

CHAPTER EIGHT: REPORTING AND DISCLAIMER RULES

The federal government, almost every state, and many localities have laws imposing disclosure requirements on campaign advertising. The disclosures required include one or both of the following:

- filing of campaign finance reports with an administrative agency, which makes the information available to the public (“reporting requirements”); and
- disclosure of information about the sponsorship of campaign advertising, *on* or *in* the advertising, whether printed or spoken (“disclaimer requirements”).¹

These requirements serve three important purposes: (1) educating voters about who supports the candidates and thus helping voters to make informed choices about the candidates; (2) deterring actual and apparent corruption by bringing sunlight to large campaign contributions and expenditures, including independent expenditures; and (3) promoting compliance by candidates and political groups with other campaign finance laws.²

I. REPORTING REQUIREMENTS

Campaign finance reporting laws usually require that the reporting entity: (1) keep certain records of campaign finance contributions and expenditures and (2) report certain recorded information to an agency responsible for collecting the data and making it available for public inspection.³ That agency is usually also responsible for analyzing

1 Courts have used conflicting terminologies to refer to disclosure requirements. While “disclosure” is frequently used as a general term, some courts contrast “reporting requirements” with “disclosure requirements.” Others speak in terms of “disclosure requirements” as opposed to “disclaimer requirements.” Sometimes “disclosure” refers only to disclosures on the face of an advertisement, while other writers limit it to disclosures to administrative agencies. To minimize any confusion, we use “reporting requirements” and “disclaimer requirements,” because each of those terms is well-understood, and we use “disclosure requirements” to cover both. Readers should consider this definitional disagreement when reading other materials that refer to disclosure requirements.

2 Disclosure requirements are often considered the bedrock of campaign finance reform. The first such laws were enacted in several states in the 1890s. See Center for Responsive Politics, *Plugging in the Public: Introduction and Overview*, available at http://www.opensecrets.org/pubs/law_plug/plug00.html (last visited Feb. 14, 2008). Federal reporting requirements were first enacted in 1910. See *Buckley v. Valeo*, 424 U.S. 1, 61 (1976) (*per curiam*).

3 The Council on Government Ethics Laws has developed a model law on campaign finance reporting, which is available on the Center for Responsive Politics’ web site. See Center for Responsive Politics, *Plugging in the Public Appendix 1: COGEL Model Law on Campaign Finance Reporting*, http://www.opensecrets.org/pubs/law_plug/plug05.html (last visited May 12, 2007)].

the data and monitoring compliance with, and enforcing, the requirements.

TIPS:

Tip: A law imposing reporting requirements should specify clearly:

- *who is required to report;*
- *what information must be reported;*
- *when reports must be filed;*
- *where the reports must be filed;*
- *the method of filing;*
- *terms for public access to the reported information; and*
- *rights and obligations of the agency responsible for collecting reports.*

More specific *TIPS* with respect to each of these elements are provided below.

WHO IS REQUIRED TO REPORT:

Tip: Entities required to report could include political action committees (“PACs”), political party committees, corporations, labor unions, and candidates (or their committees) who make contributions or expenditures, and anyone who makes independent expenditures or electioneering communications.⁴

Tip: Consider adopting separate reporting requirements for lobbyists. Increasingly, states have begun to require direct reporting from lobbyists.⁵ Although candidates may be required to report these contributions, separate reporting from lobbyists is a good enforcement tool and organizes the information for easier public access.

Tip: Consider adopting separate reporting requirements for bundlers.⁶ If the bundlers

4 The difference between election-related independent expenditures and electioneering communications, which may be subject to reporting requirements, and “issue advocacy,” which is protected from such requirements, is discussed in Chapter Seven.

5 Concern over the influence of lobbyists has also prompted legislation banning contributions from lobbyists during the legislative session. The bans are addressed more fully in Chapter Three, section II(C) (“Lobbyists”) and section III(A) (“Legislative Session Bans”).

6 Reporting requirements for bundlers are discussed in Chapter Three, section II(E) (“Bundling”).

are not required to file separately, it may be useful to require reporting of each donor's occupation and employer and the employer of the donor's spouse. That information will assist watchdogs, journalists, and the public to follow patterns of contributing and to determine whether corporations or other businesses are "bundling" employee donations.

*Tip: Consider requiring separate reporting requirements for government contractors.*⁷

Tip: Include reporting exemptions for contributors to minor party candidates who make a showing that publicized support of their party can lead to discrimination or harassment.

Tip: Consider adopting reasonable monetary limits below which reporting is not required. Below a certain point, the burdens on the reporting party and administrative agency may outweigh the benefits of reporting.

WHAT INFORMATION MUST BE REPORTED:

*Tip: Most reporting laws require disclosure of a contributor's name, address, and the size of the donation, and many reporting laws require the disclosure of the occupation and employer of contributors who give more than a threshold amount.*⁸ As noted above, reporting of a spouse's employer may help to identify corporate bundlers.

Tip: Consider requiring contributors to provide reasonable estimates of the value of non-monetary contributions. This requirement could apply to contributions of equipment, services, office space, and other things of value, and prevents the public from having to guess at the true value of an in-kind campaign contribution.⁹

⁷ See, e.g., *But see Securities Indus. & Fin. Mkts. Ass'n v. Garfield*, No. 3:06cv2005, 2007 WL 28435, (D. Conn. Jan. 3, 2007). In *Garfield*, a federal district court issued a preliminary injunction enjoining the enforcement of a state law that required the "collection, disclosure and publication on the Internet of the identities of spouses and dependent children of certain directors, officers and employees of state contractors and prospective state contractors." *Id.* at *1. However, the court expressly permitted narrower reporting requirements, including the public disclosure of (1) "the names of principal executives of state contractors, prospective state contractors, and their spouses" and (2) "the names of dependent children who actually make contributions in violation of [the campaign finance law]." *Id.*

⁸ See, e.g., Fla. Stat. Ann. § 106.07(4)(a)(1) (Westlaw Supp. 2007); Ky. Rev. Stat. Ann. § 121.160(2)(b) (Westlaw 2007).

⁹ In *Alliance for Democracy v. FEC*, 362 F. Supp. 2d 138 (D.D.C. 2005), a PAC donated a mailing list to a candidate and reported the fact of the donation but not the monetary value thereof to the FEC. The court held that federal election law did not require the PAC to state the value of the list, and that the FEC could provide enough information on its web site so that viewers could estimate the value of the list on their own. See also *Citizens for Responsibility & Ethics in Wash. v. FEC*, 475 F.3d 337, 339-40 (D.C. Cir. 2007) (determining the precise value of a list of activists given to a campaign "would add only a trifle to the store of information about the transaction already publicly available," including a copy of the list on the FEC's website).

Tip: The nature of the information to be reported may vary with the nature of the party responsible for filing reports. Information required from individuals may differ from information required from PACs.

Tip: For reporting of expenditures, consider requiring use of a list of expenditure category codes, supplemented with a description section in which filers are required to provide detail. Most jurisdictions require itemized reporting of payments from campaign coffers. These reports should include the date and amount of the expenditure, the name and address of the person or entity to which the payment was made, and the purpose of the expenditure. The use of expenditure category codes provides consistency for the agency and aids in the organizing and searching of information in electronic databases.

Tip: Consider requiring the reporting of independent expenditures and electioneering communications, including information indicating whether an expenditure is in support of or opposition to a candidate, along with the candidate's name and the office sought. Some jurisdictions require detailed reporting of independent expenditures, including the occupation and employer of those making the independent expenditure. Although independent expenditures are, by definition, not coordinated with the candidate, the identity and association of those spending money in favor of or in opposition to a candidate may reveal important information about the candidate's constituency¹⁰ Similar reasoning applies to electioneering communications.

WHEN REPORTS MUST BE FILED:

Tip: Almost all jurisdictions require some reporting prior to primary and general elections, but the frequency of reporting required varies considerably. A few states require reports on a monthly basis.¹¹ Others require less frequent reports.¹² Many states do not require any disclosure until the few weeks before the election.

Tip: The frequency of reporting may vary with proximity to an election. For example, reports could be submitted semi-annually during an off-year, quarterly during an elec-

10 For a more detailed explanation of what expenditures should be reported, see the discussion of “independent expenditures” in Chapter 6 and the discussion of “electioneering communications” in Chapter 7. *See also, e.g., Harwood v. Senate Maj. Fund*, 141 P.3d 962 (Colo. Ct. App. 2006) (holding that under state constitution and statute requiring reporting of express advocacy expenditures, PAC need not report expenditure amount for opinion poll meant to inform its own political strategy).

11 *See, e.g., Ark. Code. Ann. § 7-6-207(a)* (Westlaw Supp. 2007) (requiring monthly reports during election year and quarterly reports at other times); *Wash. Rev. Code § 42.17.080(2)* (Westlaw 2007) (requiring monthly reports and additional reports around the time of the election).

12 *See, e.g., Iowa Code Ann. § 68A.402(2)* (West 2004) (requiring filings by May 19, July 19, October 19, and January 19 during election years).

tion year, monthly during the quarter preceding the election, once 10 days before the election, and within 24 hours of receiving large contributions in the closing days of the election. Many large contributions are made in the last days of an election. The law should be drafted in a way to assure that they are disclosed before the election is over.¹³

Tip: Consider a 24-hour reporting requirement for independent expenditures and electioneering communications made in the final days of an election. During the last few weeks of an election, federal law requires reporting within 24 hours of making an independent expenditure aggregating more than \$1,000.¹⁴ Federal law includes a 24-hour reporting requirement for anyone who spends more than \$10,000 on electioneering communications, which by definition are made near an election.¹⁵

Tip: Consider requiring reporting when a campaign commits to spending funds, as opposed to when funds are actually spent. Requiring reporting only when certain amounts of money are spent allows campaigns to defer reporting by entering into binding agreements to pay prior to the election that do not require actual expenditures of funds until after the election. Federal law closes this loophole by treating contracts to disburse funds as disbursements for purposes of some reporting requirements.¹⁶ Such provisions provide more timely information to voters.

WHERE REPORTS MUST BE FILED:

Tip: Consider requiring candidates to file both locally and with the state agency. The dual filing allows interested individuals, researchers, and reporters to monitor elections more easily and is unlikely to prove unduly burdensome to candidates. A county resident interested in the race for state representative is unlikely to travel to the capitol to view disclosure reports. Similarly, a statehouse reporter trying to track a pattern of spending should not be required to go from county to county to dig up contribution information.

Tip: If dual filing is deemed infeasible, consider requiring agencies to transmit copies of reports to other repositories.

Tip: The need for dual filing can be avoided if electronic filing is required.

¹³ See, e.g., Va. Code Ann. § 24.2-947.6 (Westlaw 2007) (requiring reports to be filed with increasing frequency as election date approaches). In the few weeks preceding any election, federal law requires candidates to disclose contributions of at least \$1,000 within 48 hours of receiving them. See 2 U.S.C. § 434(a)(6)(A). Several states also require last-minute disclosure. Alaska, for instance, requires reporting within 24 hours from candidates who receive contributions of more than \$250 in the last nine days of the campaign. See Alaska Stat. § 15.13.110(b) (Westlaw 2007).

¹⁴ See 2 U.S.C. § 434(g)(1).

¹⁵ 2 U.S.C. § 434(f).

¹⁶ See, e.g., 2 U.S.C. § 434(f)(5).

Tip: Direct reporting to affected candidates, as well as to the administrative agency, may be required for last-minute independent expenditures.

METHOD OF REPORTING:

Tip: Electronic filing should be implemented if possible.¹⁷ Where electronic filing is not feasible for all entities required to report, consider more limited requirements, such as:

- requiring only candidates for certain statewide offices (or, in large municipalities, for jurisdiction-wide office) to file electronically;
- requiring candidates, PACs, and political party committees that raise or spend more than a specified amount to file reports electronically; or
- providing incentives for voluntary electronic filing by entities not required to file electronically.

Tip: Filing should be in a standardized form developed by the responsible campaign finance agency.

TERMS FOR PUBLIC ACCESS:

Tip: Easy access to reported information is essential to an effective system of disclosure. Jurisdictions vary widely with respect to requirements for public access to disclosed information.

Tip: Campaign finance data should be stored electronically in a database that can be easily searched by members of the public. Given the computer, CD-ROM, and internet technology that is available today, the public should not be forced to comb through thousands of pages of reports to compile and analyze campaign finance data. An early investment in, and use of, such technology will facilitate the filing and analysis of, and access to, reportable information. If reports are not electronically filed, the administrative agency should be required to enter the reported information into an electronic database. Information should then be posted on a web site and made available at a public computer terminal at the agency office and other locations around the state. Approximately 30 states and several large cities had comprehensive electronic reporting systems (including both filing and public access to data) as of 2000; by 2003, at least 46 jurisdictions in the United States and Canada had some form of electronic filing.¹⁸

¹⁷ The Campaign Disclosure Project, a collaboration of the UCLA School of Law, the Center for Governmental Studies, and the California Voter Foundation, evaluates state electronic filing programs, See *Grading State Disclosure* at <http://campaigndisclosure.org/gradingstate/> (last visited Feb. 14, 2007).

¹⁸ See Craig B. Holman & Robert M. Stern, Access Delayed Is Access Denied: Electronic Reporting of Campaign Finance Activity, *Public Integrity* 11 (Winter 2001), available at http://www.brennancenter.org/programs/downloads/electronic_reporting2000.pdf; Center for Governmental Studies, *Electronic Filing and Disclosure Survey: 2003 Update* (last

AGENCY RIGHTS AND OBLIGATIONS:

Tip: The agency charged with administering reporting requirements should: (1) prescribe the form of, receive, organize, file, maintain, and otherwise process the reports, (2) review and analyze the reports, (3) get the information in the reports out to the public, and (4) monitor and enforce the submission of reports.¹⁹

Tip: Reporting requirements can be effective only if the agency administering the system is adequately staffed and funded. Funding and staff should be substantial enough to permit the agency to perform all of the duties described above.

LEGAL ANALYSIS:

A. Reporting of Contributions and Candidates' Expenditures

In *Buckley v. Valeo*, the Supreme Court upheld the broad reporting requirements of the Federal Election Campaign Act ("FECA") against claims that the laws infringed on First Amendment associational and free speech rights. See 424 U.S. 1, 60-74 (1976) (*per curiam*). The Court found that three compelling governmental interests justified reporting requirements: (1) enhancing voters' knowledge about a candidate's possible allegiances and interests; (2) deterring actual and apparent corruption; and (3) enforcing contribution limits.²⁰ See *id.* at 66-68.

Buckley's approach to reporting requirements is notable for its deference to legislative judgments. The plaintiffs had challenged FECA's requirements that political committees maintain records with the name and address of those who make contributions in excess of \$10 and report the name, address, occupation, and employer of those who contribute, in the aggregate, more than \$100. The Court agreed that these thresholds were "indeed low," but concluded that "we cannot require Congress to establish that it has chosen the highest reasonable threshold." *Id.* at 83.²¹ To the contrary, the Court held that drawing that line was "best left in the context of this complex legislation to congressional discretion." *Id.*²²

visited May 12, 2007) (http://www.cgs.org/publications/docs/2003_survey_results.pdf.)

19 See Michael J. Malbin & Thomas L. Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* 37-39 (1998) (discussing various practical aspects of effective disclosure).

20 In *Agua Caliente Band of Cahuilla Indians v. Super. Ct. of Sacramento County*, No. S123832, 2006 WL 3741905 (Cal. Dec. 21, 2006), the California Supreme Court held that under the federal Constitution's Guarantee Clause (U.S. Const. art. IV, § 4) and the Tenth Amendment, Native American tribes may be sued for violations of California's contribution reporting requirements, despite Native American tribes' traditional sovereign immunity).

21 Additionally, the Court recognized that the record-keeping requirement for the \$10 contributors assisted in the enforcement of the disclosure provision for \$100 contributions. *Buckley*, 424 U.S. at 84.

22 Federal tax law requires some additional disclosures beyond those required by FECA.

The U.S. Court of Appeals for the First Circuit struck down a Rhode Island law that required PACs to disclose the identity of every contributor, even when the contribution was as small as \$1, a practice known as “first dollar disclosure.” *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 29 (1st Cir. 1993). What troubled the *Vote Choice* court was not the first dollar disclosure requirement, however, but the fact that Rhode Island applied it only to contributions received by PACs, while the reporting threshold for contributions to political parties and candidates was \$100. *See id.* at 33–34 (“[J]udicial deference to legislative line-drawing diminishes when the lines are disconnected, crooked, or uneven.”). Indeed, the court held that “first dollar disclosure is not, in all cases, constitutionally proscribed,” *id.* at 33, because “signals are transmitted about a candidate’s positions and concerns not only by a contribution’s size but also by the contributor’s identity,” *id.* at 32; *see Oregon Socialist Workers 1974 Campaign Comm. v. Paulus*, 432 F. Supp. 1255, 1260 (D. Or. 1977) (three-judge court) (upholding first dollar record-keeping and partial public disclosure).

A Colorado state court upheld the application of reporting requirements to a candidate’s personal expenditures, which it ruled could be treated as contributions to the candidate’s campaign committee. *Hlavac v. Davidson*, 64 P.3d 881 (Colo. App. 2002). The court recognized that the law could not restrict the amount of expenditures from personal assets that a candidate can make, but could require the candidate to report those expenditures as campaign contributions. *But see Anderson v. Spear*, 356 F.3d 651, 666–67 (6th Cir. 2004) (holding that a state could not define expenditures by a candidate as contributions to his or her campaign for purposes of triggering matching funds for publicly funded opponents). While *Anderson*’s flawed analysis is primarily focused on a matching fund program, it could be interpreted to cast doubt on requirements that candidates disclose their own expenditures.²³ Most courts, however, would probably uphold requirements like the Colorado reporting scheme.

In upholding FECA’s reporting requirements, *Buckley* also rejected an overbreadth challenge based on the applicability of the requirements to minor as well as major parties. The plaintiffs claimed both that the First Amendment rights of minor parties were seriously burdened by the requirement that they disclose contributors, because their supporters were more susceptible to harassment, and that the government had

Organizations that declare themselves to be “political organizations” in order to receive tax-exempt status must disclose the name, address, and occupation of each contributor who gives at least \$200 and the name and address of recipients of at least \$500 in expenditures. 26 U.S.C. § 527(j). The Eleventh Circuit dismissed a challenge to the constitutionality of this statute on procedural grounds, vacating a district court ruling that § 527’s requirements violated the First Amendment. *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1363 (11th Cir. 2003), *vacating Nat’l Fed. of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300 (S.D. Ala. 2002).

- 23 *Anderson* struck down numerous provisions of Kentucky election law in a remarkably poorly-reasoned opinion. While it will remain binding precedent within the Sixth Circuit, unless the Supreme Court overturns its conclusions, other courts will consider only the persuasiveness of its reasoning. As a result, courts outside the Sixth Circuit should not treat *Anderson* as worthy of much respect.

little real interest in information from parties with little chance of winning elections. See 424 U.S. at 68-74. The Court refused to carve out a blanket exemption for minor parties, citing insufficient evidence of potential harassment in the factual record of that case. *Buckley* recognized, however, that a specific minor party might in the future demonstrate a “reasonable probability” that compelled reporting would subject the party’s contributors to “threats, harassment, or reprisals.” *Id.* at 74. A party that could make that showing would be entitled to an exception from the reporting requirements.²⁴

Minor parties occasionally succeed in demonstrating a right to protection from disclosure requirements. In *Brown v. Socialist Workers ’74 Campaign Comm. (Ohio)*, 459 U.S. 87, 88 (1982), the Socialist Workers Party satisfied the standard articulated in *Buckley* and obtained an exemption from Ohio’s reporting requirements.²⁵ *Brown* made clear that the First Amendment protected from disclosure the identities of not only the Socialist Worker Party contributors but also the recipients of campaign funds from the party. The recipients of those disbursements would be “as vulnerable to threats, harassment, and reprisals as are contributors” and therefore were entitled to protection of their associational rights. *Id.* at 97. In *Averill v. City of Seattle*, 325 F. Supp. 2d 1173, 1178 (W.D. Wash. 2004), the court allowed a minor party to avoid identifying its contributors by showing evidence of threats, harassment, and reprisals against other minor parties with similar political beliefs.²⁶

After *McConnell*, states that did not previously do so may begin to require reporting of all contributions to political parties. In *Libertarian Party of Alaska, Inc. v. State*, 101 P.3d 616 (Alaska 2004), the Alaska Supreme Court held that although the Alaska

24 The *Buckley* Court established a “flexible” standard for establishing the right to an exemption, indicating that proof could include:

specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.

Id.

25 The Socialist Workers Party did not fare as well in Oregon. See *Oregon Socialist Workers 1974 Campaign Comm. v. Paulus*, 432 F. Supp. 1255, 1259 (D. Or. 1977) (finding “no ‘reasonable probability’ that disclosure of the names of contributors to the SWP will result in official or unofficial harassment of these contributors”). A more recent case rejected a candidate’s claim that compliance with New York City’s reporting requirements would subject Orthodox Jews to harassment. See *Herschaft v. New York City Campaign Finance Board*, 139 F. Supp. 2d 282 (E.D.N.Y.), *aff’d mem.*, 2001 WL 533590 (2d Cir. 2001) (unpublished table decision).

26 The *Averill* court also held that portions of the Seattle municipal code requiring such groups to demonstrate that they had been subject to interference with advocacy and that the exercise of their First Amendment rights had been chilled—in addition to showing a reasonable probability of future threats, as required under *Buckley*—were unconstitutional as applied to the plaintiffs, but declined to strike the statute as unconstitutional on its face. *Averill*, 325 F. Supp. 2d at 1179.

Campaign Disclosure Act expressly regulates only hard money contributions (defined as contributions made for the purpose of influencing the nomination or election of a candidate), Alaska Stat. § 15.13.070(b)(2), regulations under the Act, Alaska Admin. Code tit. 2, § 50.327, could require political parties to disclose soft money contributions (all other contributions) as well. 101 P.3d at 623-27. The court held that because political parties and candidates are often so closely connected, all of the functions served by reporting of hard money contributions as described in *Buckley*—informing the public where political money comes from, deterring corruption by publicizing large contributions, and aiding enforcement of the campaign finance laws—applied equally well to soft-money contributions to political parties. *Id.* at 623-27.

B. Reporting of Independent Expenditures

When a group or individual engages in election-related spending that is not coordinated with a candidate, states may require reporting of these independent expenditures – along with information about the financial sponsors of the expenditures. See *Buckley*, 424 U.S. at 80-81; *Voters Educ. Committee v. Washington State Public Disclosure Comm’n*, 166 P.3d 1174, 1186-87 (Wash. 2007) (holding that disclosure requirements are not a prior restraint), *petition for cert. filed*, No. 07-1153 (Mar 10, 2008). Even associations that are not PACs may be required to file reports of such spending. See *Colorado Right To Life Committee, Inc. v. Coffman*, 498 F.3d 1137, 1144 (10th Cir. 2007) (upholding against a facial challenge a requirement that nonprofit organizations disclose disbursements for electioneering communications over a \$1,000 threshold); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 791 (9th Cir.), *cert. denied* 127 U.S. 261 (2006) (upholding as constitutional Alaska’s registration and financial reporting requirements for all non-PAC groups, even if they are small nonprofit political organizations of the type contemplated in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)); *Richey v. Tyson*, 120 F. Supp. 2d 1298 (S.D. Ala. 2000) (holding that groups whose major purpose is not electioneering may nevertheless be required to disclose “express advocacy”); *Osterberg v. Peca*, 12 S.W.3d 31 (Tex. 2000) (holding that a married couple need not file as a political committee but must comply with reporting requirements).

The Supreme Court unambiguously established in *McConnell v. FEC* that reporting requirements may be applied to electioneering communications as well as to independent expenditures that constitute express advocacy. *McConnell v. FEC*, 540 U.S. 93, 194-98 (2003).²⁷ In addition to expanding the category of advertisements to which reporting requirements may be applied, the Court’s opinion is also notable for the broad language extolling the virtues of reporting, providing additional emphasis to the already broad statements in *Buckley*. *McConnell* overturned several lower court decisions that had struck down reporting requirements that applied to advertisements that did

²⁷ The recent as-applied challenge to BCRA’s ban on corporate funding of electioneering communications, *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), did not raise a claim with respect to BCRA’s reporting requirements, and the Court did not reach that issue.

not expressly advocate the election or defeat of a specific candidate. Regulation of pure “issue advocacy” that cannot be categorized as electioneering is, however, likely to raise constitutional questions, even if the regulation is limited to reporting requirements.²⁸ PACs, in contrast, may be required to report “substantially all” of their contributions and expenditures, even if some of their funds are directed at pure issue advocacy. See *Richey*, 120 F. Supp. 2d at 1311. Although no court has directly considered the issue, the same analysis should apply to political parties, which are a type of PAC under federal law. Political parties are in fact required to report all federal contributions and expenditures, irrespective of whether they are used for express advocacy.

Although, as a general matter, reporting requirements for independent expenditures are constitutionally secure, some timing requirements may invite challenge. *McConnell* upheld, without discussion, 24-hour reporting requirements for electioneering communications, which by definition are made near in time to an election.

The *McConnell* Court also upheld a provision that went even further, requiring disclosure when a contract for electioneering communications or independent expenditures is formed, even if the ads have not yet been disseminated. *McConnell*, 540 U.S. at 199-200. The Court stated that “[g]iven the relatively short time frames in which electioneering communications are made, the interest in assuring that disclosures are made promptly and in time to provide relevant information to voters is unquestionably significant.” *Id.* at 200. The Court did note that the disclosures “would not have to reveal the specific content of the advertisements,” raising the possibility that a reporting requirement that required disclosure of the contents of ads before the ads were released might not pass muster. The *McConnell* decision overturned a lower court opinion that had invalidated similar requirements. See *Florida Right to Life, Inc. v. Mortham*, 1998 WL 1735137, *8-*9 (M.D. Fla. Sept. 30, 1998) (striking down reporting requirement that applied within 24 hours of obligating funds), *aff’d on other grounds sub nom. Florida Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001). *Mortham* should no longer be considered good law.

One case prior to *McConnell* suggests that applying 24-hour requirements far from elections may be unconstitutional. In *Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000), the Tenth Circuit saw “no constitutional problems” with mandatory reporting of the amount and use of an expenditure, as well as the name of the candidate supported or opposed. *Id.* at 1197. But the court ended up invalidating the entire reporting requirement because of a provision mandating separate notice to the candidates in an affected race and a “patently unreasonable” 24-hour deadline for all reports. *Id.* Lower courts have not yet had call to consider similar requirements since *McConnell* was decided.

Requiring disclosure of the content of an ad prior to its distribution risks invalidation. The Ninth Circuit struck down an Arizona statute that required sponsors of independent ads to provide 24-hour notice of intent to run an ad, with a copy of the ad, to any

28 See Chapter Seven for a discussion of independent expenditures, electioneering communications, the “functional equivalent” of express advocacy, and issue advocacy.

candidate mentioned in it. *Arizona Right to Life Comm. v. Bayless*, 320 F.3d 1002, 1004 (9th Cir. 2003). Reporting requirements should be designed to provide the public information about who is spending how much on political advertising. Discouraging negative ads by allowing candidates an improved opportunity to respond is not likely to be found a constitutionally sufficient justification for reporting requirements.

II. DISCLAIMER REQUIREMENTS

Most states require that advertisements for candidate elections contain disclaimers disclosing the ads' financial sponsors.²⁹ Some jurisdictions also require disclosure of whether the ad is authorized by any candidate. Consequently, the public is used to seeing or hearing brief disclaimers at the bottom of television advertisements or at the end of radio spots, such as: "Paid for by Clinton/Gore '96" or "Paid for by the AFL-CIO." Such information helps the public evaluate the advertisement. After all, an ad soliciting votes for Candidate Smith on the grounds that "Smith has the best environmental record in the legislature" may mean something very different coming from the Sierra Club than it does coming from the Chemical Manufacturers' Association.

TIPS:

Tip: Preventing the reality and appearance of corruption and avoiding evasion of contribution limits and reporting requirements should be identified as the purposes of the disclaimer requirements.

Tip: Draft disclaimer requirements so that they apply exclusively to electioneering communications and expenditures that expressly advocate the election or defeat of a clearly identified candidate. See Chapter Seven for discussions of "electioneering communications" and "express advocacy."

LEGAL ANALYSIS:

The plaintiffs in *Buckley* did not challenge FECA's disclaimer requirements for advertising that expressly advocated the election or defeat of a clearly identified candidate.³⁰ Since that time, the Supreme Court issued opinions in two cases involving advertising in connection with ballot issues. The plaintiffs in *McConnell* sought to challenge

29 See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 371 (1995) (Scalia, J., dissenting) (commenting that, as of 1995, every state except California had disclosure statutes of this sort). *McIntyre* involved leafleting for a tax referendum, rather than advertising for candidate elections. Readers should note that this handbook focuses exclusively on *candidate* campaigns and that campaigns on *ballot issues* are sometimes subject to a different constitutional analysis.

30 The disclaimer requirement is set forth at 2 U.S.C. §441d. At the time of *Buckley*, the requirement applied only to expenditures to finance express advocacy. Under BCRA, certain other categories of campaign advertising are covered as well.

BCRA's expanded disclaimer requirements, but the Supreme Court refused to reach the issue for technical reasons. As a result, the disclaimer requirements remain in force, but no binding precedent establishes that they are constitutional.

The first Supreme Court case with potential bearing on disclaimer requirements was *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). *Bellotti* involved a Massachusetts criminal statute that prohibited banking and business corporations from making contributions or expenditures to influence the vote on ballot initiatives, unless the initiative materially affected corporate assets, property, or business. Although the Supreme Court invalidated the statute on First Amendment grounds, the Court recognized that “[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.” *Id.* at 792 n.32 (citing *Buckley*, 424 U.S. at 66-67). The citation to *Buckley* suggests, however, that *Bellotti* may have been reaffirming the constitutionality of reporting requirements, rather than disclaimer requirements.

The Supreme Court explicitly addressed disclaimer requirements in *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995).³¹ Margaret McIntyre had been fined for violating an Ohio statute that required disclosure, on the face of the campaign material, of the name and address of any person issuing the literature. The state complained that her home-made and hand-distributed leaflets on a proposed school tax levy failed to include that information. After an impassioned discussion of the importance of anonymous leafleting in the history of this country, the Supreme Court struck down the challenged statute. In doing so, however, *McIntyre* expressly distinguished the over-broad disclaimer requirements in the Ohio law from the provisions of FECA upheld in *Buckley*, stating:

Not only is the Ohio statute’s infringement on speech more intrusive than the *Buckley* disclosure requirement, but it rests on different and less powerful state interests. The Federal Election Campaign Act of 1971, at issue in *Buckley*, regulates only candidate elections, not referenda or other issue-based ballot measures; and we construed “independent expenditures” to mean only those expenditures that “expressly advocate the election or defeat of a clearly identified candidate.” . . . Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment after the candidate is in office. . . . Moreover, the federal Act contains numerous legitimate disclosure requirements for campaign organizations; the similar requirements for independent expenditures serve to ensure that a campaign organization will not seek to evade disclosure by routing

31 In one largely overlooked case pre-dating *McIntyre*, the Supreme Court affirmed a Fifth Circuit decision upholding a sponsor identification requirement insofar as it governed state candidates and state issues. See *Texas v. KVUE, Inc.*, 465 U.S. 1092 (1984), *aff’g mem.* 709 F.2d 922 (5th Cir. 1983) (upholding a requirement that all “political advertising” state the name and address of the sponsor). *McIntyre* thus appears to have overruled *KVUE* as it applies to ballot measures, at least with respect to advertising by individuals.

its expenditures through individual supporters. . . . In short, although *Buckley* may permit a more narrowly drawn statute, it surely is not authority for upholding Ohio’s open-ended provision.

Id. at 356 (footnotes and citations omitted). *McIntyre* thus appears to preclude disclaimer requirements only as they apply to ballot measures, and possibly only by private individuals.³²

Most recently, *McConnell* has suggested that *McIntyre* applies only to genuine issue advocacy, such as advertisements attempting to influence ballot measures. The only place where any of the majority opinions in *McConnell* addresses *McIntyre* is in a cryptic footnote responding to some dissenting arguments about whether electioneering communications could be treated the same as express advocacy. The footnote reads:

As Justice Kennedy emphasizes in dissent, we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads. The premise that apparently underlies Justice Kennedy’s principal submission is a conclusion that the two categories of speech are nevertheless entitled to the same constitutional protection. If that is correct, Justice Kennedy must take issue with the basic holding in *Buckley* and, indeed, with our recognition in [*Bellotti*] that unusually important interests underlie the regulation of corporations’ campaign related speech. In *Bellotti* we cited *Buckley*, among other cases, for the proposition that “preserving the integrity of the electoral process, preventing corruption, and ‘sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government’ are interests of the highest importance.” “Preservation of the individual citizen’s confidence in government,” we added, “is equally important.” BCRA’s fidelity to these imperatives sets it apart from the statute in *Bellotti* – and, for that matter, from the Ohio statute banning the distribution of anonymous campaign literature, struck down in [*McIntyre*].

McConnell, 540 U.S. at 206, n.88 (internal citations omitted). While the footnote is hardly a model of clarity, it seems to be drawing a distinction between BCRA’s disclosure requirements, which apply only to candidate-election-related speech, and the

32 In view of the Court’s prior decision in *Bellotti*, the *McIntyre* Court suggested that disclosure requirements might be appropriate for corporations, even though they were unconstitutional as applied “to independent communications by an individual like Mrs. McIntyre.” 514 U.S. at 354; *see also id.* at 358 (Ginsburg, J., concurring) (“The Court’s decision finds unnecessary, overintrusive, and inconsistent with American ideals the State’s imposition of a fine on an individual leafleteer who, within her local community, spoke her mind, but sometimes not her name. We do not thereby hold that the State may not in other, larger circumstances, require the speaker to disclose its interest by disclosing its identity.”); Malcolm A. Heinicke, Note, *A Political Reformer’s Guide to McIntyre and Source Disclosure Laws for Political Advertising*, 8 Stan. L. & Pol’y Rev. 133 (1997) (arguing that *McIntyre* does not invalidate source disclosure rules applied to groups putting forth large-scale, organized political ads for ballot initiatives and candidate elections).

disclaimer requirement in *McIntyre*, which applied to the purely issue-oriented speech about ballot measures. That analysis suggests that *McIntyre* does not govern disclaimer requirements that apply only in candidate elections. It's difficult to be positive, however, because the Supreme Court did not fully determine the constitutionality of BCRA's disclaimer provisions. The Court upheld the expansion of FECA's disclaimer provisions to cover electioneering communications, but only based on the assumption that FECA's disclaimer provisions were themselves constitutional. *Id.* at 231.

One final disclaimer provision of BCRA – the so-called “stand-by-your-ad” provision – remains in effect after *McConnell*, because the Court did not address its constitutionality. Under 2 U.S.C. § 441d(d), radio and television express advocacy, electioneering communications, and advertisements paid for by political committees must include a statement by their sponsors taking responsibility for the ads. In the case of ads paid for by a campaign committee, that statement must be made by the candidate and must state that the candidate has approved the communication. This requirement that the disclaimer be made in the candidate's own voice may provoke additional litigation.

Only two recorded decisions have addressed the constitutionality of disclaimer requirements since *McConnell* was decided. The Seventh Circuit upheld the constitutionality of an Indiana statute that required disclaimers on political advertising that “expressly advocat[es] the election or defeat of a clearly identified candidate.” *Majors v. Abell*, 361 F.3d 349, 350 (7th Cir. 2004) (quoting Ind. Code § 3-9-3-2.5(b)(1)). The Seventh Circuit did not discuss the distinction between disclaimer requirements and reporting requirements at length, *see id.* at 354-55, but concluded that *McConnell* had established the constitutionality of reporting requirements, at least when an exception is provided for individuals distributing small amounts of political materials. *Id.* at 355.³³ The Ninth Circuit struck down a disclaimer requirement that applied to “any material or information relating to an election, candidate or any question on a ballot.” *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 981 (9th Cir. 2004) (quoting Nev. Rev. Stat. 294A.320). The Ninth Circuit noted that some disclaimer requirements could be constitutional but concluded that Nevada's law was not narrowly tailored because it included all speech about an election and applied to ballot measures as well as candidate elections. The court also held that a safe harbor that the statute created for individuals distributing information independently of any organization or business was insufficient to distinguish Nevada's statute from the law at issue in *McIntyre*.

33 The most notable thing about the *Majors* opinion is how different it is from a prior opinion issued by the same panel before *McConnell* was decided. In the earlier opinion, the same judge wrote skeptically about the distinction between candidate elections and ballot measure campaigns. *Majors v. Abell*, 317 F.3d 719 (7th Cir. 2003). While the panel did not conclude definitively that the Indiana statute was unconstitutional, it strongly implied that it would strike the statute if it had to reach the issue, before certifying a question about the scope of the law to the Indiana Supreme Court. *Id.* The dramatic shift in attitude of the Seventh Circuit may reflect a more general trend: while *McConnell* did not unambiguously uphold disclaimer requirements or clearly draw a distinction between candidate elections and ballot measures, its language and approach will nonetheless convince some courts to uphold disclaimer provisions in candidate elections that they might have struck down before *McConnell*.

In the time between *McIntyre* and *McConnell*, a clear majority of courts upheld state-law sponsor identification requirements for advertisements expressly advocating the election or defeat of a clearly identified candidate. See *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir. 1997) (upholding Kentucky’s “Sponsor Identification” law, which required identification of the party who “paid for” the advertisement); see also *Gable v. Patton*, 142 F.3d 940, 945 (6th Cir. 1998) (reaffirming the constitutionality of Kentucky’s “Sponsor Identification” requirement); *Griset v. Fair Political Practices Comm’n*, 23 P.3d 43 (Cal. 2001) (reversing on technical grounds a decision invalidating sponsor identification requirement for mass mailings in support of or opposition to a candidate); *Seymour v. Elections Enforcement Comm’n*, 762 A.2d 880 (Conn. 2000) (distinguishing *McIntyre* to uphold “paid for” requirement on ads by or coordinated with candidates); cf. *Ark. Right to Life State Political Action Comm. v. Butler*, 983 F. Supp. 1209, 1226–30 (W.D. Ark. 1997) (denying plaintiffs’ motion for summary judgment on the unconstitutionality of disclaimer requirements for independent expenditures for candidate elections), *aff’d on other grounds*, 146 F.3d 558 (8th Cir. 1998). In addition, two federal appellate courts have upheld the constitutionality of the federal disclaimer requirements, which govern both advertisements and solicitations for contributions, as defined under federal law. See *FEC v. Public Citizen*, 268 F.3d 1283 (11th Cir. 2001); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 293–98 (2d Cir. 1995). These courts have acknowledged that the challenged disclaimer statutes serve the state interests approved in *Buckley* and its progeny: combating the reality and appearance of corruption and preventing evasion of contribution limits and state reporting requirements.

However, a significant minority of courts have struck down disclaimer statutes. See *Citizens for Responsible Gov’t State Political Action Comm.*, 236 F.3d 1174, 1200 (10th Cir. 2000) (invalidating a disclaimer requirement for independent expenditures in excess of \$1,000 that called for “the full name of the person [making an independent expenditure], the name of the registered agent, the amount of the expenditure, and the specific statement that the advertisement or material is not authorized by any candidate”); *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 291 F. Supp. 2d 1052, 1067–69 (D. Minn. 2003) (striking disclaimer requirement that applied to “any . . . material tending to influence voting . . . except for news items or editorial comments by the news media” on the grounds that the definition was unconstitutionally vague and that the exception granted to individuals who independently distribute small amounts of campaign materials was insufficient to satisfy *McIntyre*), *rev’d on other grounds* 427 F.3d 1106 (8th Cir. 2005); *Doe v. Mortham*, 708 So. 2d 929, 934–35 (Fla. 1998) (striking requirement that advertisement state name and address of sponsor, while upholding requirement that ad state “Paid political advertisement”); *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. Ct. App. 2006) (striking down an amended version of the law at issue in *Kelley*, *supra*); *Doe v. State*, 112 S.W.3d 532 (Tex. Crim. App. 2003) (striking down requirement of disclaimer of full name and address of sponsor of political advertising). Note that in most of these cases, the invalidated law required more information than the disclaimers that have been upheld.

McConnell held that disclaimer requirements face no higher burden when applied to electioneering communications than to express advocacy. *McConnell*, 540 U.S. at 231.

Requirements that govern pure issue advocacy as well as express advocacy and electioneering communications are, however, likely to continue to fare poorly in courts. (See Chapter Seven for a complete discussion of these issues.) Prior to *McConnell*, courts that considered disclaimer requirements applicable to speech besides express advocacy generally invalidated the requirements. The Second Circuit invalidated disclosure requirements that applied to any “political advertisement” that “expressly or implicitly advocate[d] the success or defeat of a candidate” and thus extended to “advocacy with respect to public issues.” *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2nd Cir. 2000); see also *Stewart v. Taylor*, 953 F. Supp. 1047, 1055-56 (S.D. Ind. 1997) (invalidating a sponsor identification requirement applicable to both express and issue advocacy). While *McConnell* overruled these cases to the extent that they would invalidate disclaimer requirements applied to electioneering communications, they continue to constrain pure issue advocacy.

Courts have split on the constitutionality of requirements calling for disclosure of whether an independently financed political advertisement was authorized by a candidate. Compare *FEC v. Public Citizen*, 268 F.3d at 1291 (upholding the federal requirement), and *Guetzloe v. Fla. Elections Comm’n*, 927 So.2d 942, 945 (Fla. App. 2006) (upholding a Florida requirement that independent speakers provide broadcasters with written statement that no candidate approved the advertisement), with *Arkansas Right to Life*, 29 F. Supp. 2d 540, 550 (W.D. Ark. 1998) (holding that Arkansas had not come forward with any “demonstrable evidence” that independent expenditures caused genuine problems and finding that the “disassociation message” was not narrowly tailored to serve the state’s interest in informing the public of the sources of support for or opposition to a candidate), and *Shrink Missouri Gov’t PAC v. Maupin*, 892 F. Supp. 1246, 1254-56 (E.D. Mo.) (overturning a Missouri requirement that advertisements commenting on candidates carry a notice that the candidate ostensibly benefiting from the advertisements had approved and authorized them), *aff’d*, 71 F.3d 1422 (8th Cir. 1995). The Missouri law was designed to reduce negative advertisements by requiring candidates to approve advertisements designed to work in their interest. The court did not recognize the implicit interests in promoting civility or improving the quality of campaigns as sufficiently compelling to justify the infringement on First Amendment rights.³⁴ See 892 F. Supp. at 1255. Other disclosure requirements have met with similar resistance. *North Carolina Right to Life, Inc. v. Leake* preliminarily enjoined a requirement that advertisements disclose on their face the sponsor’s position for or against the identified candidate. See 108 F. Supp. 2d 498, 511-13 (E.D.N.C. 2000).

³⁴ The requirement effectively eliminated the possibility of making truly independent expenditures and thus imposed a major burden on speech.