

HOUSE COMMITTEE ON JUDICIARY CIVIL LAW AND JUDICIAL ADMINISTRATION

May 23, 1991 Hearing Room 357 1:00 p.m. Tapes 110 & 111

MEMBERS PRESENT: Rep. Ray Baum, Chair Rep. Marie Bell Rep. Tom Brian
Rep. Kelly Clark Rep. Rod Johnson Rep. Kevin Mannix Rep. Randy Miller

MEMBER EXCUSED: Rep. Jim Edmunson

STAFF PRESENT: Greg Chaimov, Committee Counsel Carol Wilder,
Committee Assistant

MEASURES HEARD: HB 3279 - PH HB 3283 - PH & WS

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

TAPE 110, SIDE A

004 CHAIR BAUM: Calls the meeting to order at 1:08 p.m. Opens public hearing on HB 3283.

HB 3283 - POLITICAL PAYMENTS, PUBLIC HEARING Witnesses: Bill
Dwyer, State Representative Scott Bartlett, Legislative Aide David
Fidanque, ACLU

060 REP. BILL DWYER, HOUSE DISTRICT #42: This bill helps stop a loophole in the law from being expanded to other areas. Public is entitled to know where the money is coming from. Any kind of a process that has a tendency to shield or hide money is not an Oregon process that should be tolerated. Chair Miller had a problem with the bill affecting legitimate corporations. I think that's why you have the bill and would respectfully request that I'm not as upset about the original wording of the bill because I really think that it did what it was intended to do. The problem that I see is that if you talk about primary or incidental you could say your primary business is painting but you haven't got around to do any painting yet, but that's what your primary purpose is. I talked to Ted Rutledge in Counsel and he resolved the question in regard to language for Rep. Miller. I think it's good public policy and we ought to stop it so we don't have every person or entity forming legal corporations to subvert the intent of the reporting requirements.

110 REP. MILLER: Our intention in bringing this bill to the Judiciary Committee is to fix what appeared to be a problem with the bill. There were those who were skeptical about what we were intending to do. We will improve this and get it down on the Floor in short order.

125 REP. DWYER: I've never seen a bill in my life that Rep. Mannix couldn't improve on.

127 CHAIR BAUM: Realizing that we have in front of us Rep. Mannix's amendment to the bill, the concern of the Chair with that is that a lot of things can be material, but I would like to say that I would like the language "and primary substantive purpose".

135 REP. MILLER: What about the -2 amendments?

136 CHAIR BAUM: I haven't seen the -2s.

140 REP. MILLER: I heard Rep. Courtney on some particular bill this morning just in anticipation of Floor discussion say that because the room wasn't filled up with witnesses on a particular bill that it couldn't have merit. Tell me how many people came to complain about the current campaign financing system in previous hearings and cited this as a major problem.

148 REP. DWYER: I don't recall anyone.

150 SCOTT BARTLETT, LEGISLATIVE AIDE TO REP. DWYER: You're talking about at the hearing for State and Federal Affairs?

152 REP. MILLER: Right. This is so I can get an idea of how many people beyond this building are caring about this.

155 BARTLETT: We got some telephone input. We talked at great length with the Secretary of State's office that was aware of this and had identified it as a loophole, had communicated with the Attorney General, found out it was an unenforceable gap in the election statutes. We did have input that it not only was a creative way to shield or facilitate money that may not want to be identified by either legal sources or potentially illegal sources but that there were potentially in the future other creative mechanisms to influence the political process. This was a gaping loophole through which triple trailers could be driven. We specifically instructed the Secretary of State's office to try to preclude the possibility that bona fide corporations only doing political work as a very minor component of their whole operations preclude them from being covered in this bill. We instructed them to do that. Jack Graham talked to the Attorney General's office, ran it through both the Attorney General's office and Legislative Counsel, as well as the Commerce Department and the Corporation people specifically. We sent it back saying to make sure that it passes that test.

175 REP. MILLER: I understand the nature of the problem. I don't think we need to fill up a hearing room as evidence that there's a problem.

185 REP. MANNIX: For some of my best bills, no witnesses have shown up. We all know it's a good bill.

190 BARTLETT: Mr. Chairman, did you get the two memoranda from Jack Graham dated May 14, 1991, and May 10, 1991, specifically dealing with the whole question of primary, incidental, and the reason for that wording. The other deals with concerns vis a vis contribution definition in the statute, in Section 2. Does the committee have those two memoranda?

200 CHAIR BAUM: The Chair does not. Do other members of the committee?

202 REP. MILLER: No, we're sending those over along with the signatures to the ballot measures.

205 BARTLETT: Could staff copy it and return it to you.

HB 3283 - WORK SESSION

210 DAVID FIDANQUE, ACLU OF OREGON: We can see other problems with the language "or incidental".

220 REP. MANNIX: Are you assuming we're going to change that?

222 FIDANQUE: I am assuming that and wanted to go on record in support of that change. The ACLU has opposed limitations and prohibitions on campaign contributions and expenditures. We strongly believe that sunshine is the best policy with regard to political campaign financing. We believe this bill would advance that principle if it can be fixed.

232 REP. BAUM: Do you like the word, "primary"?

235 FIDANQUE: I am comfortable with "primary". I think the issue that the bill is trying to address is in essence a shadow corporation that doesn't have any other purpose, and by fudging the language beyond that you get into all kinds of corporations, including non-profit corporations potentially which I think could be a real constitutional problem.

245 MOTION:Rep. Miller moves to adopt -2 amendment to HB 3283.

VOTE:There being no objection, Chair Baum so moves.

250 MOTION:Rep. Mannix moves to substitute "a substantial" for "the primary" on HB 328 3 as amended.

255 CHAIR BAUM: My concern about that is that "substantial" is subject to some interpretation. "Primary" is more what they do up front; what's the purpose of the business. It's better than "material".

260 REP. MANNIX: This is a two-part test already. We've already required the major source of revenue be paid in capital. That's a substantial test right away. If we say, "and a primary purpose", if I wanted to set up Shell Corporation and I had paid in capital I would just make sure that I held on to 51% of my paid in capital and I could argue that we're holding on to it to invest somewhere. Suddenly I've never reached the primary purpose. That's my concern.

270 REP. MILLER: 51-49 is one definition of "substantial". So is 90-10 in terms of your activities. Is 10% a substantial part of the corporation's activities? I really think if we're trying to go after some practice that I think we need to correct so far as I understand the factual situation, it's not widespread. Before we blow it away with the biggest guns we've got maybe we ought to pick off the most obvious violators. We can come back in two years and if it's gotten out of hand maybe we can think about it.

283 REP. MANNIX: Withdraws motion. We could use "a major purpose of the corporation". That's beyond being "substantial". It's got to be a major purpose of the corporation. The "primary" purpose of the

corporation can be hidden away by a lot of verbiage.

305 REP. BRIAN: Is it possible to just pick a percentage? When we first said "primary", I thought that's 51%. If you really want to abuse this system you would raise twice as much money as you really want to give away and you would give away 49%. Later on you would liquidate the 51% to the shareholders. When you go "major", "significant", etc., then you're opening up definitional problems. If you picked a number, you could more easily determine if it's substantial.

320 REP. MANNIX: I think that if you look at the earlier phrase, we were willing to use the major source of revenue of a corporation being paid in capital. Why not just say, "and the major purpose of the corporation"? You're using the same terminology in both sides. I don't like percentages. I don't want to get into that game because as soon as you put a percentage in there, someone will dance around the percentage. If you say "major", it's in the eye of the beholder; we have some general idea of where we are. It's more than substantial, it's more than material, and we already used that phrase earlier.

332 REP. JOHNSON: Objects to Rep. Mannix's assertion that we previously accepted the use of the word "major" in line 13. That was not something I was comfortable with in the first place.

337 REP. CLARK: The whole question of political activity arises a lot in the area of non-profit corporations and federal tax law. There is a safe harbor that the IRS has come up with, a series of factors beyond which you probably shouldn't go or your non-profit status will be challenged. Is there any way we could use some of that reasoning in this bill to provide some guidance?

345 REP. BRIAN: I think they use something like "less than a substantial amount".

352 FIDANQUE: There are different types of non-profit corporations. The ACLU has two corporations. We have a 501C4 which can be involved in political activity but we don't choose to get involved in electoral politics. We do make contributions to ballot measure campaigns occasionally. One of our concerns is if the original language had been left you would go to something else that's fudgy language and we may be required to disclose all of our contributors because we make a \$500 contribution to a ballot measure campaign. There is a right-of-association issue there that is a problem. I don't think you need to worry about this very much because if you look at Section 1 of the bill it is designed to get directly at the corporation that is attempting to launder campaign contributions. That's the strongest part of this bill. If there is evidence that a corporation isn't doing anything other than making campaign contributions, given the changes to 26402 the Secretary of State would have the jurisdiction to want an investigation. I think that's where the real teeth are. Do you want to require corporations to file complete reports of where they're getting all of their contributions if that corporation is not set up for purpose of engaging in political activity? I'm comfortable with leaving it "primary" and recognizing the fact that this change is going to have in Section 1 of the bill. That's where the real teeth are.

390 REP. MILLER: How does the language in Section 1 impact the same situation in contributions to PACs, hoping they'll do the right thing versus contributing to a corporation and hoping they'll do the right thing?

397 FIDANQUE: I'm not sure without looking at the election law definitions whether political committees are included in the definition of person. I don't think they are and it might not be a bad idea to include them there.

400 REP. MANNIX: I think the answer is that on contributors to PAC's the PAC's have to file reports and they have to show who contributed to the PAC's. Corporations don't have to file reports and show who their shareholders are. And that's the difference.

405 REP. MILLER: Do PAC's have to report contributors of less than \$50?

410 FIDANQUE: I believe not. But I think it's the larger contributions we're primarily concerned about here, but I'm not certain whether committees would be included there.

415 REP. BAUM: A person is defined as an individual or corporation, association, partnership, joint stock company, club, organization, or combination of individuals having collective capacity. Then it defines "political committee" in the next section.

420 REP. MILLER: Rep. Mannix, isn't "major" broader than "primary"?

427 REP. MANNIX: No, "primary" means first; you can only have one first purpose. "Major" - you can three major purposes of operation. "Substantial" - you could have ten or twenty substantial purposes. "Material" - you could probably have a hundred material purposes because that means significant. When you're going down the constellation of values I would treat primary as a higher value than major.

437 REP. MILLER: So "major" is a broader category of activities than "primary purpose".

440 REP. MANNIX: No, not in that sense. If you're looking at a corporation, you can only have one primary purpose. It can have a secondary, tertiary, but one primary purpose. That means it's got to come first. It might have three major purposes. So when I say, "major", I'm actually talking about a narrower range of values, not a broader range of values.

TAPE 111, SIDE A

002 (REP. MANNIX, CONTINUES): If you tried to use percentages, you could have a corporation with 33% of its purpose for this and for that, etc., and it comes up to 99%. Each of those is a major purpose. If you said, "primary", it's got to be more than anything else.

007 REP. MILLER: Maybe Mr. Bartlett is as familiar with this as anybody. If it was the primary purpose, if there was language to that effect, would you be confident that the particular group you were concerned with would be caught in the net we construct using the word "primary"? The corporation you are aware of and outraged by, are you convinced their primary purpose was to get involved in campaigns, raise money for just that and was clearly the primary purpose?

017 BARTLETT: If the use of "primary" means their reason for being was in essence a masquerade as shares of stock were really contributions they could get through that way and then just shovel it over to

committee their reason for being. If that's synonymous with primary then that's what we're trying to get at. If someone set up shop to violate accountability of paper trails if that's their basic purpose, their primary purpose, then yes.

025 REP. JOHNSON: Reword Section 3, paragraph 1, to read, "If a corporation makes a contribution to a political party, candidate, or ballot measure, and if during the twelve-month period prior to the date such contribution is made more than 75% of the funds that were received were paid in capital payments from its shareholders, it was actively engaged in the pursuit of legitimate business objectives, and its primary purpose is not to support or oppose one or more political parties, candidates, or ballot measures, then" this reporting takes place.

055 REP. MANNIX: I had opposed that language because I think when you set up a precise standard so clear like that it's an invitation for smart lawyers to work around the precise standard. The reality is, you give me a formula like that and I'll figure out a way where I do what I want to do but fall outside the formula. If we use something similar to what's in the bill right now we pretty much expressed what we're concerned about and it gives the enforcement and judicial type of authority some leeway to look at those English words and get an idea of whether they meant this or not.

067 REP. JOHNSON: You can always either choose on one end to use mushy language and hope that some judge can come to some equitable conclusion later or you can use precise language and get your exact meaning down on paper so there isn't room for anybody to misinterpret what you tried to do. Our objection on the Floor was that it was too mushy and had too broad of a net and we sent it back here to nail it down. We shouldn't send it back with just different mushy language. We haven't cured anything if that's what we do.

090 REP. MANNIX: Withdraws any motions made. So far, it says, "if the major source of revenue of a corporation is paid in capital, and the primary purpose of the corporation", I think we're there.

097 MOTION:Rep. Mannix moves HB 3283, as amended, to the Full Committee with a Do Pass recommendation.

097 REP. JOHNSON: Asks for clarification of the bill.

098 CHAIR BAUM: We took out the word, "or incidental".

100 MOTION:Rep. Johnson moves to amend Rep. Mannix's motion to read as he previously indicated.

VOTE:In a roll call vote, the motion to amend Rep. Mannix's motion fails. Reps. Brian, Clark, Mannix and Miller voted NAY.

127 (Motion was previously made to pass bill, as amended, to the Full Committee.)

VOTE:In a roll call vote, the motion passes with all members present voting AYE. Rep. Edmunson was excused.

145 CHAIR BAUM: Closes the work session on HB 3283 and opens a public hearing on HB 3279.

Witness: Steven Marks, Attorney

175 STEVEN MARKS, PRACTICING ATTORNEY, ALASKA AND OREGON: Submits and summarizes written testimony in favor of HB 3279 (EXHIBIT A).

277 REP. CLARK: Last session we had a bill that started off as a pure prejudgment interest bill. We amended it substantially to get at the very thing that you're trying to do which is to drive settlements. You get your prejudgment interest if you make a settlement offer that comes within a certain amount of range of what the ultimate verdict is. You don't get it if the other side makes a reasonable settlement offer and you walk away from it. Is there any policy reason why the attorney fee issue mechanism is different in driving the settlement process?

290 MARKS: It's the exact same policy which drives both rules. In Alaska, we have a prejudgment interest rule as well. You combine the prejudgment interest rule with the prevailing party attorney fee rule and the result is that people come together. I practice now in Portland and don't represent one side or the other. I represent businesses and plaintiffs. It seems that the modus operandi in this jurisdiction is just take it to trial. Don't even make a serious bona fide attempt at settling cases. There's no incentive to. The bar doesn't have an incentive to settle the case because it generates more business. But that's not the issue. The issue should be, "What's the best system of justice?" Some of the concern is that this will chill the bringing of lawsuits by indigent persons or others not indigent that they might be dissuaded from bringing claims that were meritorious for fear of incurring a liability. In my 13 years in Alaska representing both sides I can tell you that I can't think of a case where a party at the beginning of a lawsuit hesitated to file it for fear of incurring opposing side attorney's fees. At the beginning of the case, a party always believes that they are going to win. They wouldn't bring the lawsuit unless they thought they were going to win. After discovery occurs and both sides have a chance to see what the other case is about then people aren't quite so sure. That's when this whole settlement mechanism kicks in. It says to the plaintiff to be more reasonable because now you know you have some chance to not get everything you're asking for. Mr. defendant, you better be more reasonable here because if you don't you're going to get hit with the substantive amount of the judgement, you're also going to get hit with prejudgment interest and attorney fees. It successfully brings people together and cases get settled. One of the side benefits of the rule also is it reduces appeals. If a plaintiff does not prevail and then has a liability, under the scheme as it exists right now the plaintiff appeals. The defendant has to incur additional expense to defend the appeal, the plaintiff may get another shot at the apple, maybe not. That depends on how meritorious the claim is. The judicial process continues in full force. In practice, if you have a prevailing party attorney fee award, what happens often is if there is a defense verdict, there's a swap. The defendant says he will agree to waive his attorney award if you agree to dismiss your appeal. The case is over.

360 REP. BAUM: You make a good case for it. Prejudgment interest draws a certain amount of attention too. You got them all in the same hopper. If you get a \$25,000 judgement, the fee in a contested or not contested without trial, contested means it goes through trial and gets 20% or \$5,000 and without trial it drops to \$4,000, and uncontested is \$2,500. That's how that works.

375 REP. MILLER: How long has Alaska been so enlightened?

380 MARKS: Prior to statehood. Statehood occurred in 1959.

382 REP. MILLER: Any movement there to change that system?

383 MARKS: No, in fact I obviously do not make it a common experience to testify. I'm not a political person by nature. I feel very strongly about this issue. Prior to coming here today, I called some of my colleagues on both sides of the bench in Alaska for their comments on improvements to the existing rule in Alaska. I also asked them for comments and thoughts on whether the bill chilled any bringing of claims. The consistent response was it's a great way to do law and it definitely accomplishes the objective of settling cases, and it does not chill the bringing of claims. The only recommendation that I would have is in Alaska the prevailing party attorney fee rule does not apply to administrative proceedings before state agencies. I think that's a flaw in the bill.

397 REP. CLARK: The rationale of what you're talking about the way the system in Alaska works would lend itself to this amending the bill and inserting some sort of prejudgment interest mechanisms as well, if you're relieved the prejudgment interest can have effective driving settlement.

400 MARKS: It definitely accomplishes the same objective. I suppose it depends on how sweeping your amendments want to be. 410 REP. MILLER: What's your impression among members of the bar here?

410 MARKS: My impression is that when someone takes the time to listen to the system and listens to it with an open mind, they generally come away with a pretty positive response. If you're not familiar with the way something works, your natural reaction is to be afraid of it.

415 CHAIR BAUM: Adjourns the meeting at 3:00 p.m.

Submitted by: Reviewed by:

Carol Wilder Pat Zwick Assistant Office Manager

EXHIBIT LOG:

A - Testimony on HB 3279 - Steven Marks - 4 pages.