) the commission disapproved the draft advisory opinion.

(f) Advisory opinion requests and advisory opinions are public records subject to inspection and copying under AS 40.25.

* **Sec. 13.** AS 15.13.380 is repealed and reenacted to read:

Sec. 15.13.380. Violations; limitations on actions. (a) Promptly after the final date for filing statements and reports under this chapter, the commission shall notify all persons who have become delinquent in filing a statement or report under this chapter, including contributors who failed to file a statement in accordance with AS 15.13.040, and shall make available a list of delinquent filers for public inspection. The commission shall also report to the attorney general the names of all candidates in an election whose campaign treasurers have failed to file the reports required by this chapter.

(b) A member of the commission, the commission's executive director, or a person who believes a violation of this chapter or a regulation adopted under this chapter has occurred or is occurring may file an administrative complaint with the commission within one year after the date of the alleged violation. If a member of the commission has filed the complaint, that member may not participate as a commissioner in any proceeding of the commission with respect to the complaint. The commission may consider a complaint on an expedited basis or a regular basis.

(c) The complainant or the respondent to the complaint may request in writing that the commission expedite consideration of the complaint. A request for expedited consideration must be accompanied by evidence to support expedited consideration and be served on the opposing party. The commission shall grant or deny the request within two days after receiving it. In deciding whether to expedite consideration, the commission shall consider such factors as whether the alleged violation, if not immediately restrained, could materially affect the outcome of an election or other impending event; whether the alleged violation could cause irreparable harm that penalties could not adequately remedy; and whether there is reasonable cause to

believe that a violation has occurred or will occur. Notwithstanding the absence of a request to expedite consideration, the commission may independently expedite consideration of the complaint if the commission finds that the standards for expedited consideration set out in this subsection have been met.

(d) If the commission expedites consideration, the commission shall hold a hearing on the complaint within two days after granting expedited consideration. Not later than one day after affording the respondent notice and an opportunity to be heard, the commission shall

(1) enter an emergency order requiring the violation to cease or to be remedied and shall assess civil penalties under AS 15.13.390 if the commission finds that the respondent has engaged in or is about to engage in an act or practice that constitutes or will constitute a violation of this chapter or a regulation adopted under this chapter; or

(2) enter an emergency order dismissing the complaint if the commission finds that the respondent has not or is not about to engage in an act or practice that constitutes or will constitute a violation of this chapter or a regulation adopted under this chapter; or

(3) remand the complaint to the executive director of the commission for consideration by the commission on a regular rather than expedited basis.

(e) If the commission accepts the complaint for consideration on a regular rather than expedited basis, the commission shall notify the respondent within seven days after receiving the complaint and shall investigate the complaint. The respondent may answer the complaint by filing a written response with the commission within 15 days after the commission notifies the respondent of the complaint. The commission may grant the respondent additional time to respond to the complaint only for good cause. The commission shall hold a hearing on the complaint not later than 45 days after the respondent's written response is due. Not later than 10 days after the hearing, the commission shall issue its order. If the commission finds that the respondent has engaged in or is about to engage in an act or practice that constitutes or will constitute a violation of this chapter or a regulation adopted under this chapter, the commission shall enter an order requiring the violation to cease or to be remedied and shall assess

civil penalties under AS 15.13.390.

(f) If the complaint involves a challenge to the constitutionality of a statute or regulation, necessary witnesses that are not subject to the commission's subpoena authority, or other issues outside the commission's authority, the commission may request the attorney general to undertake a court action. The commission may request the attorney general to undertake a court action to remedy the violation of a commission order.

(g) A commission order under (d) or (e) of this section may be appealed to the superior court by either the complainant or respondent within 30 days after the order was issued in accordance with the Alaska Rules of Appellate Procedure.

(h) If the commission does not complete action on an administrative complaint within 90 days after the complaint was filed, the complainant may file a complaint in superior court alleging a violation of this chapter by a respondent as described in the administrative complaint filed with the commission. The complainant shall provide copies of the complaint filed in the superior court to the commission and the attorney general. A complaint may not be filed in superior court under this subsection if more than two years have elapsed after the date of the alleged violation. This subsection does not create a private cause of action against the commission; against the commission's members, officers, or employees; or against the state.

(i) If, after a successful candidate is sworn into office, a person who was a successful candidate or the campaign treasurer or deputy campaign treasurer of a person who was a successful candidate is convicted of a violation of this chapter, proceedings shall be held and appropriate action taken in accordance with

(1) art. II, sec. 12, Constitution of the State of Alaska, if the candidate is a candidate for the state legislature;

(2) art. II, sec. 20, Constitution of the State of Alaska, if the candidate is a candidate for governor or lieutenant governor;

(3) AS 29.20.170, if the candidate is a candidate for the borough assembly;

(4) AS 29.20.280, if the candidate is a candidate for borough mayor;

(5) AS 29.20.170, if the candidate is a candidate for city council;

(6) AS 29.20.280, if the candidate is a candidate for city mayor;

(7) the provisions of the call for the constitutional convention, if the candidate is a candidate for constitutional convention delegate;

(8) art. IV, sec. 10, Constitution of the State of Alaska, if the candidate is a candidate for judicial retention.

(j) Information developed by the commission under (b) - (e) of this section shall be considered during a proceeding under (i) of this section.

(k) If, after a successful candidate is sworn into office, the successful candidate or the campaign treasurer or deputy campaign treasurer of the person who was a successful candidate is charged with a violation of this chapter, the case shall be promptly tried and accorded a preferred position for purposes of argument and decision, so as to assure a speedy disposition of the matter.

* **Sec. 14.** AS 15.13.400(15) is repealed and reenacted to read:

(15) "political party" means any group that is a political party under AS 15.60.010 and any subordinate unit of that group if, consistent with the rules or bylaws of the political party, the unit conducts or supports campaign operations in a municipality, neighborhood, house district, or precinct;

* **Sec. 15.** AS 24.45.041 is amended by adding a new subsection to read:

(h) Upon request of the Alaska Public Offices commission, information required under this section shall be submitted electronically.

* **Sec. 16.** AS 24.45.051 is amended to read:

Sec. 24.45.051. Reports. Each lobbyist registered under AS 24.45.041 shall file with the commission a report concerning the lobbyist's activities during each reporting period prescribed in AS 24.45.081, so long as the lobbyist continues to engage in lobbying activities. The report shall be made on a form prescribed by the commission and filed in accordance with AS 24.45.071 and 24.45.081. **Upon request of the Alaska Public Offices commission, information required under this section shall be submitted electronically.** The report also must include any changes in the information required to be supplied under AS 24.45.041(b) and the following information for the reporting period, as applicable:

(1) the source of income, as defined in AS 39.50.200(a) and the

monetary value of all payments, including but not limited to salary, fees, and reimbursement of expenses, received in consideration for or directly or indirectly in support of or in connection with influencing legislative or administrative action, and the full name and complete address of each person from whom amounts or things of value have been received and the total monetary value received from each person;

(2) the aggregate amount of disbursements or expenditures made or incurred during the period in support of or in connection with influencing legislative or administrative action by the lobbyist, or on behalf of the lobbyist by the lobbyist's employer in the following categories:

(A) food and beverages;

(B) living accommodations;

(C) travel;

(3) the date and nature of any gift exceeding $100 in value made to a public official and the full name and official position of that person;

(4) the name and official position of each public official, and the name of each member of the immediate family of any of these officials, with whom the lobbyist has engaged in an exchange of money, goods, services, or anything of more than $100 in value and the nature and date of each of these exchanges and the monetary values exchanged;

(5) the name and address of any business entity in which the lobbyist knows or has reason to know that a public official is a proprietor, partner, director, officer or manager, or has a controlling interest, and whom the lobbyist has engaged in an exchange of money, goods, services, or anything of value and the nature and date of each exchange and the monetary value exchanged if the total value of these exchanges is $100 or more in a calendar year; and

(6) a notice of termination if the lobbyist has ceased the lobbying activity that required registration under this chapter and if this report constitutes the final report of the lobbyist's activities.

* **Sec. 17.** AS 24.45.061 is amended by adding a new subsection to read:

(c) Upon request of the Alaska Public Offices commission, information required under this section shall be submitted electronically.

* **Sec. 18.** AS 24.45.171(1) is amended to read:

(1) "administrative action" means the proposal, drafting, development, consideration, amendment, adoption, approval, promulgation, issuance, modification, rejection, or postponement by any state agency of any rule **or** [,] regulation, [ORDER, DECISION, DETERMINATION,] or any other quasi-legislative [OR QUASI-JUDICIAL] action or proceeding whether or not governed by AS 44.62 (Administrative Procedure Act); **"administrative action" does not include**

(A) a proceeding or an action to determine the rights or duties of a person under existing statutes, regulations, or policies;

(B) the issuance, amendment, or revocation of a permit, license, or entitlement for use;

(C) the enforcement of compliance with existing law or the imposition of sanctions for a violation of existing law;

(D) procurement activity, including the purchase or sale of property, goods, or services by the agency or the award of a grant or contract;

(E) the issuance of, or ensuring compliance with, a legal opinion; or

(F) activity related to a collective bargaining agreement, including negotiating or enforcing the agreement;

* **Sec. 19.** AS 24.45.171(8) is amended to read:

(8) "lobbyist" means

(A) a person who**, on a full-time or part-time basis,** is employed and receives payments, **income,** or [WHO CONTRACTS FOR] economic consideration, including reimbursement for reasonable travel and living expenses, to communicate directly or through the person's agents with any public official for the purpose of influencing legislative or administrative action if a substantial or regular portion of the activities for which the person receives consideration is for the purpose of influencing legislative or administrative action; **in this subparagraph, "substantial or regular" means more than 16 hours in a 30-day period in direct communication with**