

## 2009 DRAFTING REQUEST

### Assembly Substitute Amendment (ASA-AB63)

Received: 03/26/2009

Received By: **jkuesel**

Wanted: **Soon**

Identical to LRB:

For: **Jeff Smith (608) 266-0660**

By/Representing: **Ron Sklansky - LCS**

This file may be shown to any legislator: **NO**

Drafter: **jkuesel**

May Contact:

Addl. Drafters:

Subject: **Elections - campaign finance**

Extra Copies: **Ron Sklansky - LCS - 1**

Submit via email: **YES**

Requester's email: **Rep.Smith@legis.wisconsin.gov**

Carbon copy (CC:) to:

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#### Pre Topic:

No specific pre topic given

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#### Topic:

ASA to AB-63

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#### Instructions:

Per attached E mail, 3/25/09.

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#### Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	jkuesel 03/26/2009	wjackson 03/27/2009		_____			
/1			mduchek 03/27/2009	_____	cduerst 03/27/2009	cduerst 03/27/2009	

FE Sent For:

<END>

(DNOTE)

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**Assembly Substitute Amendment (ASA-AB63)**

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12/1	jkuesel 3/26/09	1 Wlj 3/27	M	<del>AD</del> 3/27 RS			
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FE Sent For:   
 <END>

**Kuesel, Jeffery**

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**To:** Sklansky, Ron  
**Subject:** RE: Issue ads

Ron,  
I will need to enter this request twice under two LRB numbers -- one for Sen. Erpenbach and one for Rep. Smith. I will work on this tomorrow. I will call you when I am finished to go over a few details that I think will be necessary to stitch the draft together mechanically.

Jeff

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**From:** Sklansky, Ron  
**Sent:** Wednesday, March 25, 2009 1:57 PM  
**To:** Kuesel, Jeffery  
**Subject:** Issue ads

Jeff:

Senator Erpenbach and Representative Smith met today to agree on one substitute amendment to SB 43 and AB 63. They decided on a substitute with the following components:

1. The mass communication language in SECS. 1 to 4 of LRBa0016/1.
2. The judicial ad language in SECS. 1 and 3 of LRBs0018/1.
3. The issue ad treatment of LRBs0018/1 in SECS. 2, 4, and 5.
4. The language that appears in SECS. 6 and 7 of both substitute amendments.
5. The structure of SEC. 8 of LRBa0016/1, (the creation of s. 11.38 (1m) (a)), but using the appropriate language from SEC. 5 of LRBs0018/1.

So, that's one substitute amendment for each house at the request of Senator Erpenbach and Representative Smith. If you have any questions, let me know. Thanks.

Ron



State of Wisconsin  
2009 - 2010 LEGISLATURE

LPS: From s 0018/1 and s 0016/1

LRB 50029/

LRBs 0018/1

JTK:wlj:ph

wanted for 3/27

↑  
Stays

ASSEMBLY  
SENATE SUBSTITUTE AMENDMENT,  
ASSEMBLY  
TO 2009 SENATE BILL 43 63

1 AN ACT <sup>(repeals)</sup> to renumber and amend 11.01 (16) (b); to amend 11.06 (2); and to  
2 create 11.001 (1m), 11.01 (16) (a) 3., 11.01 (16) (a) 4., 11.01 (16) (b) 2. and 11.05  
3 (3) (s) of the statutes; relating to: the scope of regulated activity under the  
4 campaign finance law.

**Analysis by the Legislative Reference Bureau**

Currently, individuals who accept contributions, organizations that make or accept contributions, and individuals who or organizations that incur obligations or make disbursements for the purpose of influencing an election for state or local office are generally required to register with the appropriate filing officer and to file financial reports with that officer, regardless of whether they act in conjunction with or independently of any candidate who is supported or opposed.

With certain exceptions, this substitute amendment imposes registration and reporting requirements, in addition, upon any individual who and organization that, within 60 days of an election ~~and by means of communications media~~, makes any communication that includes a reference to a candidate at that election, an office to be filled at that election, or a political party. The substitute amendment ~~also~~ imposes registration and reporting requirements upon any individual who or organization that, at any time, makes any communication, ~~whether or not by means of communications media~~, that refers to a candidate for judicial office and either focuses on and takes a position for or against a judicial candidate's position on an

including  
an electronic  
communication  
a mass  
distribution  
or a mass  
telephoning

STET  
mass

mass

issue or takes a position on that judicial candidate's character, qualifications, or fitness for office. The substitute amendment <sup>also</sup> requires an individual who or organization that becomes subject to a registration requirement by making such a communication to report, upon registration, the information that would have been required to be reported if the individual or organization had been registered with respect to any obligation incurred or disbursement made for the purpose of making such a communication prior to registration. The substitute amendment, however, does not require registration and reporting if the communication is made by a corporation, cooperative, or nonpolitical voluntary association and is limited to the corporation's, cooperative's, or association's members, shareholders, or subscribers. In addition, the substitute amendment exempts from registration and reporting the cost of making a communication that 1) does not support or oppose a candidate's record on an issue; 2) does not mention an election, a candidacy, an opposing candidate, a political party, or voting by the general public; and 3) does not take a position on a candidate's or officeholder's character, qualifications, or fitness for office, and either a) focuses on and takes a position on a legislative or executive matter or issue and urges the public to adopt the position and to contact one or more public officials about the matter or issue, or b) proposes a commercial transaction, unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a candidate for state or local office whose name is certified to appear on the ballot at the election.

The change in the scope of reportable activity under the substitute amendment also applies to contribution and disbursement (spending) limitations and restrictions by causing reportable "contributions," "obligations," and "disbursements" to include the cost of all reportable communications.

Violators of registration and reporting requirements are subject to a forfeiture (civil penalty) of not more than \$500 for each violation. In addition, any person who is delinquent in filing a report is subject to a forfeiture of not more than \$50 or 1 percent of the annual salary of the office for which a candidate is being supported or opposed, whichever is greater, for each day of delinquency. Intentional violators of the registration requirements and persons who intentionally file false reports or statements may be fined not more than \$1,000 or imprisoned for not more than six months, or both, if the violation does not exceed \$100 in amount or value, and may be fined not more than \$10,000 or imprisoned for not more than three years and six months, or both, if the violation exceeds \$100 in amount or value.

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LPS: please note underlying draft. → LRBs0016/1 JTK:wjl:rs

of a clearly identified candidate at that election and it: 1) refers to the personal qualities, character, or fitness of that candidate; 2) supports or opposes that candidate's position or stance on one or more issues; or 3) supports or opposes that candidate's public record. The substitute amendment also requires an individual who or organization that becomes subject to a registration requirement by making such a mass communication to report, upon registration, the information that would have been required to be reported if the individual or organization had been registered with respect to any obligation incurred or disbursement made for the purpose of making such a communication prior to registration. The substitute amendment, however, does not require registration and reporting if the communication is made by a corporation, cooperative, or nonpolitical voluntary association and is limited to the corporation's, cooperative's, or association's members, shareholders, or subscribers.

The change in the scope of reportable activity under the substitute amendment also applies to contribution and disbursement (spending) limitations and restrictions by causing reportable "contributions," "obligations," and "disbursements" to include the cost of all reportable communications.

Violators of registration and reporting requirements are subject to a forfeiture (civil penalty) of not more than \$500 for each violation. In addition, any person who is delinquent in filing a report is subject to a forfeiture of not more than \$50 or 1 percent of the annual salary of the office for which a candidate is being supported or opposed, whichever is greater, for each day of delinquency. Intentional violators of the registration requirements and persons who intentionally file false reports or statements may be fined not more than \$1,000 or imprisoned for not more than six months, or both, if the violation does not exceed \$100 in amount or value, and may be fined not more than \$10,000 or imprisoned for not more than three years and six months, or both, if the violation exceeds \$100 in amount or value.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

INS ↓  
2-1

SECTION 1. 11.01 (12v) of the statutes is created to read:

11.01 (12v) "Mass communication" means a message that is disseminated by means of one or more communications media, a mass electronic communication, a mass distribution, or a mass telephoning, but not including a bona fide poll conducted for the purpose of objectively identifying or collecting data concerning the attitudes or preferences of electors.

SECTION 2. 11.01 (12w) of the statutes is created to read:

LPS Note:

LRBs0016/1  
JTK:wlj:rs  
SECTION 2

1           11.01 (12w) "Mass distribution" means the distribution of 50 or more pieces of  
2 substantially identical material.

3           ~~SECTION 3.~~ 11.01 (13) of the statutes is created to read:

4           11.01 (13) "Mass electronic communication" means the transmission of 50 or  
5 more pieces of substantially identical material by means of electronic mail or  
6 facsimile transmission.

7           ~~SECTION 4.~~ 11.01 (14) of the statutes is created to read:

8           11.01 (14) "Mass telephoning" means the making of 50 or more telephone calls  
9 conveying a substantially identical message.

10          ~~SECTION 5.~~ 11.01 (16) (a) 3. of the statutes is created to read:

11          11.01 (16) (a) 3. Except for purposes of s. 11.38 (1m), a mass communication  
12 ~~that is susceptible of no reasonable interpretation other than as an appeal to vote for~~  
13 ~~or against a specific candidate at an election, other than a communication that is~~  
14 ~~exempt from reporting under s. 11.29. A mass communication is susceptible of no~~  
15 ~~other such interpretation if it is made during the period beginning on the 60th day~~  
16 ~~preceding a general, special, or spring election and ending on the date of that election~~  
17 ~~or during the period beginning on the 30th day preceding a primary election and~~  
18 ~~ending on the date of that primary election, it includes a reference to or depiction of~~  
19 ~~a clearly identified candidate at that election, and it:~~

- 20           a. Refers to the personal qualities, character, or fitness of that candidate;
- 21           b. Supports or opposes that candidate's position or stance on one or more issues;
- 22          or
- 23           c. Supports or opposes that candidate's public record.

24          SECTION 6. 11.05 (3) (s) of the statutes is created to read:

LPS: From ↓

~~50018/1~~

8 ~~communications media~~, other than a communication that is exempt from reporting  
9 under s. 11.29, that is made during the period beginning on the 60th day preceding  
10 an election and ending on the date of that election, and that includes a reference to  
11 a candidate whose name is certified under s. 7.08 (2) (a) or 8.50 (1) (d) to appear on  
12 the ballot at that election, a reference to an office to be filled at that election, or a  
13 reference to a political party.

14 SECTION ~~3~~ 11.01 (16) (a) 4. of the statutes is created to read:

15 11.01 (16) (a) 4. <sup>MASS ↓</sup> A communication that refers to a judicial office and either  
16 focuses on and takes a position for or against a judicial candidate's position on an  
17 issue or takes a position on that judicial candidate's character, qualifications, or  
18 fitness for office.

19 SECTION ~~4~~ 11.01 (16) (b) of the statutes is renumbered 11.01 (16) (b) (intro.) and  
20 amended to read:

21 11.01 (16) (b) (intro.) A "political purpose" does not include expenditures any  
22 of the following:

23 1. An expenditure made for the purpose of supporting or defending a person  
24 who is being investigated for, charged with or convicted of a criminal violation of state  
25 or federal law, or an agent or dependent of such a person.



~~SECTION 5.~~ 11.01 (16) (b) 2. of the statutes is created to read:

11.01 (16) (b) 2. Unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a candidate whose name is certified to appear on a ballot at an election, <sup>MASS</sup> a communication that either focuses on and takes a position on a legislative or executive issue and urges the public to adopt the position and to contact one or more public officials about the issue or proposes a commercial transaction and does not do any of the following:

a. Supports <sup>or opposes</sup> a candidate's record on an issue.

b. Mentions an election, a candidacy, an opposing candidate, a political party, or voting by the general public.

c. Takes a position on a candidate's character, qualifications, or fitness for office.

~~SECTION 6.~~ 11.05 (3) (s) of the statutes is created to read:

11.05 (3) (s) In the case of a registrant that has made <sup>MASS</sup> a communication identified in s. 11.01 (16) (a) 3, <sup>or 4</sup> a report containing the information specified in s. 11.06 (1) with respect to any obligation to make a disbursement incurred or any disbursement made for the purpose of making such a communication prior to registration.

~~SECTION 7.~~ 11.06 (2) of the statutes is amended to read:

11.06 (2) DISCLOSURE OF CERTAIN INDIRECT DISBURSEMENTS. Notwithstanding sub. (1), if a disbursement is made or obligation incurred by an individual other than a candidate or by a committee or group which is not primarily organized for political purposes, and the disbursement does not constitute a contribution to any candidate or other individual, committee, or group, and the disbursement is not made or the obligation is not incurred for the purpose of making a <sup>MASS</sup> communication specified in s.

1 11.01 (16) (a) 3., the disbursement or obligation is required to be reported only if the  
 2 purpose is to expressly advocate the election or defeat of a clearly identified  
 3 candidate or the adoption or rejection of a referendum. The exemption provided by  
 4 this subsection shall in no case be construed to apply to a political party, legislative  
 5 campaign, personal campaign, or support committee.

6 **SECTION 8. Initial applicability.**

7 (1) The treatment of section 11.01 (16) (a) 3. of the statutes, the renumbering  
 8 and amendment of section 11.01 (16) (b) of the statutes, and the creation of section  
 9 11.01 (16) (b) 2. of the statutes first apply with respect to reporting periods that begin  
 10 on or after the effective date of this subsection.

11 (END)

Plain  
S-5

INS  
S-5

Plain

Insert 5-7

11.001 (1m)  
 11.05 (3) (5)  
 11.38 (1m)

11.06(2)

JWS 2-1

1 SECTION ~~11~~. 11.001 (1m)<sup>✓</sup> of the statutes is created to read:  
2 11.001 (1m) The legislature finds and declares that the function of judges and  
3 justices, who must independently apply the law, is fundamentally distinct from that

2009 - 2010 Legislature

- 3 -

LRBs0018/1  
JTK:wlj:ph  
SECTION 1

1 of elective legislative and executive branch officials who take positions on issues that  
2 are influenced by, and represent the will of, their constituencies. The legislature  
3 therefore finds that because it is improper for a <sup>MASS</sup> communication to seek to persuade  
4 a judge or justice to take a position on an issue, any such communication should be  
5 deemed to have been made for a political purpose.

OK  
SRM  
3 27-09

MISS-5:1

Lps: From ↓  
~~500/6%~~

18  
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~~#~~ SECTION 8. 11.38 (1m) ↓ of the statutes is created to read:  
11.38 (1m) (a) ↓ No corporation or association specified in sub. (1) (a) 1. may  
make a disbursement for the purpose of making a mass communication that is →

*INS 5-5:2*

1 of elective legislative and executive branch officials who take positions on issues that  
2 are influenced by, and represent the will of, their constituencies. The legislature  
3 therefore finds that because it is improper for a communication to seek to persuade  
4 a judge or justice to take a position on an issue, any such communication should be  
5 deemed to have been made for a political purpose.

6 SECTION 2. 11.01 (16) (a) 3. of the statutes is created to read:

7 ~~11.01 (16) (a) 3. A communication that is~~ made by means of one or more  
8 communications media, other than a communication that is exempt from reporting  
9 under s. 11.29, <sup>and:</sup> ~~that is~~ made during the period beginning on the 60th day preceding  
10 an election and ending on the date of that election, and that includes a reference to  
11 a candidate whose name is certified under s. 7.08 (2) (a) or 8.50 (1) (d) to appear on  
12 the ballot at that election, a reference to an office to be filled at that election, or a  
13 reference to a political party, <sup>or</sup>

14 SECTION 3. 11.01 (16) (a) 4. of the statutes is created to read:

15 ~~11.01 (16) (a) 4. A communication that refers~~ to a judicial office and either  
16 focuses on and takes a position for or against a judicial candidate's position on an  
17 issue or takes a position on that judicial candidate's character, qualifications, or  
18 fitness for office.

*Refers*

19 SECTION 4. 11.01 (16) (b) of the statutes is renumbered 11.01 (16) (b) (intro.) and  
20 amended to read:

21 11.01 (16) (b) (intro.) A "political purpose" does not include expenditures any  
22 of the following:

- 23 1. An expenditure made for the purpose of supporting or defending a person  
24 who is being investigated for, charged with or convicted of a criminal violation of state  
25 or federal law, or an agent or dependent of such a person.

*MS 5-5:3*

~~SECTION 5. 11.01 (16) (b) 2. of the statutes is created to read:~~

~~11.01 (16) (b) Unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a candidate whose name is certified to appear on a ballot at an election, a communication that either focuses on and takes a position on a legislative or executive issue and urges the public to adopt the position and to contact one or more public officials about the issue or proposes a commercial transaction and does not do any of the following:~~

- ~~1) Supports or opposes a candidate's record on an issue;~~
- ~~2) Mentions an election, a candidacy, an opposing candidate, a political party, or voting by the general public;~~

~~3) Takes a position on a candidate's character, qualifications, or fitness for office.~~

~~SECTION 6. 11.05 (3) (s) of the statutes is created to read:~~

~~11.05 (3) (s) In the case of a registrant that has made a communication identified in s. 11.01 (16) (a) 3, a report containing the information specified in s. 11.06 (1) with respect to any obligation to make a disbursement incurred or any disbursement made for the purpose of making such a communication prior to registration.~~

~~SECTION 7. 11.06 (2) of the statutes is amended to read:~~

~~11.06 (2) DISCLOSURE OF CERTAIN INDIRECT DISBURSEMENTS. Notwithstanding sub. (1), if a disbursement is made or obligation incurred by an individual other than a candidate or by a committee or group which is not primarily organized for political purposes, and the disbursement does not constitute a contribution to any candidate or other individual, committee, or group, and the disbursement is not made or the obligation is not incurred for the purpose of making a communication specified in s.~~

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*NoFF*

*NoFF*

*candidate whose name is certified to appear on the ballot at an election*

*MASS*

2009-2010 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRBs0029/lins

.....

INSERT 5-7

1           ~~¶~~ The treatment of sections 11.01 (12v), (12w), (13), (14), and (16) (a) 3. and  
2           4. and 11.06 (2) of the statutes, the renumbering and amendment of section 11.01 (16)  
3           (b) of the statutes, and the creation of section 11.01 (16) (b) 2. of the statutes first  
4           apply with respect to reporting periods that begin on or after the effective date of this  
5           subsection.

DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB 0018/14  
JTK:wlj:ph

50029/144

stays

March 13, 2009

Date

Representative Smith  
Senator Erpenbach:

only  
if it does

This ~~amendment~~ <sup>draft</sup> makes some changes to ~~SB 43~~ <sup>Mass AB-63</sup> that may affect the probability that a court would find an inconsistency between the draft and the holding of the U.S. Supreme Court in *F.E.C. v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007), which permitted prohibition of corporate communications only when they are express advocacy or its functional equivalent. One change is ~~to add a requirement~~ <sup>provide</sup> that a communication ~~that is exempt from reporting and that~~ <sup>provide</sup> qualifies as a permissible corporate communication ~~must not not support, or oppose a candidate's record on an issue.~~ This requirement does not appear in the court's core test set forth on p. 2667 of that opinion but rather is based upon a response to the dissent in footnote 6 and does not appear in the corresponding test adopted by the F.E.C. in 11 C.F.R. 114.15. I think this requirement may be a fair reading of the decision, but it is not free from doubt. Another change is to specifically require registration and reporting and to ban corporate communications whenever ~~any~~ <sup>Mass</sup> communication refers to a judicial office and either focuses on and takes a position for or against a judicial candidate's position on an issue or takes a position on that judicial candidate's character, qualifications, or fitness for office. Because this requirement does not set forth a window when it is operative, ~~applies broadly to all communications rather than just to media or broadcast communications,~~ <sup>Mass</sup> and sets forth a separate rule for judicial races, it does not parallel the fact situation that received the approval of the court, and it will therefore affect the probability that a court may distinguish ~~it~~ <sup>as interpreted by the F.E.C.</sup> from the approved test ~~for determining the functional equivalent of advocacy.~~

mess

Mass

core test

If you would like to discuss

This is any related matters  
if anything please let me  
know

Jeffery T. Kuesel  
Managing Attorney  
Phone: (608) 266-6778

the draft's test for determining the functional equivalent of express advocacy.



**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRBs0029/1dn  
JTK:wlj:md

March 27, 2009

Representative Smith:

This draft makes some changes to AB-63 that may affect the probability that a court would find an inconsistency between the draft and the holding of the U.S. Supreme Court in *F.E.C. v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652 (2007), which permitted prohibition of corporate mass communications only when they are express advocacy or its functional equivalent. One change is to provide that a communication qualifies as a permissible corporate mass communication only if it does not support or oppose a candidate's record on an issue. This requirement does not appear in the Court's core test set forth on p. 2667 of that opinion but rather is based upon a response to the dissent in footnote 6 and does not appear in the corresponding test adopted by the F.E.C. in 11 C.F. R. 114.15. I think this requirement may be a fair reading of the decision, but it is not free from doubt. Another change is to specifically require registration and reporting and to ban corporate mass communications whenever a mass communication refers to a judicial office and either focuses on and takes a position for or against a judicial candidate's position on an issue or takes a position on that judicial candidate's character, qualifications, or fitness for office. Because this requirement does not set forth a window when it is operative and sets forth a separate rule for judicial races, it does not parallel the core test that received the approval of the Court as interpreted by the F.E.C., and it will affect the probability that a court may distinguish the draft's test for determining the functional equivalent of express advocacy from the Court's approved test.

If you would like to discuss this or any related matters further, please let me know.

Jeffery T. Kuesel  
Managing Attorney  
Phone: (608) 266-6778

**Barman, Mike**

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**From:** Kuesel, Jeffery  
**Sent:** Monday, May 04, 2009 8:31 AM  
**To:** Barman, Mike  
**Cc:** Wahl, Andrea  
**Subject:** FW: LRBs0029/1 - substitute amendment to AB63

Mike,

Please allow Rep. Dexter to have copies of the above draft, or to jacket the draft. Ilsa Petersen is Rep. Dexter's assistant. Thanks.

Jeff

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**From:** Wahl, Andrea  
**Sent:** Monday, May 04, 2009 7:53 AM  
**To:** Kuesel, Jeffery  
**Subject:** substitute amendment to AB63

Jeff,

I would like to release the most recent substitute amendment of AB 63 to Ilsa Petersen and Rep. Dexter, as they will be introducing this amendment. Please let me know if you have any questions.

Thank you,

**Andrea Wahl**

Office of Representative Jeff Smith  
93rd Assembly District  
608-266-0660