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Push Polling: The Art of Political Persuasion

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PUSH POLLING: THE ART OF POLITICAL PERSUASION

Jonathan S. Fox*

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I. INTRODUCTION

Push polling is political campaigning using the pretense of legitimate scientific polling. Generally, push polls provide respondents with false or misleading information in an attempt to influence their vote or to suppress their vote altogether. A typical push poll question might ask, "Would you vote for Candidate X if you knew that he or she took public money for personal profit while acting as city commissioner?"

Push pollsters telephone large numbers of voters. Frequently, they target a negative message about a candidate to a specific group, such as women, blacks or the elderly. Push polls are generally short—often less than a minute—although they can be piggy-backed on longer surveys. These polls tend to omit questions inquiring into preliminary and demographic (age, income, race, etc.) matters. Sometimes, question results are not even collected or tabulated. Finally, push polls are usually run late in a campaign, leaving the media little time to expose the poll and an opposing candidate even less time to effectively respond.

Push polls have become a part of many campaigns; absent legislation, their use is likely to grow in future campaigns. This Article identifies the factors which distinguish push polls from legitimate polls, and offers the newly-enacted Florida law as a comprehensive, constitutional scheme for regulating push polls and their counterparts, attack telephone banks. The Article also includes a model statute for the same purpose.

Both the Florida legislation and the model statute require push pollsters and political telemarketers to identify themselves and their clients. Such a disclosure requirement introduces accountability and responsibility into the process—elements which already exist with regard to written and broadcast political advertisements in many states. In addition, a disclosure requirement will timely provide voters with the critical information they need to assess the validity of push poll messages. Finally, a disclosure requirement will further a state's interest in ensuring the integrity of the election process and in preventing fraud.

II. SAMPLE PUSH POLL

“Oh, the telephone is now a very evil technique.”

—Republican Pollster Frank Luntz, November 1994.¹

Imagine that it is 6:30 p.m., and you just sat down to dinner with your family. Your 10-year-old, the future astronaut, tells you that she is planning to build a working model of the space shuttle for the school science fair, and asks you to lend a hand. Oh, and by the way, the science fair is this weekend. Translation—you will very quickly be building a papier mâché model of the space shuttle with the assistance of your 10-year-old, who will learn a little about space and a little about papier mâché in the process.

“That sounds great,” you respond encouragingly. “We’ll get started right after dinner.”

As you begin to discuss plans for the project, the phone rings.

“Mr. Jones?”

“Yes.”

“This is Hal Richards with Southern Polling. I was hoping you have just a few minutes to answer some questions about the upcoming elections.”

“We’re right in the middle of dinner,” you respond. “Can you call back . . .”

“I promise this will only take a minute or two,” the caller politely interrupts.

You agree that you should take the poll. After all, this is a political poll. It represents a rare opportunity to speak out on a broad range of important issues—taxes, crime, education, the budget, entitlements. You are in a position of influence, a virtual political “pooh-bah.”²

“Sure, if it will only take a few minutes,” you say.

“Thank you. Now, Mr. Jones, are you supporting Janice Riley or Representative Pete Levinson in the upcoming primary for Florida State Representative in District 121?”

“Pete Levinson,” you innocently reply.

Wrong Answer.

“Mr. Jones, do you think honesty and integrity are important qualities in your state representative?”

“Of course.”

1. LARRY J. SABATO & GLENN R. SIMPSON, *DIRTY LITTLE SECRETS: THE PERSISTENCE OF CORRUPTION IN AMERICAN POLITICS* 244 (1996).

2. ANN DELANEY, *POLITICS FOR DUMMIES* 203-04 (1995).

"Would you be more or less likely to vote for Mr. Levinson if you knew that during the last election he was investigated by the State Ethics Commission for using campaign funds to go skiing in Aspen, Colorado?"

"I didn't hear anything about that," you answer, somewhat stunned by the accusation.

"Would you be more or less likely to vote for Mr. Levinson if you knew that he beat his wife and hasn't payed his child support in over a year?"

"Uh, well, probably less." How could I have missed *that*, you think to yourself.

"Mr. Jones, are you still planning to support Representative Levinson in the upcoming primary election?"

"I'm not sure."

"Thank you and have a nice evening."

Congratulations! You have just responded to a hypothetical "push poll," a fast-growing and already pervasive negative campaign tactic.

A push poll is negative political advertising masquerading under the guise of legitimate scientific research. The purpose of a push poll is to push respondents away from a particular candidate or a neutral position into supporting the poll sponsor's candidate, or, alternatively, to suppress voter turnout for the opposing candidate altogether. In our sample push poll, the poll sponsor is seeking to dissuade Mr. Jones from supporting Pete Levinson, the incumbent state representative.

Just who is the poll sponsor? It's difficult to say. It could be Janice Riley's campaign. However, campaigns and candidates often try to distance themselves from push polls, and routinely deny responsibility.³ Maybe Riley's political party commissioned the poll. Or the sponsor might be a special interest group, such as the pro-choice lobby, who is upset with Representative Levinson because he voted for a bill last session requiring a 24-hour waiting period for an abortion.⁴ Or, maybe

3. See *It's Mud Season: Beware Dirty Tricks as Campaign Winds Down*, BRADENTON HERALD, Aug. 28, 1996, at L4; Marie Cocco, *Suppression Phone Calls Corrode Campaign*, THE RECORD, NORTHERN NEW JERSEY, Feb. 19, 1996, at A19.

4. The major special interest groups like the Pro-Choice groups, the Right-to-Life movement, and the labor unions are often responsible for conducting push polls. See American Association for Public Opinion Research (AAPOR), 1996 Annual Conference, Transcription of Panel Session, "Push Polls" and "Truth-in-Polling" Laws: How Shall We Respond 26 (May 17, 1996) [hereinafter AAPOR Panel Discussion], reprinted in FLORIDA HOUSE OF REPRESENTATIVES COMM. ON ELECTION REFORM REPORT, PUSH POLLING: THE ART OF POLITICAL PERSUASION, at Exhibit A (Jan. 1997) [hereinafter FLORIDA HOUSE PUSH POLLING REPORT] (authored by Jonathan Fox).

the poll is an independent expenditure by a group of citizens in Representative Levinson's district who think he is doing a bad job. Unraveling the sponsorship "who-dunnit" often requires the efforts of a master sleuth. Even then, there is no guarantee that the case will be solved.⁵

What makes push polls more offensive than other forms of political advertising is that they operate under the cloak of scientific legitimacy. As one writer put it: "[P]ush polls are effective because they lull voters into believing they have been contacted by an impartial public opinion company. That false air of neutrality makes the political attack launched at the end of the call all the more devastating."⁶

Another disturbing feature of push polls—and their first cousins, attack phone banks—is that they fly "below the radar screen"⁷ and allow the push pollsters and telemarketers to avoid accountability. Because push polls and attack phone banks are conducted principally by telephone, there is rarely any paper trail to follow. Since pollsters and sponsors are not required to identify themselves, push polls and political telephone solicitations often are able to avoid the media coverage and public scrutiny which accompanies other forms of political advertisements such as radio, television and written materials.

How do push polls accomplish their goals? They do it by disseminating misinformation, frequently in the form of lies, distortions, exaggerations, misrepresentations and innuendo, to convey a negative impression of a candidate or distort a candidate's views.⁸ In our hypothetical push poll, the question "Do you think honesty and integrity are important qualities in your state representative?" is a subtle way of *suggesting* that the current Representative, Mr. Levinson, lacks these qualities.

The next question, which implies that Levinson is dishonest, contains several distortions and misrepresentations. Our hypothetical pollster asked: "Would you be more or less likely to vote for Mr. Levinson if you knew that during the last election he was investigated by the State Ethics Commission for using campaign funds to go skiing in Aspen, Colorado?"

First, the question does not state that Levinson violated any law—only that he was "investigated." In Florida, any citizen can file a

5. See SABATO & SIMPSON, *supra* note 1, at 259 (indicating that it is almost impossible to trace the sources of push polls); Charles Elmore, *It's True: Campaign Phone Pollsters Are Free to Fib*, PALM BEACH POST, Oct. 28, 1996, at 1A (stating that push polls are often "orphans, claimed by no one").

6. Thomas Turcol, *Lawmaker Hopes to Use His Pull to Eliminate Election 'Push Polls'*, PHILA. INQUIRER, June 13, 1996, at B4.

7. SABATO & SIMPSON, *supra* note 1, at 259 (citations omitted).

8. See *Put an End to Push Polls*, ST. PETERSBURG TIMES, June 30, 1996, at 2D.

complaint with the Florida Commission on Ethics alleging that a public official has violated a provision of the Code of Ethics. The Commission on Ethics *must* take some action regardless of whether there is any legal or factual basis for the complaint. Thus, a public official is arguably under "investigation" by the Commission whenever a complaint is filed. In our hypothetical example, the Commission or its staff probably would reject the complaint against Levinson because violations of elections laws are not within the scope of its jurisdiction. Rather, election law violations are investigated by the Florida Elections Commission. However, by selectively omitting this information, the pollster's question strongly suggests that Levinson did something wrong.

Second, Representative Levinson's use of campaign funds to travel to Aspen may have been perfectly legal. After winning an election, Florida law allows a District Representative to allocate up to \$5000 in surplus campaign funds to an office account.⁹ Office account funds can be used to defray "legitimate expenses in connection with the candidate's public office," including "travel expenses."¹⁰ In our hypothetical example, Representative Levinson, vice-chairman of the House Corrections Committee, may have attended a National Conference of State Legislatures seminar in Aspen entitled "Rehabilitation and Punishment: State Models for the Incarceration and Treatment of Violent Offenders." By omitting these important facts, however, the question clearly misrepresents that Levinson used his campaign funds to take a ski vacation in Aspen and implies that he acted dishonestly. Thus, the question focuses on creating the perception of impropriety where none actually existed.

The final question, involving allegations of wife beating and failure to pay child support, is undoubtedly intended to cast Levinson in a very bad light. Could you vote for someone like that if even a small part of the allegations were true?

III. BACKGROUND

"[Push polling is] very common and it flies under the radar screen and it's rarely exposed. . . . And that's why it's being promoted by consultants on both sides. It's very effective. And it's very difficult to pick up fingerprints."

—Prof. Larry Sabato, University of Virginia¹¹

9. See FLA. STAT. § 106.141(5) (1997).

10. *Id.*

11. Cocco, *supra* note 3.

James Gallup pioneered the principles of modern public opinion surveys in the 1930s.¹² Since that time, polls have become an integral part of virtually every campaign.¹³ "In modern political campaigning, not taking a poll is tantamount to political malpractice."¹⁴ Candidates, political organizations, political parties, the news media, and others use polling to evaluate a candidate's name recognition, develop campaign strategies, test campaign messages, determine which candidate is leading a particular race, gauge the public's position on issues, and obtain feedback on specific campaign advertising and media.¹⁵

Push polls were reportedly first used as early as 1946 in a United States House of Representatives race between former President Richard Nixon and Democratic incumbent Jerry Voorhis.¹⁶ Reportedly, Democratic voters throughout the district received telephone calls stating, "This is a friend of yours, but I can't tell you who I am. Did you know that Jerry Voorhis is a Communist?"¹⁷ Although evidence linking the calls directly to the Nixon campaign is scant, the calls illustrate that the concept of push polling has been around since the early days of modern political polling.¹⁸

12. See ALBERT H. CANTRIL, THE OPINION CONNECTION: POLLING, POLITICS AND THE PRESS 5, 10 (1991); Richard D. Smith, *Letting America Speak*, AUDACITY, Winter 1997, at 50; *Polling at Risk*, SALT LAKE TRIB., May 25, 1996, at A18.

13. See DELANEY, *supra* note 2, at 308 (stating that "not taking a poll" and "taking a poll and ignoring the results" are two common political mistakes).

14. *Id.*

15. Common types of political campaign surveys include:

Benchmark Surveys: Lengthy surveys usually taken at the beginning of a campaign to determine campaign strategy and planning. The main purpose is to measure *benchmarks* from which to evaluate the future progress of a campaign. Information sought in a benchmark survey may include the candidate's name recognition level, the candidate's initial electoral strength, and, a citizen's assessment of an incumbent officeholder's performance.

Monitor/Tracking Polls: Used during the course of a campaign to measure responses to campaign messages and advertising by both sides, to monitor shifts in support or changes on issues or perceptions, to test negative themes, and to determine who is leading a race. *Id.* at 204-05. Tracking polls can occur daily as election day approaches.

Id. at 204-08.

16. See Flynn McRoberts, *Telephone as Campaign Weapon: Candidates Charge Calls Are Misleading*, CHI. TRIB., Feb. 19, 1996, at 4 (observing that push polls date back to the early campaigns of Richard Nixon).

17. SABATO & SIMPSON, *supra* note 1, at 254 (citations omitted).

18. See *id.*; Telephone Interview with John Berry, Assoc. Director, University of Connecticut Roper Center for Public Opinion Research (July 10, 1996).

While the concept itself is decades old, the recent proliferation of push polls and attack phone banks as a standard campaign tactic, aided by advancing telephone technology, appears to be new. Although there had been cases in the 1980s¹⁹ and early 1990s,²⁰ the 1994 election cycle saw an explosion in reported incidents of push polling.²¹ There were over three dozen alleged cases during the 1994 federal election cycle alone.²² An additional thirty-four candidates for the United States Congress in 1994 claimed that push polling was used against them.²³ Perhaps the most candid was freshman Representative Bob Ehrlich, who admitted that his campaign used push polling, stating, "I think all the pollsters are doing that now. I mean, ours did."²⁴

The use of push polls is not confined to federal elections. Push polls have been and continue to be used in all types of elections—federal, state, and local.²⁵ Local elections are especially vulnerable because there is comparatively little media attention and callers can canvass entire neighborhoods.²⁶ The use of push polls is bi-partisan.²⁷ Republicans and Democrats have been accused of using the tactic. Likewise, both have been victimized by push polls.

Although push polls are used in both candidate and issue-oriented elections, the bulk of reported incidents involve candidate elections. Sometimes the distinction between the two is blurred, as in the 1994 congressional elections where push polling was used by both anti-

19. Unions and other pro-Democrat interest groups used push polling against Republican candidates in the 1986 election cycle, charging that they would cut or abolish Social Security and Medicare. *See Cocco, supra* note 3; Ann Devroy, *Phone Polling: When Push Can Come to Shove*, SALT LAKE TRIB., Feb. 18, 1996, at A7.

20. For example, former President George Bush, attempting to stave off a surging Pat Buchanan in the 1992 New Hampshire presidential primary, used push polling to seize upon a Buchanan statement questioning the fitness of women to have careers. *See Devroy, supra* note 19.

21. *See Adam Clymer, Political Handlers Decry 'Push Polls,'* N.Y. TIMES, June 27, 1996, at A20 (reporting that push polling became widespread in the 1994 elections because computer technology reduced the cost to as low as 40 cents to \$1 per call); Michele Kay, *GOP Panel Admits to Authorizing 'Push Poll,'* AUSTIN AMERICAN-STATESMAN, Mar. 7, 1996, at B1 (stating that political observers believe push polling became popular and was used fairly extensively in 1994).

22. *See SABATO & SIMPSON, supra* note 1, at 259.

23. *See id.* at 258.

24. *Id.*

25. *See Political Advertising Disclaimers: Hearings on Disclaimers Before the Federal Elections Comm'n* 110 (Mar. 8, 1995) (comments of Representative Torn Petri) [hereinafter FEC Hearing Transcript].

26. *See Put an End to Push Polls,* ST. PETERSBURG TIMES, June 30, 1996, at 2D.

27. *See FEC Hearing Transcript, supra* note 25, at 111; *see also SABATO & SIMPSON, supra* note 1, at 258-60.

abortion and pro-choice groups to oppose candidates who did not support their positions.²⁸ However, even when sponsored by these single-issue groups, push polling occurred in the context of candidate elections.

The 1996 election season produced dozens of reported incidents of push polling. Some press accounts, however, confuse push polling with testing negative themes in legitimate polls and straight political telephone solicitations, occasionally using the concepts interchangeably. Such confusion apparently arose over a poll allegedly orchestrated by the Bob Dole campaign against Republican challenger Steve Forbes in the 1996 Iowa presidential caucuses. The Dole telephone poll allegedly distorted Forbes' flat tax proposal and his stance on gays in the military.²⁹

Other high-profile incidents of alleged push polling during the 1996 election season include:

- Pro-tobacco push polls opposing Texas Attorney General Dan Morales, who had initiated a suit against the tobacco industry to recover state costs incurred in caring for people with smoking-related medical injuries;³⁰

28. See SABATO & SIMPSON, *supra* note 1, at 259-61. Pro-life or conservative groups also were suspected of running push polls against Republican presidential candidate Steve Forbes in the 1996 Iowa caucuses. See Cocco, *supra* note 3. Coincidentally, on October 26, 1996, a former staff member of the Florida House Ethics and Elections Committee staff was push polled on the proposed one cent per pound sugar tax to benefit environmental restoration efforts in the Florida Everglades (ballot question #4). Interview with Lygia Tisdale, Administrative Assistant, Florida House of Representatives Committee on Ethics and Elections, in Tallahassee, Fla. (Oct. 28, 1996).

29. See *Pollsters Call for an End to Campaign Smear Tactic*, THE NEWS & OBSERVER (Raleigh, N.C.), May 19, 1996, at A4. One question asked whether voters would be more or less likely to support Forbes if they knew he supported President Clinton's policy of allowing gays in the military. See *id.* In another question, voters were told that Forbes' flat-tax plan would raise taxes on Iowa's farmers. See *id.*

However, the fact that only a few hundred voters were interviewed suggests that the Dole campaign poll may have been testing the effectiveness of negative themes for potential use in advertising against Forbes. See *Forbes Rips Dole Poll Tactic: Routine Surveys Probe Weakness, Can be Abused*, PHOENIX GAZETTE, Feb. 12, 1996, at A3. Such polling practices and tactics are generally considered routine and appropriate. John King, *Dole Did to Forbes as Forbes Did to Him*, AUSTIN AMERICAN-STATESMAN, Feb. 11, 1996, at A5 (stating that polls frequently frame survey questions to probe opponents' weaknesses). In fact, the Forbes campaign had previously polled negative themes against Dole to develop its own attack advertising. See *id.*

30. See Dave McNeely, 'Push Poll' Came to Shove with Morales, AUSTIN AMERICAN-STATESMAN, Mar. 31, 1996, at E3.

- Oregon's special mail-ballot election to fill Bob Packwood's vacant United States Senate seat;³¹
- West Virginia's gubernatorial race;³²
- Texas' 14th congressional district race, where the National Republican Congressional Committee admitted to commissioning a push poll to support incumbent U.S. Representative Greg Laughlin (Laughlin apparently did not authorize or know about the poll).³³

Florida has not been immune to the nationwide proliferation of push polls and attack phone banks. For example, Florida's 1994 gubernatorial campaign received national attention for its use of negative phone bank operations. A Washington, D.C. firm hired by the campaign of Democratic candidate Lawton Chiles telephoned approximately 70,000 senior-citizen voters in the Tampa Bay area in the waning days of the campaign.³⁴ Callers, falsely representing affiliations with real and fictitious organizations, claimed that Republican opponent Jeb Bush did not pay his taxes and that Bush's running mate favored eliminating or cutting Social Security benefits and Medicare.³⁵ Governor Chiles testified before the Florida Senate Executive Business, Ethics and

31. See Devroy, *supra* note 19.

32. See Richard Grimes, *McBride Attorney Seeks Ruling on 'Push-Polls,'* CHARLESTON DAILY MAIL, Feb. 23, 1996, at 2A. The poll question at issue asked voters if they knew that one of the candidates "had taken a poll to decide to run as a Republican." Jack McCarthy, *McKinley Poll Tactics Draw Fire*, THE CHARLESTON GAZETTE, Feb. 23, 1996, at 1C. West Virginia law precludes the use of any polls "deceptively designed or intentionally conducted" to defeat another candidate. *See infra* notes 172-75 and accompanying text (discussing West Virginia law).

33. Kay, *supra* note 21. Pollsters asked respondents who they were supporting in the upcoming Republican primary. If they answered Ron Paul, "they were asked whether they knew Paul supported legalizing drugs, pornography and prostitution." *Id.* Mr. Paul had stated that laws on drugs, pornography and prostitution should be within the province of the state, not the federal government. *See id.* If the respondent answered that they supported Jim Deats, they were told he had lost four previous election bids and had over \$200,000 in campaign debts. *See id.* Mr. Deats had previously lost two elections and won two. Deats did owe more than \$175,000 in campaign debts, including \$150,000 he had borrowed from himself. *See id.*

34. See Bill Cotterell, *Chiles: Aide Knew of Calls*, TALLAHASSEE DEMOCRAT, Nov. 16, 1995, at 1B.

35. See Ron Bartlett, *Mystery Calls Lead Crist to the Democrats*, TAMPA TRIB., Sept. 10, 1995, at 1 (Florida/Metro). The script of one call read:

"Hello. I'm calling on behalf of the Florida Association of Senior Citizens. We're calling to let you know that Jeb Bush is no friend to seniors. Jeb Bush's running mate wants to abolish Social Security and calls Medicare a welfare program that should be cut. We just can't trust Jeb Bush and Tom Feeney."

Id. Another call warned that Bush had not paid certain local and state taxes, "had profitted from failed savings and loans and 'doesn't play by the same rules like the rest of us.' " *Id.*

Elections Committee that he was not aware of the specific details of the calls or the false attribution statements at the time they were made.³⁶ Governor Chiles stood by the accuracy of the attacks, but admitted that the misidentifications in sponsorship probably should not have been made.³⁷

Other reported pre-1996 incidents in Florida include:

- A 1992 *Orlando Sentinel* report uncovered telephone callers in Orlando pretending to be pollsters, who awoke residents in the early morning hours before the primary encouraging support of a particular candidate.³⁸ The purpose was to anger voters and turn them against the candidate on whose behalf they were supposedly calling. This technique is known as “reverse phone banking.”³⁹
- The *St. Petersburg Times* reported that push polls targeting a State Representative in 1994 insinuated that he favored gay rights and abortion (two typically “hot” issues⁴⁰) and questioned his attendance record at the Legislature.⁴¹
- The *St. Petersburg Times* also reported 1994 polls accusing a former State Representative of having her wages garnished to pay off debts.⁴²

The 1996 election season brought its own allegations:

- The *Tampa Tribune* reported that a June poll attacked three of four Democratic candidates in Florida’s Eleventh Congressional District, describing State Representative Jim Davis as a political lightweight, criticizing former Mayor Sandy Freedman for preventing police from

36. See FLORIDA SENATE COMMITTEE ON EXECUTIVE BUSINESS, ETHICS AND ELECTIONS REPORT, A REVIEW OF POTENTIAL LEGISLATION RELATING TO POLITICAL CAMPAIGN TELEPHONE SOLICITATION, at 11-12 (Feb. 1996) [hereinafter FLORIDA SENATE REPORT]. Governor Chiles testified that he was generally aware that the campaign paid for calls accusing Bush of being a tax cheat and accusing his running mate, Tom Feeney, of wanting to abolish Medicare and Social Security. *See id.* However, Governor Chiles said that he did not have any specific knowledge of the false attribution statements, which he denounced. *See id.*

37. *See id.* at 12, 15.

38. See Mike Oliver & Michael Griffin, *Plot Thickens as Politicians Resort to Dirty Tricks*, ORLANDO SENTINEL, Oct. 11, 1992, at B1.

39. *See* McRoberts, *supra* note 16.

40. *See* SABATO & SIMPSON, *supra* note 1, at 263-64.

41. *See* Martin Dyckman, *More than Enough Mud*, ST. PETERSBURG TIMES, Dec. 7, 1995, at 19A.

42. *See id.*

chasing criminals, and calling former Senator Pat Frank a conservative whose time had passed.⁴³

- The *Sarasota Herald-Tribune* reported that a September poll claimed a State Representative had lied about her education and background, and that she voted against legislation which would have better protected rape victims.⁴⁴
- The *Tallahassee Democrat* reported that four candidates in Florida's Second Congressional District, Democrat and Republican, were named in push polls.⁴⁵
- The *Fort Walton Beach Daily News* reported that push polls were run in Okaloosa County against incumbent Property Appraiser Pete Smith.⁴⁶
- The *Bradenton Herald* reported the use of push polls in the Republican primary by candidates in Florida House District 68.⁴⁷
- The *Gainesville Sun* and *Palm Beach Post* reported that a push poll in Florida House District 43 allegedly asked whether respondents would be less likely to vote for a particular candidate "if they knew she had plastic surgery to look younger than [her opponent]."⁴⁸

Most experts agree that the reported incidents are just the tip of the iceberg. Because there is rarely any public record of the telephone interviews, only a small fraction of the total number of push polls are

43. See Brian Edwards, *Phone 'Poll' Tactic Upsets Candidates*, TAMPA TRIB., June 17, 1996, at A1. After respondents told interviewers that they supported Jim Davis, they were asked, "Would you agree that Jim Davis is a lightweight because he listens to what people say and does what people tell him?"

44. See Robert P. King, *Brown Says GOP Phone Pollsters Play Dirty*, SARASOTA HERALD-TRIB., Sept. 25, 1996, at A1. The Sarasota Herald-Tribune reported that Republican leaders denied that the calls were misleading and stated that they authorized a poll to test negative messages, although they admitted that they did not know exactly what the questions were. *See id.*

45. See Bill Cotterell, *Candidate Accused of Deceptive Polling*, TALLAHASSEE DEMOCRAT, Aug. 23, 1996, at 1C. Claims ranged from accusing a former county judge that he was "soft on crime" to alleging that a former county commissioner had "used her public office and cellular phone for personal business." *See id.*

46. See Lee Forst, *GOP Officials Claim No Ties to Solicitors*, DAILY NEWS (Fort Walton Beach, Fla.), Aug. 16, 1996, at 2B. According to the *Daily News*, the pollsters initially identified themselves as members of Southern Research Inc. or Southern Pollsters, but later admitted that they were working for the local Republican party. *See id.* Party officials denied any involvement. *See id.*

47. See *It's Mud Season: Beware Dirty Tricks as Campaign Winds Down*, BRADENTON HERALD, Aug. 29, 1996, at L4.

48. Mark Hollis, *Political Dollars Pour In*, GAINESVILLE SUN, Oct. 31, 1996, at 1A; Elmore, *supra* note 5.

exposed in the media.⁴⁹ Viewed from this perspective, the 1996 election season looks to have been a very busy one.

The Congress and state legislatures began to recognize the growing push polling problem as early as 1995. United States Representatives Carolyn Maloney (D-Ny) and Tom Petri (R-Wi) both testified against the use of push polls at a 1995 Federal Elections Commission (FEC) rulemaking hearing on the use of disclaimers in political advertising.⁵⁰ Mr. Petri decried the use of push polls, testifying:

I was surprised how many of my colleagues in the House and others came up and said this is one of the things that really they found distasteful about the political process. . . . I experienced it in previous races of mine, and many of my colleagues in both parties have, and it seems to me that it's the kind of thing that is basically a foul, and . . . the bright light of disclosure might help restrict it.⁵¹

Ms. Maloney testified that her own informal survey of House members indicated that the use of push polls and attack phone banks was "quite widespread."⁵² The FEC itself has acknowledged that the practice of using push polls and phone banks to spread false or negative information "appears to be growing."⁵³

The FEC, however, declined to adopt a rule requiring disclaimers on push polls for legal and practical reasons, including the FEC's lack of statutory authority to do so and the inherent difficulty in defining push polls.⁵⁴ The FEC's 1996 legislative recommendations included a suggestion that Congress consider enacting legislation to require disclaimers on push polls.⁵⁵ Representatives Petri and Maloney, along

49. See David Sarasohn, *In Dirty Tricks, Push Comes to Poll*, PORTLAND OREGONIAN, May 3, 1996, at B06 (Editorial) (quoting Charles Cook in *Roll Call* magazine). According to prominent Republican strategist Robert Teeter, push polling "is all over practically every campaign in the country and has been for a long time." See Devroy, *supra* note 19.

50. See FEC Hearing Transcript, *supra* note 25, at 1 (listing Rep. Thomas Petri and Rep. Carolyn Maloney as witnesses); *Federal Election Commission, Hearing on Disclosure Requirements* (Mar. 8, 1995) (testimony of Rep. Carolyn Maloney).

51. *FEC Hearing Transcript*, *supra* note 25, at 109, 111 (comments of Mr. Petri). Representatives Petri and Maloney were the first members of Congress to testify *in person* before the FEC in 14 years. See *id.* at 106 (comments of FEC Chairman McDonald).

52. See *id.* at 129.

53. See Fed. Election Comm'n, *1997 Legislative Recommendations*, reprinted in FED. ELECTION COMM'N, ANNUAL REPORT 1996, at 51-52 (Rev. 1997) [hereinafter FEC 1997 Legislative Recommendations] (favoring changes to 2 U.S.C. § 441d).

54. See *id.* at 52-53; see also 60 Fed. Reg. 52069, 52071 (Oct. 5, 1995) (final rule adopted by FEC and codified at 11 C.F.R. § 110.11).

55. See Fed. Election Comm'n, *1996 Legislative Recommendations*, reprinted in FED.

with Representative Linda Smith (R-Wa), filed bills in the House to address telephone push polling and attack phone banks, but none passed the 104th Congress.⁵⁶

Legislation also began to appear in the state legislatures in 1995 and 1996 to address the push polling situation. Bills filed in California,⁵⁷ Florida,⁵⁸ South Carolina,⁵⁹ Wisconsin,⁶⁰ Washington,⁶¹ New Jersey,⁶² Nevada,⁶³ and Virginia,⁶⁴ sought to regulate push polls either through sponsorship identification disclaimers, filing requirements, or a combination of the two. Many of these early efforts, however, failed to effectively distinguish between push polls and legitimate scientific surveys. Consequently, most swept significant numbers of legitimate polls under the regulatory umbrella. The second generation of push polling statutes, such as the new Florida law, utilizes scientific polling criteria to more effectively distinguish push polls from scientific surveys which test negative themes.⁶⁵

IV. FINDINGS

A. *Push Polls vs. Legitimate Polls*

1. Definitions

A "push poll" is a poll which includes questions *designed* to "push" voters from the opposition candidate or the undecided column into supporting the candidate favored by the poll sponsor or, alternatively, to dissuade voters from voting at all, thereby suppressing the voter

ELECTION COMM'N, ANNUAL REPORT 1996, at 52 (1996) [hereinafter *FEC 1996 Legislative Recommendations*]; Telephone Interview with Susan Propper, Asst. General Counsel, FEC (July 9, 1996). The FEC's 1997 legislative package contained the same recommendation. *See FEC 1997 Legislative Recommendations*, *supra* note 53, at 51-52. Current federal election law only mandates disclaimers on public political advertising which solicits money or expressly advocates a clearly identified candidate. *See* 2 U.S.C. § 441d (1994).

56. *See* H.R. 324, 104th Cong., 1st Sess. (1995) (Maloney bill); H.R. 2119, 104th Cong., 1st Sess. (1995) (Petri bill); H.R. 4183, 104th Cong., 2d Sess. (1995) (Smith bill). All of these bills died in committee in the House of Representatives.

57. *See* A.B. 3343, Reg. Sess. (Cal. 1996).

58. *See* S.B. 478, 528 (Fla. 1996); S.B. 1508 (Fla. 1995).

59. *See* S.B. 1272, Statewide Sess. (S.C. 1995).

60. *See* S.B. 549, 92d Leg., Reg. Sess. (Wis. 1995); A.B. 37, § 4, 92d Leg., Reg. Sess. (Wis. 1995); A.B. 90, 92d Leg., Reg. Sess. (Wis. 1995).

61. *See* S.B. 5115, 54th Leg., Reg. Sess. (Wash. 1995).

62. *See* A.B. 2155, 207th Leg., 1st Sess. (N.J. 1996).

63. *See* A.B. 636 (Nev. 1995).

64. *See* H.B. 1065, Reg. Sess. (Va. 1994).

65. *See* *infra* notes 163-71 and accompanying text (discussing Florida push polling law).

turnout for the candidate under attack.⁶⁶ A push poll is essentially political advertising masquerading under the guise of legitimate scientific research.⁶⁷ As such, there seems little justification for not requiring a sponsorship disclaimer on push polls, since many state laws require a disclaimer on virtually all other written and broadcast political advertisements.⁶⁸

Washington Post political correspondent David Broder coined the term "push poll" in 1994.⁶⁹ He originally used it to describe telephone polls designed to "push" voters away from a candidate or a neutral position by imparting negative information.⁷⁰ Since then, candidates and the media have seized upon the term to describe essentially *any* poll which includes negative information about a candidate.⁷¹ Scholars have expanded the term to describe a variety of polling activities.⁷² More recent terms, such as "suppression polling,"⁷³ "advocacy polling"⁷⁴ or "negative persuasion,"⁷⁵ appear to better reflect the original meaning of the term and the crux of the problem.

"Legitimate" political research surveys, by contrast, strive to provide a campaign or poll sponsor with *objective information and data* which: measures public opinion and is of value to the campaign or sponsor in making *future* decisions regarding campaign strategy and advertising. Most persons involved with election polling agree that testing *negative themes* to assess which ones play well with the voters for later use in a

66. See SABATO & SIMPSON, *supra* note 1, at 245, 253; National Council on Public Polls, *Beware of Push Polls* (Press Rel., May 22, 1995) [hereinafter NCPP Press Warning], reprinted in FLORIDA HOUSE PUSH POLLING REPORT, *supra* note 4, at Exhibit D; Jeff Woods, *Attack-Poll Tactics Buffet Boner*, NASHVILLE BANNER, May 31, 1996, at A1; Cocco, *supra* note 3; *Forbes Rips Dole Tactic*, *supra* note 29, at A3; David S. Broder, *Beware the 'Push Poll.'* WASH. POST, Oct. 9, 1994, at C7 (Editorial).

67. See SABATO & SIMPSON, *supra* note 1, at 245; NCPP Press Warning, *supra* note 66; Woods, *supra* note 66.

68. See, e.g., FLA. STAT. §§ 106.011(17), .071, .143 (1997) (Florida disclaimer law). "It's kind of silly to require all this disclosure on billboards and TV ads and not do it on mass telephone calls." John Harwood & Daniel Pearl, *U.S. Midterm Elections: U.S. Politicians Yell Foul Over Phone-Polling Method*, WALL ST. J. EUROPE, Nov. 11, 1994, at 8 (comment of U.S. House Representative Tom Petri).

69. See Tony Semerad, *Pollsters Gather in S.L., Push for an End to 'Push Polling.'* SALT LAKE TRIB., May 18, 1996, at A1; Broder, *supra* note 66.

70. See Broder, *supra* note 66.

71. See, e.g., AAPOR Panel Discussion, *supra* note 4, at 22 (comments of Mr. McInturff).

72. See SABATO & SIMPSON, *supra* note 1, at 244-54.

73. Cocco, *supra* note 3.

74. Donn Esmonde, *Dirty Trick of Push-Polling Debuts Here*, BUFFALO NEWS, Nov. 3, 1995, at C1.

75. SABATO & SIMPSON, *supra* note 1, at 253.

campaign is a legitimate polling practice.⁷⁶ Testing negative themes differs substantially from push polling, although the two may at times be difficult to distinguish.⁷⁷ While testing negative themes may sometimes require the interviewer to provide new information about a candidate to the interviewee, the intent is to simulate potential campaign debate and measure voter response, not to sway it.⁷⁸ In addition, the information provided to an interviewee in testing negative themes is commonly fact-based and essentially true, although often asked bluntly and with clear partisanship.⁷⁹ Conversely, push poll questions more often employ outright lies, distortions and innuendo.

2. Distinctions Between Push Polls and Legitimate Polls

The difference between a push poll and a legitimate poll hinges on the subjective intent of the poll sponsor. Determining and demonstrating subjective intent can be extremely difficult. Fortunately, the polling process provides some objective manifestations of the sponsor's intent, which in turn provide a good basis for developing statutory criteria to regulate push polls.

The critical difference between legitimate polling and push polling is the poll sponsor's purpose and intent in commissioning or performing the poll.⁸⁰ The purpose of legitimate scientific polling is to obtain objective and valuable information regarding public opinion.⁸¹ Push polling uses negative information to persuade or advocate the sponsor's position.⁸² The use of advocacy or persuasion in push polls—whether through loaded questions, word order or context, or some other device—creates a bias which undermines the value of the information being gathered. Therefore, legitimate public opinion polling is essentially an information-gathering prelude to making campaign decisions, whereas

76. See Charles Cook, *Dirty Party Lines Attack Tread on Legitimate Phone Polls*, ARIZONA REPUBLIC, May 12, 1996, at H1 (observing that testing certain negative arguments in legitimate public opinion polls is "absolutely acceptable").

77. See *id.* (stating that a push question in a legitimate poll is "far different" from a push poll).

78. See American Association of Political Consultants, Board of Directors Declaration Regarding So-Called "Push-Polling," at 2 (June 26, 1996) [hereinafter AAPC Declaration], reprinted in FLORIDA HOUSE PUSH POLLING REPORT, *supra* note 4, at Exhibit E.

79. SABATO & SIMPSON, *supra* note 1, at 246; see also, e.g., *id.* at 248-53 (example "research" push poll).

80. AAPOR Panel Discussion, *supra* note 4, at 12 (comment from audience).

81. See *supra* notes 76-79 and accompanying text.

82. See *supra* notes 66-67 and accompanying text.

push polling serves to implement previously established plans, goals, or strategies.

The polling process itself offers objective measures of the sponsor's subjective intent: sample size, length of call, target audience, name identification, negative message, requests for demographic information, question order, and timing of the poll.

(a) Sample Size

Push polls are aimed at reaching as many voters as possible,⁸³ which is why many legitimate polling organizations characterize push polling as "political telemarketing."⁸⁴ The maximum sample necessary for a legitimate *statewide* public opinion poll is usually not more than 1000 completed interviews.⁸⁵ For a district-wide or local poll, the desirable number of completed surveys is as low as 300 to 600.⁸⁶ These respondent sizes are generally sufficient to provide a sample that is representative of the larger relevant population, and contains an adequate number of interviews with members of relevant subsets (for example, women, persons over 40, households with an average income over \$50,000, or registered independents) to allow survey results to be broken down along demographic lines. However, the greater the need to break down the results by subset, the greater the danger of not obtaining a sufficient sample within any particular subset.⁸⁷

83. See SABATO & SIMPSON, *supra* note 1, at 253 (stating that the emphasis of suppression push polls is on volume, and the intent is to contact as many voters in the target population as possible).

84. NCPP Press Warning, *supra* note 66.

85. See AAPC Declaration, *supra* note 78, at 1. Professor Thomas Guterbock, Director of the University of Virginia Center for Survey Research and one of the nation's leading experts on polling, believes that 1000 respondents "is a reasonable cutoff sample size for a legitimate election poll," and should be sufficient for any "state, local, or national survey." Facsimile from Thomas Guterbock (c/o Joanne Cohoon), Professor, University of Virginia, to Jonathan Fox, Staff Attorney, Florida House of Representatives Ethics and Elections Committee (July 26, 1996).

86. See AAPC Declaration, *supra* note 78, at 1; Telephone Interview with Jim Kane, Editor/Pollster, THE FLORIDA VOTER (Nov. 6, 1996) (The Florida Voter is an independent, nonpartisan, bi-monthly poll of political opinions published by the Forman Center for Political Studies in Fort Lauderdale, Florida.); DELANEY, *supra* note 2, at 205.

87. See generally app. B (discussing stratification of sample results by subset).

(b) Short Calls

Push polls generally take less than one minute to complete.⁸⁸ Shorter calls cost less per call and allow more voters to be contacted. In fact, thanks to the expanded use of computers, the average cost for a push poll call can be as low as 40 to 45 cents.⁸⁹ Thus, push polls tend to be quick and cost-efficient.

Conversely, even the shortest legitimate tracking survey will normally take at least five minutes.⁹⁰ Preliminary, demographic, and political characteristic questions essential to obtaining a representative sample and insuring that the results can be broken down by relevant subsets necessarily take some time.

This is not to say that push questions, or "mini" push polls, cannot occur within an otherwise scientific opinion survey. The survey can have all the bells and whistles of a legitimate poll—for example, reasonable sample size, extensive demographic questions, tabulated results broken down by subsets—but still be a push poll if some questions are designed to dissuade voters from a particular candidate. Short calls are characteristic of "pure" push polls, not those piggybacked on otherwise legitimate opinion surveys.

(c) Targeting

Push polls often target particular groups of voters based on age, race, ethnicity, or some other distinguishing characteristic.⁹¹ Although the purpose of some push polls may simply be to disseminate negative information into the general voting community, the essence of push polling is to seek out certain groups and provide them with a negative message to dissuade them from voting for a particular candidate.⁹² The

88. See AAPC Declaration, *supra* note 78, at 2; SABATO & SIMPSON, *supra* note 1, at 253.

89. See SABATO & SIMPSON, *supra* note 1, at 255 (stating that costs for push polls can range from \$0.45 to \$1.30 per call); Clymer, *supra* note 21 (reporting that costs can be reduced to about \$0.40 per call). The cost for a quarter million calls would be between \$100,000 and \$325,000—a fairly modest amount for a statewide campaign which may spend much more on diffuse television and radio ads. See SABATO & SIMPSON, *supra* note 1, at 255.

90. See AAPC Declaration, *supra* note 78, at 2.

91. See SABATO & SIMPSON, *supra* note 1, at 253 (stating that push polls are a form of targeted voter contact and canvassing where no random sample of the population is selected); Devroy, *supra* note 19 (reporting that suppression push polls target selected demographic groups).

92. SABATO & SIMPSON, *supra* note 1, at 253; AAPOR Panel Discussion, *supra* note 4, at 3; Cocco, *supra* note 3. According to one pollster, the telephone provides the "ultimate in targeted political communication." AAPOR Panel Discussion, *supra* note 4, at 3 (comment of Mr. McInturff).

more the poll sponsor knows about the target group, the better tailored and more effective the message can be. This is the essence of target marketing. For example, a message that a candidate is going to cut social security benefits will be much more effective if it is targeted to seniors with fixed incomes rather than to Generation X-ers.

Targeting can be accomplished by drawing a sample pool from a list of potential respondents possessing the demographic characteristics in which the push pollster is interested, as opposed to selecting respondents at random. For example, assume a push pollster's message is "Representative Todd has sold out Florida's environment in favor of big business interests and land developers." Using a list of voters in the district active in environmental organizations, such as the Florida Audubon Society or the Sierra Club, would be a good way to reach a "receptive" audience. Legitimate polls may or may not target specific subsets of the population, depending on what information is being sought.⁹³

(d) No Name Identification

Legitimate polling firms generally open each interview by identifying the true name of the firm or research center conducting the interview.⁹⁴ Push polls historically provide no name, or provide a false name.⁹⁵

(e) Use of Negative Messages

Research indicates that the crux of the push poll problem involves "advocacy" or "suppression" polling—polling essentially designed to discredit a candidate and thereby persuade the voter to support the poll sponsor's candidate or dissuade the voter from voting at all. This requires attacking the candidate personally, or attacking the candidate's professional record. Often this involves distortions, innuendo and outright lies. Thus, push polls necessarily involve some form of *negative statement* about an opponent.⁹⁶

93. See *infra* notes 368-71 and accompanying text (discussing sampling rare populations and distinct population subsets).

94. See AAPC Declaration, *supra* note 78, at 1.

95. *See id.*

96. See SABATO & SIMPSON, *supra* note 1, at 253; Christopher Lopez, *DeGette Denies Claim She Ran Negative Poll*, DENVER POST, May 5, 1996, at B3.

(f) Inadequate or No Request for Demographic
Information/Data Collection,
Tabulation and Analysis

Sometimes, push polling data is not even collected or tabulated.⁹⁷ Even when it is, little analysis can be conducted. Push polls are often so short that they omit or ask insufficient key questions about demographics (for example, age, sex, race, or income) or political characteristics (for example, party affiliation, registration status, likelihood of voting, or liberal versus conservative political leanings).⁹⁸ Scientific opinion polling, on the other hand, often involves extensive data tabulation, analysis, and reports broken down by key demographic and political variables.

(g) Modify Script Based on Answer to Preference
Question/Question Order

One of the most common push polling patterns is to ask an initial preference question to discover which candidate the respondent supports in a certain race, and then vary the poll script depending on the answer.⁹⁹ If the answer favors the poll sponsor's candidate, some notation is made to contact the respondent for a "get-out-the-vote" drive near election day.¹⁰⁰ The call ends there. However, if the respondent supports another candidate in the race or is undecided, then the caller provides negative information to dissuade the voter from supporting a particular candidate.¹⁰¹ This is frequently followed by a final preference question to see whether the call has had any impact.

97. See *Pollsters Call for an End to Campaign Smear Tactic*, THE NEWS & OBSERVER (Raleigh, N.C.), May 19, 1996, at A4 (quoting prominent Republican pollster William McInturff as stating that "it is unethical to use the information to plant rumors without ever compiling the poll results"); Thomas B. Edsall, *Dole Camp Acknowledges 'Push Poll': Critical Questions Asked About GOP Rival Forbes*, WASH. POST (FINAL EDITION), Feb. 12, 1996, at A08 (reporting that the Dole campaign recognized that responses to push polls "are never recorded").

98. See SABATO & SIMPSON, *supra* note 1, at 253; HERBERT ASHER, POLLING AND THE PUBLIC: WHAT EVERY CITIZEN SHOULD KNOW 11 (3d ed. 1995).

99. See SABATO & SIMPSON, *supra* note 1, at 253; Alan Bernstein & John C. Henry, *Campaign Notebook '96*, HOUS. CHRON., Mar. 10, 1996, at 44 (reporting use of preference question in 1996 push poll from Texas' 9th congressional district); Roger K. Lowe, *Dirty Political Tricks Thrive—Because They Work So Well*, COLUMBUS DISPATCH, Mar. 28, 1996, at 3E (Editorial and Comment) (citing similar example in 1994 Ohio congressional races).

100. See SABATO & SIMPSON, *supra* note 1, at 253.

101. See Kay, *supra* note 21.

(h) Late Timing

Push polls often occur at the so-called “eleventh hour” of an election.¹⁰² One of the greatest attributes of a push poll is its ability to remain hidden from public view.¹⁰³ The absence of a written record means that many push polls will never be discovered unless some disgruntled, motivated respondent comes forward and complains.¹⁰⁴ However, more push polls may be coming to the surface, given the media’s diligent reporting of these incidents and the consequent greater public awareness of these polls.

By using push polls at the last minute, say within 72 hours of the election,¹⁰⁵ a poll sponsor leaves little time for discovery of the poll and media reporting.¹⁰⁶ Consequently, last-minute push polls afford an opposing candidate little or no time to effectively respond. Although it is impossible to accurately predict the impact of such a poll, a well-timed push poll might drastically impact the outcome of an election.

B. First Amendment Issues

“The First Amendment is the darling of the Constitution’s nursery. Freedom of speech, it has been stated, ‘is the essence of self government.’ ”¹⁰⁷

The constitutionality of political advertising disclaimer requirements is the subject of considerable debate in the courts. Florida’s state and federal courts have consistently upheld the constitutionality of such disclaimer requirements. However, no clear consensus has yet emerged from the numerous decisions from other jurisdictions. The First Amendment generally prevents the government from directly or indirectly restricting free speech and associational rights.¹⁰⁸ First

102. See Cocco, *supra* note 3 (reporting that a recurring push poll pattern is to time the calls to occur just prior to an election); Devroy, *supra* note 19.

103. See Devroy, *supra* note 19.

104. See Cocco, *supra* note 3 (reporting that push polling “flies under the radar screen” and is rarely exposed). “Because [push poll] operations ‘come in with the fog in the last couple days and then disappear,’ they are rarely tracked down.” Devroy, *supra* note 19.

105. See Devroy, *supra* note 19 (reporting that suppression push polls typically phone voters in the last 48-72 hours of a campaign).

106. By the time anyone knows about the push poll, the election is over. At that point, the election and the poll are history, and the media may or may not report it.

107. *People v. Duryea*, 351 N.Y.S.2d 978, 983 (N.Y. Sup. Ct. 1974).

108. The First Amendment provides that: “Congress shall make no law . . . abridging the freedom of speech. . . .” U.S. CONST. amend. I. The First Amendment Freedom of Speech Clause is applicable to state action through the Due Process Clause of the Fourteenth

Amendment guarantees have their most urgent application in the context of political speech, particularly campaigns for public office.¹⁰⁹ The United States Supreme Court has stated that: “[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹¹⁰

Courts have held that anonymous publishing is a cherished part of the collective American experience. The landmark United States Supreme Court case, *Talley v. California*,¹¹¹ struck down a broad Los Angeles city ordinance requiring an identification disclaimer on any hand-bill distributed anywhere in Los Angeles under *any* circumstances.¹¹² In *Talley*, the Supreme court observed:

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. . . . Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. . . . Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. *It is plain that anonymity has sometimes been assumed for the most constructive purposes.*¹¹³

A state law *requiring* an identification disclaimer on political advertisements inhibits free expression just as if it were prohibiting speech, and raises the same First Amendment concerns.¹¹⁴

Does this mean that legislatures can never pass laws which adversely impact free speech or association? That is, are all political advertising disclaimer requirements unconstitutional? Probably not. There are limits to the protections afforded by the First Amendment. However, courts generally will uphold a law impacting political speech or associational rights only where the state can demonstrate that the law is “narrowly

Amendment. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n.1 (1995).

109. *See Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).

110. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (citations omitted).

111. 362 U.S. 60 (1960).

112. *See id.* at 65.

113. *Id.* at 64-65 (emphasis supplied).

114. *See McIntyre*, 514 U.S. at 342-43 (citing *Talley*, 362 U.S. at 60).

tailored" to advance a "compelling state interest."¹¹⁵ It is very difficult for the state to meet its evidentiary burden under this "strict scrutiny" test. For example, to meet the "narrowly tailored" prong of the test, the State must demonstrate that the means employed in the statute represent the least restrictive alternative available.¹¹⁶ The purpose of this requirement is to insure that the deterrent effect on free speech is no greater than absolutely necessary to further the state's compelling interest.¹¹⁷ In 1995, the United States Supreme Court held that the strict scrutiny test is the appropriate standard to use in evaluating the constitutionality of political advertising disclaimer requirements under the First Amendment.¹¹⁸

1. United States Supreme Court Decisions

The only United States Supreme Court case directly addressing the validity of requiring political advertising disclaimers is *McIntyre v. Ohio Elections Commission*.¹¹⁹ Unfortunately, the *McIntyre* decision raises as many questions as it resolves.

The issue in *McIntyre* was whether an Ohio statute requiring a disclaimer on all political publications unconstitutionally infringed on an individual's right to anonymously draft and distribute leaflets opposing a school tax levy.¹²⁰ The *McIntyre* Court essentially held that, while the state's interest in preventing fraud and libel in political campaigns may be legitimate, the Ohio statute was not "narrowly tailored" to effectuate those interests.¹²¹ The Court intimated, however, that a more tightly-drawn statute might pass constitutional muster.¹²²

In *McIntyre*, a private citizen, Ms. Margaret McIntyre, composed and printed leaflets on her home computer opposing a proposed school tax levy.¹²³ She distributed the leaflets at a public meeting to discuss a

115. See *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (stating that a statute regulating only political speech is a content-based restriction subject to strict scrutiny); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (recognizing that the First Amendment free speech guarantee includes the right to refrain from speaking at all). However, statutes regulating the mechanics of the voting process are subject to a less rigorous balancing standard. See *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983).

116. See *People v. Duryea*, 351 N.Y.S.2d 978, *aff'd*, 354 N.Y.S.2d 129 (1974).

117. See *id.*

118. See *McIntyre*, 514 U.S. at 345-46.

119. 514 U.S. 334 (1995).

120. See *id.* at 336-41 (discussing First Amendment issue and its factual context).

121. See *id.* at 349-53.

122. See *id.*

123. See *id.* at 337.

referendum on the proposed tax.¹²⁴ Some of the leaflets did not identify Ms. McIntyre as the author, stating only that the views expressed were those of "CONCERNED PARENTS AND TAXPAYERS."¹²⁵ Ms. McIntyre paid a professional printer to make additional copies of the leaflets, and received some help from her son and a friend in distributing them.¹²⁶ Otherwise, she acted independently. The opinion contains no suggestion that the leaflet message was false, misleading or libelous.

The *McIntyre* Court found that the Ohio statute violated Ms. McIntyre's First Amendment free speech rights.¹²⁷ However, the Court limited its discussion to written political publications, specifically campaign leaflets.¹²⁸ In addition, the Court specifically reserved a ruling on whether the decision would apply to other forms of unidentified oral communications "uttered" on radio and television, and, by analogy, telephone conversations.¹²⁹

Finding that the Ohio statute was not narrowly tailored to effectuate the state's legitimate interest in preventing fraud and libel, Justice Stevens wrote:

As this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources. It applies not only to elections of public officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage. It applies not only to leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance. It applies no matter what the character or strength of the author's interest in anonymity.¹³⁰

However, the Court's reasoning in *McIntyre* will probably not travel well to other cases because of the narrow factual circumstances on which the decision is predicated. *McIntyre* involved a single individual with modest resources publishing political leaflets in opposition to a

124. *See id.*

125. *Id.*

126. *See id.*

127. *See id.* at 357.

128. *See id.* at 338 n.3.

129. *See id.*

130. *Id.* at 351-52 (citations omitted).

local school board levy (an issue as opposed to a candidate). Despite finding the statute unconstitutional, the decision inherently recognized the value of Ohio's interest in preventing fraud and libel in political campaigns, while accommodating an individual's right, independent of any candidate, party, or political organization, to publish political leaflets anonymously or under a fictitious name.

McIntyre probably stands for a narrow exception to the general validity of political advertising disclaimer requirements laws, rather than a facial constitutional assault on their overall validity.¹³¹ It is likely that the *McIntyre* decision applies only to political leafleting by an individual. Arguably, the *McIntyre* decision is also limited to disclaimer requirements on publications in issue, as opposed to candidate, elections.

What is *McIntyre*'s impact on telephone solicitation and polling disclaimer requirements? By its express terms, *McIntyre* only applies to written political leafleting.¹³² It does not apply to telephone communications.¹³³ Thus, although *McIntyre* struck down Ohio's blanket prohibition on anonymous political leafleting by an independent individual, it does not appear the case would be dispositive in preventing states from enacting a narrowly-tailored telephone solicitation and polling disclaimer statute.

2. Florida Federal and State Court Decisions

Federal and state court decisions from Florida support the constitutionality of requiring sponsorship disclaimers on push polls and political telephone solicitations. In *United States v. Inesco*,¹³⁴ the federal district court in Orlando upheld the constitutionality of a federal statute¹³⁵ requiring a disclaimer on any writing relating to or concerning certain federal candidates.¹³⁶ The *Inesco* court found the federal statute at issue narrower than the Los Angeles ordinance in *Talley* because it did not

131. See *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 647 n.22 (6th Cir. 1997) (*McIntyre* ruled only on issue advocacy ad); *Arkansas Right to Life State Political Action Comm. v. Butler*, 983 F. Supp. 1209, 1228 (W.D. Ark. 1997) (state statute at issue in *McIntyre* was not narrowly drawn because it regulated issue-based measures); *Doe v. Mortham*, 23 FLA. L. WKLY. S152a (Fla. 1997) (limiting the scope of *McIntyre* to personal pamphleteering of "individuals acting independently and using only their own modest resources"); *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1291 (1975) (stating that, although it is a close question, campaign literature disclosure requirements appear to be constitutional).

132. See *supra* note 128 and accompanying text.

133. See *supra* note 129 and accompanying text.

134. 365 F. Supp. 1308 (M.D. Fla. 1973).

135. The statute was the predecessor of the current federal disclaimer requirement codified at 2 U.S.C. § 441d (1994).

136. See *Inesco*, 365 F. Supp. at 1312.

preclude "anonymous criticism of oppressive practices and laws" (issues), but rather applied only to candidates.¹³⁷ (Recall that in *Talley*, the United States Supreme Court struck down a Los Angeles ordinance requiring a disclaimer on any handbill, distributed at any place under any circumstances.)¹³⁸

In *Doe v. Mortham*,¹³⁹ the Florida Supreme Court addressed the constitutionality of Florida's political advertising disclaimer statutes.¹⁴⁰ The *Doe* petitioners sought a declaratory judgment allowing them to make anonymous independent expenditures exceeding \$100, either as individuals or in groups.¹⁴¹ The petitioners planned to run political advertisements in candidate races in a variety of advertising media, including leaflets, billboards, newspapers, and television.¹⁴² The *Doe* Court held that the sponsorship identification requirements in Florida law were constitutional on their face.¹⁴³ The Court did create a narrow exemption for independent expenditures by certain individuals situated similarly to the petitioner in *McIntyre*.¹⁴⁴ However, such an exemption is unlikely to have much practical application in the context of disclaimer requirements on push polls and attack phone banks since an individual utilizing only modest resources is unlikely to commission or conduct such activities independent of some sponsoring group or campaign.

3. Court Decisions Outside Florida

There are deep divisions and significant conflicts in federal and state courts outside Florida concerning the constitutionality of political advertising disclaimer requirements. Several courts have held political advertising disclaimer statutes unconstitutional.¹⁴⁵ The general principal

137. *See id.* Other federal cases also have upheld the constitutionality of 18 U.S.C. § 612. *See, e.g.*, *United States v. Scott*, 195 F. Supp. 440, 441, 444 (D.N.D. 1961) (upholding § 612 in the context of a pamphlet "smear" campaign against a candidate for United States Senator).

138. *See supra* notes 111-13 and accompanying text.

139. 23 FLA. L. WKLY. at S152.

140. The constitutionality of Florida's newly-enacted disclaimer requirements which apply to push polls and political telephone solicitations, *see FLA. STAT. § 106.147* (1997), were not specifically at issue in the case. *See generally infra* pt. IV.C. (discussing 1997 changes to Florida's political advertising laws).

141. *See* Petitioner's Complaint for Declaratory Judgment at ¶ 5-8, *Doe v. Mortham*, No. 96-630 (Fla. 2d Jud. cir. June 18, 1996), *question certified*, No. 96-2583 (Fla. 1st DCA Aug. 7, 1996), *aff'd and modified*, 23 FLA. L. WKLY. S152 (Fla. Mar. 19, 1998).

142. *See id.*

143. *See Doe*, 23 FLA. L. WKLY. at S154.

144. *See id.*

145. *See, e.g.*, *California v. Bongiorni*, 23 Cal. Rptr. 565 (1962) (statute requires sponsor's signature on all circulars or handbills that seek to influence the results of an election); *Illinois*

which grows out of most of these cases is that a ban on all anonymous political advertising is probably unconstitutional, but that a more narrowly-drawn statute might pass constitutional muster.¹⁴⁶ Many of the statutes at issue in the cases were fairly broad. For instance, they embraced both issue and candidate elections,¹⁴⁷ true and false statements,¹⁴⁸ and laudatory statements along with personal attacks.¹⁴⁹ Consequently, many courts invalidated these political disclaimer statutes because they were "not narrowly tailored" to effectuate the state's interests, and thus did not pass constitutional muster under the second prong of the strict scrutiny test.

In addition, most of the cases invalidating political advertising disclaimer statutes rely heavily on the reasoning in *Talley*.¹⁵⁰ In *Talley*, the United States Supreme Court invalidated a Los Angeles city ordinance requiring an identification disclaimer on *any* hand-bill, distributed at *any* place, under *any* circumstances.¹⁵¹ However, in *McIntyre*, the Supreme Court later flatly rejected the assertion that the *Talley* decision is always dispositive in determining the validity of political advertising disclaimer requirements.¹⁵²

A number of cases have upheld the constitutionality of more narrowly-drawn political advertising disclaimer statutes.¹⁵³ Probably

v. White, 506 N.E.2d 1284 (Ill. 1987) (statute mandates signature of any person publishing or distributing any political literature in support or opposition to a candidate or issue); Louisiana v. Fulton, 337 So. 2d 866 (La. 1976) (statute prohibits any person from publishing any statement concerning a candidate unless signed); Commonwealth v. Dennis, 329 N.E.2d 706 (Mass. 1975) (statute criminalizes the writing or distribution of any circular or handbill designed to support or defeat any candidate or issue without sponsorship disclaimer); New York v. Duryea, 351 N.Y.S.2d 978 (N.Y. Sup. Ct. 1974) (statute criminalizes the printing or distribution of anonymous literature in quantity which contains any statement about a candidate or certain issues); State v. North Dakota Educ. Ass'n, 262 N.W.2d 731 (N.D. 1978) (statute requires all political advertisements to disclose the sponsor's name); Pennsylvania v. Wadzinski, 422 A.2d 124 (Pa. 1980) (statute prohibits any person from publishing any anonymous statement concerning any candidate); State v. Petersilie, 432 S.E.2d 832, 844-45 (N.C. 1993) (citing *Zwickler v. Koota*, 290 F. Supp. 244 (E.D.N.Y. 1968)) (statute requires that any handbill containing any election-related statement concerning a candidate must be signed), *rev'd on other grounds*, 394 U.S. 103 (1969).

146. See, e.g., *Dennis*, 329 N.E.2d at 709; *Duryea*, 351 N.Y.S.2d at 993; *North Dakota Educ. Ass'n*, 262 N.W.2d at 735-36 & 741-42.

147. See, e.g., *North Dakota Educ. Ass'n*, 262 N.W.2d at 741-42.

148. See, e.g., *id.* at 736.

149. See, e.g., *Dennis*, 329 N.E.2d at 709; *Duryea*, 351 N.Y.S.2d at 993.

150. See, e.g., *North Dakota Educ. Ass'n*, 262 N.W.2d at 735 (recognizing that constitutional free speech analysis of a state political advertising disclaimer statute is controlled by *Talley* decision).

151. See *supra* notes 111-13 and accompanying text.

152. *McIntyre*, 514 U.S. at 344.

153. See, e.g., *Griset v. Fair Political Practices Comm'n*, 884 P.2d 116, 125-26 (Cal. 1994),

the most instructive case upholding the validity of a political disclaimer requirement against a free speech challenge is *Canon v. Justice Court*.¹⁵⁴ The issue in *Canon* was the constitutionality of a now-repealed provision of California's election code making it unlawful to write or distribute political literature making personal attacks on candidates without identifying the names and addresses of the sponsor.¹⁵⁵ Although the California Supreme Court invalidated the statute on equal protection grounds,¹⁵⁶ the court rejected the contention that the statute violated free speech guarantees.¹⁵⁷ The court found that the statute was narrowly tailored to effectuate the state's compelling interest in maintaining the integrity of elections and deterring "scurrilous hit and run smear attacks which are all too common in the course of political campaigns."¹⁵⁸

In 1994, the California Supreme Court cited its *Canon* analysis with approval in upholding the constitutionality of a similar statute requiring candidates, and individuals or groups supporting or opposing a candidate or ballot measure, to identify themselves on mass mailings.¹⁵⁹ Even courts holding other political disclaimer statutes unconstitutional have cited the statute in *Canon* as a fairly good example of a narrowly-tailored statute.¹⁶⁰ The statute in *Canon* was limited to:

cert. denied, 514 U.S. 1083 (1995); *Canon v. Justice Court*, 393 P.2d 428, 436 (Cal. 1964); *State v. Freeman*, 55 P.2d 362, 365 (Kan. 1936); *Morefield v. Moore*, 540 S.W.2d 873, 875 (Ky. 1976); *Petersilie*, 432 S.E.2d at 842; *State v. Acey*, 633 S.W.2d 306, 307 (Tenn. 1982); *Commonwealth v. Evans*, 40 A.2d 137, 140 (Pa. Super. Ct. 1944).

154. 393 P.2d 428 (Ca. 1968).

155. *See id.* at 430. The California election provision provided:

Every person is guilty of a misdemeanor who writes or causes to be written, printed, posted, or distributed any circular, pamphlet, letter, or poster which is designed to injure or defeat any candidate for nomination or election to any public office by reflecting upon his personal character or political action, unless there appears upon . . . [the literature], in a conspicuous place, the name and address of the printer and either:

(a) The name and address of the chairman and secretary or the names and addresses of at least two officers of the political or other organization issuing it; or

(b) The name and residence address . . . of some voter of this State, who is responsible for it.

See id. at 429 n.1.

156. *See id.* at 430.

157. *See id.* at 436-37.

158. *Id.* at 431-32, 435-36.

159. *See Griset*, 884 P.2d at 117, 124.

160. *See, e.g., North Dakota Educ. Ass'n*, 262 N.W. 2d at 735-36 (indicating that disclaimer statutes directed at essentially personal attacks on the character or actions of candidates, as in

- Election campaigns of candidates as opposed to issues;
- Attacks on candidates, and then only when the attack was primarily personal; and
- Derogatory as opposed to laudatory writings.¹⁶¹

This is not to suggest that all the elements found in the statute in *Canon* are essential to pass First Amendment constitutional muster. However, the statute, along with Florida's recently-enacted telephone disclaimer statute,¹⁶² are good starting points for any legislature pursuing legislation in this area.

C. Florida Statutes

In 1997, the Florida Legislature forged new ground in several areas of election law by overwhelmingly passing a major election reform package. The package included sponsorship disclaimer requirements for political telephone solicitations and push polls.¹⁶³ The Florida law offers a comprehensive and constitutional approach to regulation in this area.

The new Florida law, effective January 1, 1998, requires anyone making a telephone call supporting or opposing a candidate, elected public official, or issue, to identify the sponsor during the call—either by stating who paid for the call or who authorized it.¹⁶⁴ The law specifically exempts certain “political polls” from the disclaimer requirement, namely, those surveys which: Concern a candidate or elected public official, are part of a series of like telephone calls consisting of fewer than 1000 completed calls; and, contain calls averaging more than two minutes in duration.¹⁶⁵

Canon, may be constitutional).

161. *Canon*, 393 P.2d at 436.

162. See *infra* pt. IV.C.

163. See 1997 Fla. Laws ch. 97-13, §§ 18-19 (codified at FLA. STAT. §§ 106.147 & .1475 (1997)).

164. The Florida statute provides:

Any telephone call supporting or opposing a candidate, elected public official, or ballot proposal must identify the persons or organizations sponsoring the call by stating either: “paid for by _____” (insert name of persons or organizations sponsoring the call) or “paid for on behalf of _____” (insert name of persons or organizations authorizing call).

FLA. STAT. § 106.147(1)(a) (1997).

165. See *id.* § 106.147(1)(b).

The new Florida law prohibits telephone callers from misrepresenting an affiliation with a person or existing organization without specific approval,¹⁶⁶ and also prohibits misrepresenting an affiliation with a fictitious organization.¹⁶⁷ In addition, the law requires that a candidate or sponsor of a ballot proposal first approve the calls in writing, unless the call is an independent expenditure, and file the written approval with the qualifying officer.¹⁶⁸ Finally, the law requires persons or organizations making paid telephone calls to individuals in Florida to establish a registered agent for service of process prior to commencing the calls.¹⁶⁹

The unique aspect of Florida's new law is that the statutory criteria for defining a push poll are based on specific objective manifestations of the poll sponsor's subjective intent, namely, a maximum sample size of 1000 and average call duration of less than two minutes.¹⁷⁰ The Florida approach provides poll sponsors and pollsters with specific, enforceable guidelines for when a sponsorship disclaimer is required and when it is not. In contrast, the majority of other states' legislation in this area either seeks to regulate all polls, failing to effectively distinguish between push polls and legitimate surveys, or requires a board or court to determine the subjective intent of the poll sponsor without providing substantive guidelines.¹⁷¹

D. Other State Laws

West Virginia and Nevada are the only states other than Florida with laws specifically addressing push polling. Wisconsin requires paid pollsters to disclose the name of the person paying for a poll upon request of the respondent. New York requires the filing of public opinion polls in candidate elections where results are disclosed by a candidate, political party, or committee.

West Virginia was the first state to enact a law directly addressing push polls. Prophetically, the West Virginia law was enacted long before the 1994 explosion in push polling. West Virginia law prohibits the use of any poll which is "deceptively designed or intentionally conducted in

166. *See id.* § 106.147(1)(c).

167. *See id.* § 106.147(1)(d).

168. *See id.* § 106.147(2). An "independent expenditure" is an expenditure advocating the election or defeat of a candidate or issue which is "not controlled by, coordinated with, or made upon consultation with any candidate, political committee, or agent of [the foregoing]." FLA. STAT. § 106.011(5)(a) (1997).

169. *See* FLA. STAT. § 106.1475(1) (1997).

170. *See id.* § 106.147(1)(b).

171. *See infra* pts. IV.D. & IV.E. (generally discussing other states' laws and proposed legislation).

a manner calculated to advocate the election or defeat of any candidate or group of candidates or calculated to influence any person or persons so polled to vote for or against any candidate, [or] group of candidates. . . ."¹⁷² The law specifically defines "public opinion polls" as the "gathering, collection, collation, and evaluation of information reflecting public opinion, needs and preferences as to any candidate, group of candidates, party, issue or issues."¹⁷³

The West Virginia law appears to prohibit broadly the use of push polls. However, an enforcement problem remains. The practical impact of the statute is limited because it lacks objective standards for determining the intent of the poll sponsor. The absence of objective standards, such as sample size or targeting, places the West Virginia Elections Commission in the unenviable position of having to determine the sponsor's intent in order to find a violation. At best, this is an extremely difficult task. The likelihood of evading penalties for violating the statute, in turn, probably will not discourage candidates and others from disseminating push polls. In fact, charges of push polling surfaced in the 1996 West Virginia gubernatorial race.¹⁷⁴ However, there have been no judicial or administrative decisions interpreting the statute.¹⁷⁵

In July 1997, subsequent to the enactment of the new Florida law, the Nevada legislature passed a bill requiring paid pollsters conducting "persuasion polls" to identify the candidate, political party, committee sponsored by a political party, or committee for political action that requested or paid for the poll.¹⁷⁶ The law defines "persuasion poll" to mean the canvassing of persons: by means other than an established scientific sampling method, and by asking questions or offering information about a candidate which is designed to provide information that is negative or derogatory about a candidate or his family.¹⁷⁷ However, the term does not include "a poll that is conducted only to measure the public's opinion about or reaction to an issue, fact or theme."¹⁷⁸

172. W. VA. CODE § 3-8-9(10) (Supp. 1996).

173. *Id.*

174. *See supra* note 32 (discussing push polling charges in the West Virginia gubernatorial race). The West Virginia Elections Commission has not rendered any decision or taken other action concerning the charges. Telephone Interview with Bill Harrington, Chief of Staff, West Virginia Secretary of State's Office (Oct. 28, 1996).

175. *See* Telephone Interview with Bill Harrington, Chief of Staff, West Virginia Secretary of State's Office (Oct. 28, 1996).

176. A.B. 5, § 2 (Nev. 1997) (Approved July 16, 1997, codified at NEV. REV. STAT. ANN. § 294A.341 (Michie 1997)).

177. NEV. REV. STAT. ANN. § 294A.341.2 (Michie 1997).

178. *Id.*

The Nevada law has good and bad points. On the positive side, the disclaimer requirement is limited to polls concerning candidates. This accords with current research which indicates that push polls occur most frequently in candidate, not issue, elections.¹⁷⁹ Also, the Nevada law employs a combination of factors to define a push poll, including the pollster's use of an unscientific "sampling method."¹⁸⁰ However, whether the term "sampling method" is broad enough to cover both the concept of sample design and sample size is unclear.

The biggest concern with the Nevada statute is that requiring that information proffered about a candidate be "designed" to be negative or derogatory introduces a subjective intent element into the definition of push poll which may be difficult to prove in an enforcement proceeding. Unlike the Florida law, which uses objective manifestations of the pollster's subjective intent (sample size and average length of call) to define a push poll, the Nevada law requires proof that the poll sponsor "designed" the information or questions to be negative or derogatory. Thus, the Nevada law may suffer the same evidentiary problems as the West Virginia statute.¹⁸¹

Another concern is that the Nevada law contains a patent ambiguity when applied to legitimate public opinion surveys which test negative themes. Such surveys fall squarely within Nevada's definition of a "persuasive poll," since they are "designed to provide information that is negative or derogatory about a candidate or his family"¹⁸² in order to find out what strikes a responsive chord with voters. A campaign can then use the results of those questions to guide future strategy and advertising. However, the Nevada law goes on to specifically exclude "a poll conducted only to measure the public's opinion about or reaction to an issue, fact or theme."¹⁸³ A true public opinion survey that tests negative themes would also fall squarely within the exclusion. It is unclear whether the new Nevada law requires a disclaimer on these types of polls.

Wisconsin law currently requires paid pollsters to identify the name and address of the person paying for the poll, but only upon request of the person being interviewed.¹⁸⁴ The law applies to any poll supporting

179. See *supra* note 28 and accompanying paragraph in text (discussing the type of elections in which push polls are most frequently used).

180. NEV. REV. STAT. ANN. § 294A.341.2 (Michie 1997).

181. See *supra* notes 172-75 and accompanying text (discussing West Virginia law).

182. See NEV. REV. STAT. ANN. § 294A.341.2 (Michie 1997).

183. *Id.*

184. See WIS. STAT. § 11.30(5) (1997). Subsection 11.30(5) specifically provides:

or opposing a candidate, political party, or referendum.¹⁸⁵ Thus, the disclaimer requirement does not distinguish between legitimate polls and push polls.

New York law requires any candidate, political party or committee disclosing poll results in any candidate election to file information with election officials within 48 hours of the disclosure the following: the name of the sponsor and/or payor of the poll; the name and address of the polling organization; the total sample size, geographic area covered and any special characteristics of the population included in the sample; the exact wording of questions and the question sequence; the method of polling (mail, telephone, personal interview, or other); the time period during which the poll was conducted; the number of persons contacted who responded to each specific poll question and the number contacted who did not respond; and the poll results.¹⁸⁶ The New York State Board of Elections may impose a civil penalty of up to \$1,000 per violation.¹⁸⁷

Since the results of many pure push polls are never publicly reported, the New York law probably would not cover the push poll problem. Of course, these disclosure requirements would provide information on mini-push polls, which are those administered within the context of an otherwise legitimate scientific poll.

E. Proposed Federal and State Legislation

1. Federal

There are no federal laws specifically restricting push polls, but several bills introduced in the 105th Congress addressing political polling and attack phone banks have been referred to the House Oversight Committee in the U.S. House of Representatives. Federal election law only requires disclaimers for expenditures on political

Whenever any person receives payment from another person, in cash or in-kind, for the direct or indirect cost of conducting a poll concerning support or opposition to a candidate, political party or referendum, the person conducting the poll shall, upon request of any person who is polled, disclose the name and address of the person making payment for the poll and, in the case of a registrant under s[ection] 11.05, the name of the treasurer of the person making payment.

Id.

185. *See id.*

186. *See N.Y. ELEC. LAW § 6201.2 (McKinney Supp. 1996).* New York's "Fair Campaign Code" is adopted, after hearing, by the State Board of Elections. *N.Y. ELEC. LAW § 3-106(1)* (McKinney 1997).

187. *See N.Y. ELEC. LAW § 3-106(4)* (McKinney 1997).

advertisements which solicit money or expressly advocate the election or defeat of a clearly identified candidate.¹⁸⁸ The FEC's position is that push polls generally do not fall within the scope of this disclaimer requirement because they lack express advocacy language.¹⁸⁹ The FEC's 1997 legislative recommendations to Congress recognize push polls as a growing problem and include a suggestion to consider legislation requiring sponsorship disclaimers.¹⁹⁰

There are a number of bills pending in the House of Representatives which address push polling.¹⁹¹ None of these bills have yet made it to the floor for a vote.

House Bill 248, introduced by Representative Pitts (R-Pa) and entitled the "Push Poll Disclaimer Act," requires individuals conducting a telephone or electronic opinion poll in a federal election to identify his or her identity, the identity of the person sponsoring or paying for the poll, and, if during the interview the pollster provides any information relating to a candidate for that election, either the source of the information or a statement that there is no source.¹⁹²

House Bills 2528 and 2529, introduced by Representative Petri (R-Wi), are identical. Both bills provide that any person conducting a federal election poll by telephone or electronic device must disclose the identity of the person paying for the poll at the end of the interview.¹⁹³ The bills define "federal election poll" to mean a survey in which the respondent is asked to state a candidate preference, and which includes more than 1200 households.¹⁹⁴ The bills also require pollsters to report to the FEC the total number of households surveyed and to provide a copy of the poll questions.¹⁹⁵ In addition, if the poll results are not to be made public, the bills require the pollster to report the total cost of the poll and all sources of funds for the poll.¹⁹⁶

House Bill 2075, introduced by Representative Goodlatte (R-Va), mandates that any person conducting a federal opinion poll by telephone or electronic device who interviews 1200 respondents must disclose to subsequent respondents the identity of the person sponsoring or paying

188. See 2 U.S.C. § 441d (1994).

189. See *FEC 1996 Legislative Recommendations*, *supra* note 55, at 52-53.

190. See *FEC 1997 Legislative Recommendations*, *supra* note 53, at 51-52 (recommending changes to 2 U.S.C. § 441d).

191. See H.R.s 248, 498, 2075, 2528 & 2529, 105th Cong., 1st Sess. (1997).

192. See H.R. 248, 105th Cong., 1st Sess. (1997).

193. See H.R.s 2528 & 2592, 105th Cong., 1st Sess. (1997).

194. See *id.*

195. See *id.*

196. See *id.*

for the poll.¹⁹⁷ However, if the poll is conducted more than ten days prior to the election, the pollster is only required to disclose this information upon request of the respondent.¹⁹⁸

Representative Maloney's (D-NY) House Bill 498, introduced as the "Voters' Right to Know Act," subjects any political advertisement using "phone banks" to solicit contributions to the disclaimer requirements under current federal law.¹⁹⁹ However, this bill does not mandate disclaimers on telephone push polls and most types of attack phone banks.²⁰⁰

2. State

The last few years have seen an explosion in the number of states proposing legislation to regulate polling and phone bank operations through mandatory disclaimer and filing requirements. With the exception of the Florida and Nevada statutes, however, none of these proposed bills have passed their respective legislatures. The approach of the states toward proposed push polling legislation has varied. Much of the recent proposed legislation can be classified as follows:

	FILING REQUIREMENT	ORAL DISCLAIMER
All Political POLLS	SC, TX	NJ, WI, TX
Targeting PUSH POLLS	CT, NY	CA, CT, NY

The most common concerns with the proposed state legislation include:

- (1) regulating legitimate scientific surveys by failing to effectively distinguish between push polls and legitimate polls which test negative themes,²⁰¹
- (2) defining a push poll in terms of the *subjective intent* of the poll sponsor, but omitting specific statutory guidelines for making that determination;²⁰²

197. See H.R. 2075, 105th Cong., 1st Sess. (1997).

198. See *id.*

199. See H.R. 498, 105th Cong., 1st Sess. (1997).

200. See *id.*

201. See *infra* pt. IV.E.2. (discussing Connecticut Committee Bill 30, New Jersey Assembly Bill 2155, Wisconsin Senate Bill 125, South Carolina Senate Bill 3, and Texas Senate Bill 1686).

202. See *infra* pt. IV.E.2. (discussing New York Assembly Bill 8583).

- (3) failing to specifically incorporate the criteria of sample size (for example, 1000 completed calls),²⁰³ and
- (4) requiring a sponsorship disclaimer at the beginning of the poll, which serves to bias the poll results or discourage participation in the poll altogether.²⁰⁴

Committee Bill 30, referred to the Connecticut General Assembly in January 1997, requires each person administering a "persuasion poll" to provide a sponsorship disclaimer and to file with the State Elections Enforcement Commission a statement containing the names of targeted persons and the poll script.²⁰⁵ The filing must be made no later than 48 hours after the poll commences.²⁰⁶ "Persuasion poll" means any telephone survey or series of telephone surveys consisting of more than *100 completed calls* referencing a candidate, and to which three or more of the following apply:

- (A) A list or directory is used, in whole or in part, to select respondents belonging to a particular subset or combination of subsets of the population, based on demographic or political characteristics such as race, sex, age, ethnicity or party affiliation [Targeting/Sample Design];
- (B) The individual conducting the poll uses a modified script based on answers to questions about the respondent's preference for a candidate [Modification of Script Based on Answer to Preference Question];
- (C) The pollster or polling organization does not collect or tabulate survey results [Failure to Tabulate Results];
- (D) The poll takes less than three minutes to complete, excluding sponsorship identification [Short Calls]; or
- (E) The poll is commenced less than ten days before an election [Late Timing].²⁰⁷

The Connecticut bill does several positive things. The factors used to identify push polls, including targeting, tabulation, length of calls and

203. *See infra* pt. IV.E.2. (discussing New York Assembly Bill 8583, Wisconsin Senate Bill 125, South Carolina Senate Bill 3, and Texas Senate Bill 1686).

204. *See infra* pt. IV.E.2. (discussing New York Assembly Bill 8583, Wisconsin Senate Bill 125, and Texas House Bill 2943).

205. C.B. 30, Gen. Assembly, Jan. Sess. (Conn. 1997). The Connecticut bill incorporates many of the concepts, recommendations, and proposed model disclaimer statute language contained in the original Florida House of Representatives report from which this Article was derived. *See generally* FLORIDA HOUSE PUSH POLLING REPORT, *supra* note 4.

206. *See* C.B. 30.

207. *Id.*

timing of the poll, distinguish them from legitimate scientific surveys. Also, the bill recognizes that not all push polls contain the same factors and provides for the use of various combinations of factors to define push polls.

The biggest shortcoming of the Connecticut bill is that it fails to effectively incorporate sample size, perhaps the single most important criteria for distinguishing push polls from legitimate surveys. Adopting a threshold number of 100 completed calls, instead of 1000, obviates the distinction between the two types of surveys. Even the most basic legitimate tracking survey would require more than 100 calls to obtain a representative sample from which to generalize poll results. It is very possible that a legitimate survey concerning a candidate would meet three or more of the factors identified in the bill. Therefore, the Connecticut bill could be dramatically improved by changing the threshold number of calls to trigger the disclaimer and filing requirements from 100 to 1000 completed calls.

A recent effort which failed to pass in California was Senate Bill 520, introduced by Senator Brulte in February, 1997.²⁰⁸ The bill targeted paid political telephone push pollsters and phone bank operators.²⁰⁹ The bill prohibited candidates, committees and other organizations from directly or indirectly paying for 1000 or more similar telephone calls supporting or opposing a candidate or ballot measure, unless during the course of each call the name of the organization that paid for the call were disclosed.²¹⁰ The bill specifically did not apply to calls made by a candidate, campaign manager or individuals who were volunteers.²¹¹ The bill unanimously passed the Senate but died in the Elections, Reapportionment, and Constitutional Amendment Committee in the Assembly in July, 1997.

The California bill effectively employed sample size to distinguish push polls from legitimate polls. By requiring a sponsorship disclaimer only on telephone marketing operations involving 1000 or more calls, the bill employed the maximum recommended sample size for a legitimate statewide survey.²¹² Unlike other proposed legislation, Senate Bill 520 did not get mired down in issues of question wording or order. Also, the California bill would have encompassed both polling and phone bank operations.²¹³

208. See S.B. 520 (Cal. 1997).

209. See *id.*

210. See *id.*

211. See *id.*

212. See *supra* notes 85-87 and accompanying text; *infra* app. B (discussing sample size).

213. See S.B. 520.

One possible loophole in the California bill was that it required a disclaimer only on calls which "advocate support of, or opposition to, a candidate, or ballot measure, or both."²¹⁴ Push pollsters could have argued that they were not subject to the disclaimer requirement, reasoning that the act of asking a question does not advocate the election or defeat of any candidate or ballot issue.

New York Assembly Bill 8583, introduced in 1997 by the Committee on Rules, requires a sponsorship disclaimer at the beginning of all push polls and also mandates that push poll scripts be filed with the state or local board of elections.²¹⁵ The New York Bill specifically authorizes the State Board of Elections to prohibit misrepresentation of a candidate's background, morality, character, voting record or any other act or omission by a candidate to a voter, that: is done by telephone or personal contact from a list of names that is not obtained from a scientifically measurable and random sampling technique, is specifically designed to persuade voters rather than to gather a random opinion sample, and solicits a respondent's opinion on an issue or preference for a candidate.²¹⁶ At the beginning of the call, the pollster may be required to identify the identity of the caller, the name of the sponsor or source of the poll, and the name of the candidate or committee on whose behalf the poll is being conducted.²¹⁷

Like the Nevada law, it is unclear whether the phrase "scientifically measurable and random sampling technique" in the New York Bill embraces the concept of sample size or simply addresses the issue of targeting poll respondents. If it does not limit the survey to 1000 or fewer completed calls, the statute will be missing an extremely important criteria for distinguishing push polls from legitimate surveys.

Similar to both the West Virginia and Nevada laws, the New York Bill requires a determination by the state elections commission that the sponsor's subjective intent in authorizing or conducting the poll is to persuade voters rather than to gather objective information.²¹⁸ Unfortunately, the bill provides the commission with no further guidance. As discussed previously, this situation poses a major enforcement prob-

214. *See id.*

215. *See* S.B. A08583, State Assembly, Reg. Sess. (N.Y. 1997). The filing requirement codifies § 6201.2 of the rules and regulations of the New York State Board of Election, and makes those rules and regulations specifically applicable to push polls. *See supra* note 186 and accompanying text (detailing current filing requirements for polls under N.Y. ELEC. LAW § 6201.2 (McKinney 1997)).

216. *See* S.B. A08583.

217. *See id.*

218. *See id.*

lem.²¹⁹ In addition, it fails to provide clear guidance to pollsters seeking to comply with the disclaimer and filing requirements in the bill. Finally, requiring the sponsorship identification disclaimer at the beginning of the poll could serve to bias respondents' answers or dissuade them from participating in the poll altogether, thereby increasing the cost of obtaining a representative sample.²²⁰

New Jersey Assembly Bill 2155, introduced in 1996, requires a sponsorship disclaimer on virtually all public opinion campaign surveys,²²¹ even though it originated as a response to concerns over push polling. The disclaimer must include the name and address of the committee, group or person financing the poll, as well as a statement that the communication has been financed by that committee, group, or person.²²² The bill also specifically includes public opinion polls conducted by volunteers of a candidate, committee, or individual financing the poll.²²³ No action has been taken on the bill since it was referred to the Assembly State Government Committee in June of 1996.

Wisconsin Senate Bill 125 seeks to change existing law to require paid pollsters to identify the person paying for the poll up front, regardless of whether or not a request is made by the respondent.²²⁴ Current Wisconsin law requires a sponsorship disclaimer only upon request of the respondent.²²⁵ However, the requirement that the payor be identified at the beginning of the poll could serve to bias respondents' answers or encourage them not to participate in the survey altogether.²²⁶

South Carolina Senate Bill 3 requires that the entity in charge of conducting a poll file the text of all questions and the name of the person who authorized, donated, paid for, or sponsored the poll with the state elections commission.²²⁷ The bill covers only polls paid for or authorized by a candidate or candidate's committee, and only those polls

219. See *supra* notes 174-75 and accompanying paragraphs in text (discussing failure of West Virginia and Nevada laws to provide specific guidelines for determining poll sponsor's intent).

220. See *Campaign Practices: Hearings on A.B. 636 Before the Assembly Comm. on Elections and Procedures, Gen. Assembly* (Nev. 1995) (discussing Nevada pollsters' opposition to up-front sponsorship disclaimer requirements).

221. See A.B. 2155, 207th Legis., 1st Sess. (N.J. 1996).

222. See *id.*

223. See *id.*

224. See S.B. 125 (Wisc. 1997).

225. See *supra* note 184 and accompanying text (discussing current Wisconsin law).

226. See *supra* note 220 and accompanying text (discussing pollsters' opposition to sponsorship disclaimer at the beginning of polls).

227. See S.B. 3, Gen. Assembly (S.C. 1997).

initiated during the six months preceding the general election.²²⁸ Additionally, the filing requirement is limited to polls which refer to a candidate or political party by name.²²⁹ The pollster must file the required information with the elections commission on the first business day after the poll is initiated.²³⁰ However, if the poll is initiated ten days or less before the election, the filing is required before the poll is initiated.²³¹ A court may find that such a pre-filing requirement constitutes an impermissible prior restraint on free speech.²³²

Two 1997 bills from Texas address polling that is affiliated with or paid for by a candidate, political committee, political party, or campaign consultant. Senate Bill 1686 requires a person conducting a telephone advertising campaign or poll regarding a candidate to file the script with the state elections commission within 24 hours of commencing the calls.²³³ Unfortunately, the bill fails to distinguish between push polling and legitimate polling.

Like Senate Bill 1686, House Bill 2943 applies only to telephone polls concerning a candidate which are affiliated with or paid for by a candidate, political committee, political party, or campaign consultant.²³⁴ However, House Bill 2943 goes further by requiring both a script filing and a sponsorship disclaimer.²³⁵ The person conducting the poll must file the script five days before the survey commences.²³⁶ As with the South Carolina bill, a court may view such a pre-filing requirement as an impermissible prior restraint on free speech.²³⁷

Texas House Bill 2943 further requires that the oral disclaimer must be made at the beginning of the poll, and must include the name of the pollster, the name of the candidate or political committee on whose behalf the poll is conducted, and the location and phone number from

228. *See id.*

229. *See id.*

230. *See id.*

231. *See id.*

232. *See Alexander v. United States*, 509 U.S. 544, 544-45 (1993) (discussing general principles of prior restraint); *Town of Lantana v. Pelczynski*, 303 So. 2d 326, 328 (Fla. 1974) (holding unconstitutional a local ordinance criminalizing publication of charges or attacks against opposing candidate in the last seven days preceding an election without prior notification to the candidate of the charges); *Commonwealth v. Wadzinski*, 422 A.2d 124, 132 (Pa. 1980) (finding that a notice requirement imposed on political advertising chilled free speech and was an unconstitutional prior restraint under the First Amendment Free Speech Clause).

233. *See S.B. 1686, § 14, 75th Legis., Reg. Sess. (Tex. 1997)* (Introduced Version).

234. *See H.B. 2943, § 6, 75th Legis., Reg. Sess. (Tex. 1997)* (Introduced Version).

235. *See id.*

236. *See id.*

237. *See supra* note 232 (listing cases discussing prior restraint).

which the person is calling.²³⁸ In addition, the pollster cannot deviate from the pre-filed script, except in response to a question from the respondent.²³⁹ The disclaimer is problematic for several reasons. Identifying the sponsor at the beginning of the poll may serve to bias the poll results or discourage participation in the poll altogether. Moreover, restricting pollsters to questions and statements contained in pre-filed scripts may hamper the pollster's ability to get complete and useful answers.

F. Position of the Polling Industry

Although no strong consensus has emerged on how to address the problem of push polling or what role, if any, government regulation should play, leading polling trade associations and pollsters appear generally united in their opposition to push polling.²⁴⁰ This does not mean that they are against the use of telephone banks as a legitimate campaign tool to persuade voters. Nor does this mean that they necessarily endorse state regulation as the solution.²⁴¹ What they object to is advocacy telephone polling which masquerades as scientific research. However, no strong industry consensus on how to curb the growing problem has emerged.

One of the main concerns of legitimate pollsters is that push polling will "turn off" the public to all forms of public opinion polling.²⁴² They believe that push polls damage the image of legitimate pollsters,

238. See H.B. 2943, § 6, 75th Legis., Reg. Sess. (Tex. 1997).

239. See *id.*

240. See Leading polling trade associations include the American Association of Political Consultants (AAPC); the National Council on Public Polls (NCPP); the American Association for Public Opinion Research (AAPOR); and the Council for Marketing and Opinion Research (CMOR). See AAPOR Panel Discussion, *supra* note 4, at 7 (comments of Professor Thomas Guterbock, Director, University of Virginia's Center for Survey Research).

241. In fact, CMOR has historically opposed proposed state polling legislation in a number of states which would have adversely impacted legitimate scientific polling. See AAPOR Panel Discussion, *supra* note 4, at 6-7 (comments of Harry O'Neill, Vice-Chairman, Roper Starch Worldwide, Inc.). However, CMOR now generally supports legislation which effectively targets push polls, such as Florida's and Nevada's current laws. Telephone Interview with Diane K. Bowers, President, Council for Marketing Opinion Research (Dec. 29, 1997).

242. See Eleanor Singer, "AAPOR Statement Condemning Push Polls" (Undated) [hereinafter AAPOR Statement], reprinted in FLORIDA HOUSE PUSH POLLING REPORT, *supra* note 4, at Exhibit R. Professor Thomas Guterbock of the University of Virginia, one of the nation's leading experts on polling, has acknowledged: "It makes citizens suspicious of people trying to do legitimate surveys when people are calling them on the phone and kind of brow-beating them into changing their minds." Associated Press, *Legislators Return Way's Polling Bill to Committee*, CHARLOTTESVILLE DAILY PROGRESS, Jan. 1, 1995, at B1.

foster distrust of the political process, and make potential survey respondents less likely to participate in future surveys.²⁴³

Legitimate pollsters already face fairly substantial refusal rates, which have been slowly increasing since the 1950s.²⁴⁴ Currently, from one-fifth (20%) to one-third (33%) of households refuse to participate in public opinion surveys when initially contacted by an interviewer.²⁴⁵ Up to another five percent terminate the interview at some point before it is scheduled to end.²⁴⁶ The two main factors cited for the initial refusals are inconvenient timing and demographics.²⁴⁷ Legitimate pollsters fear that the proliferation of push polls will undermine the public's confidence in all types of polling, including legitimate public opinion surveys, and lead to much higher refusal rates.²⁴⁸ This, in turn, will increase the costs of polling and make it more difficult to obtain a representative sample.²⁴⁹

The American Association of Political Consultants (AAPC)²⁵⁰ has denounced telephone push polling as an unethical campaign practice.²⁵¹ The bi-partisan trade association issued a Declaration decrying the use of telephone push polls, defined as polls aimed at voter persuasion which are presented as surveys of public opinion.²⁵² The Declaration was in response to a joint letter to the AAPC from 31 of the nation's

243. See AAPOR Statement, *supra* note 242; (United States Representatives) Thomas E. Petri & Carolyn B. Maloney, *Telephone Smear Artists*, WASH. POST, July 17, 1996, at A19; Semerad, *supra* note 69.

244. See AAPOR Panel Discussion, *supra* note 4, at 20; *Polling at Risk*, SALT LAKE TRIB., May 25, 1996, at A18.

245. See CANTRIL, *supra* note 12, at 99-100.

246. See *id.* at 100.

247. See *id.* Certain groups, such as older persons, less-educated persons, and individuals with lower incomes are more likely to refuse to respond. See *id.*

248. See *supra* notes 242-43 and accompanying text (push polls damage the reputation of legitimate polling, thereby discouraging participation).

249. See ASHER, *supra* note 98, at 70.

250. The AAPC is the national, bi-partisan trade association of over 400 top political researchers, professionals and managers.

251. See AAPC Declaration, *supra* note 78. American Association of Political Consultants, "Nation's Top GOP and Dem. Consultants To Condemn Use of 'Push Polls'; Pollsters Draw Distinction Between Survey Research and 'Sleazy' Smear Tactics" (Press Release, June 26, 1996) [hereinafter AAPC Smear Tactics], reprinted in FLORIDA HOUSE PUSH POLLING REPORT, *supra* note 4, at Exhibit S; Frank J. Murray, *Group to Condemn 'Push Poll' Methods: Statement Targets Unethical Moves*, WASH. TIMES (D.C.), June 24, 1996, at A7.

252. See AAPC Declaration, *supra* note 78. The Declaration states that push polling violates the AAPC's Code of Ethics, which prohibits activities "which would corrupt or degrade the practice of political campaigning." *Id.* To the extent that a push poll conveys inaccurate information about a candidate, it also violates the AAPC's ethical stricture against making false or misleading attacks. See *id.*

top political pollsters condemning the use of push polls.²⁵³ Ed Goeas, AAPC Board Member and prominent GOP pollster, referred to push polls as "merely a bunch of people hiding behind miles of copper phone line to deliberately malign opponents," and indicated that they are not a part of the legitimate, scientific polling process.²⁵⁴

The AAPC Declaration apparently is the only attempt by a trade association, so far, to develop substantive guidelines for distinguishing push polls from legitimate polls. The AAPC Declaration Guidelines are as follows:

1. Legitimate polling firms open each interview by providing the true name of the firm or the telephone research center conducting the interview. Practitioners of so-called "push-polling" generally provide no name, or in some cases make up a name.
2. In a true opinion survey, research firms interview only a small random sample of the population to be studied, typically ranging from up to 1,000 interviews for a major statewide study to as few as 300 in a congressional district. With so-called "push-polls," the objective is to reach a very high percentage of voters.
3. The interviews conducted by real polling firms generally range in length from at least five minutes for even the shortest of tracking questionnaires to more than 30 minutes for a major benchmark survey. So-called "push-poll" interviews are typically designed to last 30 to 60 seconds.
4. While real pollsters do sometimes give interviewees new information about a candidate, the intent of this process is not to shift public opinion but to simulate potential campaign debate and to assess how the voter might respond. So-called "push-polls" are designed specifically to persuade.
5. To our knowledge, there is no overlap whatsoever between legitimate polling firms and firms that conduct so-called "push polls."²⁵⁵

The Declaration states that, while voter persuasion by telephone is a legitimate campaign practice, the AAPC objects to advocacy phone calls which: masquerade under the guise of legitimate survey research, fail to accurately identify the sponsor, or present false or misleading information.²⁵⁶

253. *See id.*

254. AAPC Smear Tactics, *supra* note 251.

255. AAPC Declaration, *supra* note 78.

256. *Id.* at 2.

The Council for the American Association for Public Opinion Research (AAPOR)²⁵⁷ adopted the following statement at its January 1996 meeting:

AAPOR joins the National Council on Public Polls (and other professional survey organizations) in condemning a political campaign tactic commonly called "push polls,"²⁵⁸ which masquerades as legitimate political polling. These are not polls at all. They are a form of political telemarketing. . . . [T]he intent is not to measure public opinion but to manipulate it—to "push" voters away from one candidate and toward the opposing candidate.²⁵⁹

The AAPOR Statement also indicated that push polls violate the AAPOR Code of Ethics by intentionally lying to or misleading respondents, and that they corrupt the electoral process by disseminating false or misleading attacks against candidates.²⁶⁰

Despite this general condemnation, the AAPOR has not developed a strategy to curb push polling.²⁶¹ The AAPOR's annual meeting in May, 1996, which included a panel discussion of push polling by some of the nation's top pollsters and academicians, produced no firm consensus on how to address the problem.²⁶² AAPOR's current strategy seems to be to discourage the use of push polls and to monitor incidents reported by its members.²⁶³

The National Council for Public Polls (NCP) ²⁶⁴ went on the

257. AAPOR, established in 1947, is one of the oldest and largest polling organizations. CANTRIL, *supra* note 12, at 13. Its membership of about 1500 includes both academic and commercial pollsters. *See id.*; ENCYCLOPEDIA OF ASSOCIATIONS 2258 (Gale Research, 31st Ed. 1996). One of the purposes of AAPOR is "to promote the proper utilization of public opinion research in democratic policy formulation." CANTRIL, *supra* note 12, at 13.

258. The AAPOR Statement defines push polls as a "telemarketing technique in which telephone calls are used to canvass potential voters, feeding them false or misleading 'information' about a candidate under the pretense of taking a poll to see how this 'information' affects voter preferences." AAPOR Statement, *supra* note 242.

259. *Id.*

260. *See id.*

261. *See Pollsters Call for an End to Campaign Smear Tactic*, THE NEWS & OBSERVER (Raleigh, N.C.), May 19, 1996, at A4 (reporting that no agreement emerged from the AAPOR annual meeting on how to curtail push polling).

262. *See AAPOR Panel Discussion*, *supra* note 4, at 25-26 (comments of Mr. McInturff). Professor Tom Guterbock, who led the AAPOR Panel Discussion on push polling, was quoted as saying, "We're all pretty much against push polling, but we don't know what to do about it." Semerad, *supra* note 69.

263. *See AAPOR Statement*, *supra* note 242; AAPOR Panel Discussion, *supra* note 4, at 25-26.

264. The NCP is a professional association of 30 major polling firms. *See Letters from*

record early with its opposition to push polls.²⁶⁵ The NCPP issued a press warning in May 1995, labelling push polls "political telemarketing"²⁶⁶ and an "unethical political campaign technique."²⁶⁷ In February 1996, the NCPP again issued a press release condemning the use of push polls amidst the backdrop of push polls by presidential candidates in Iowa's Republican Caucuses.²⁶⁸ In June 1996, the NCPP sent letters to both President Clinton and Bob Dole asking them to refrain from push polling during the presidential election.²⁶⁹ The letters indicated that the NCPP does not object to testing negative themes or get-out-the-vote phone banks.²⁷⁰ Rather, it objects to advocacy phoning masquerading as polling "to saturate carefully selected segments of the electorate with mean-spirited and exaggerated assertions about the record, views, and character" of candidates.²⁷¹

The Council for Marketing and Opinion Research (CMOR)²⁷² also

Humphrey Taylor, Chairman, and Sheldon Gawiser, President, National Council for Public Polls, to President Bill Clinton and Bob Dole (June 12, 1996) (on file with author). The NCPP was established in 1969 to promote higher standards of professionalism among public opinion pollsters and to give the public a better understanding of, and basis for, interpreting poll results. *See National Council for Public Polls, "National Council on Public Polls Condemns Use of 'Push Polls' in Iowa Caucus Campaign"* (Fax Press Rel., Feb. 11, 1996) [hereinafter NCPP Iowa Caucus Fax], reprinted in FLORIDA HOUSE PUSH POLLING REPORT, *supra* note 4, at Exhibit T. The Board of Trustees includes members from such prominent polling firms and associations as Louis Harris & Associates, The Gallup Organization, Roper Starch Worldwide, and Princeton Research Associates. *See id.*

265. *See* NCPP Iowa Caucus Fax, *supra* note 264. The NCPP definition of a "push poll" is essentially the same as the AAPOR's definition: "A 'push poll' contacts voters by telephone, feeding them damaging information about a candidate under the guise of taking a poll to see how this 'information' effects [sic] voter preference, with the intent to 'push' the voters away from the candidate." *Id.*

266. The owner of Innovative Marketing Strategies, the firm which conducted the push poll in Texas' 14th congressional district Republican primary early in 1996, described his operation as an "in-bound and out-bound telemarketing firm." Kay, *supra* note 21; *see also supra* note 33 and accompanying text (discussing push poll in Texas' 14th congressional district primary).

267. NCPP Press Warning, *supra* note 66.

268. *See* NCPP Iowa Caucus Fax, *supra* note 264.

269. *See* Letters from Humphrey Taylor, Chairman, and Sheldon Gawiser, President, National Council for Public Polls, to President Bill Clinton and Bob Dole (June 12, 1996) (on file with author), reprinted in FLORIDA HOUSE PUSH POLLING REPORT, *supra* note 4, at Exhibit U.

270. *See id.*

271. *See id.*

272. CMOR was established about four years ago as the legislative companion to the Council of American Survey Research Organizations (CASRO), the trade association of the commercial survey research industry. *See* AAPOR Panel Discussion, *supra* note 4, at 6 (comment by Harry O'Neill, Vice President, Roper Starch Worldwide, Inc.). CMOR is responsible for legislative and regulatory issues, including monitoring proposed statutes and rules and contesting them where necessary, and for identifying and solving problems with respondent

advocates the elimination of push polling.²⁷³ The CMOR has been making efforts to educate its members against using push polling techniques, and generally supports legislation like the Florida and Nevada laws which specifically target push polls.²⁷⁴

G. Specific Industry Concerns

During the 1996 Florida legislative session, lobbyists and pollsters raised a number of concerns about bills pending in the Florida Senate and House which would require sponsorship disclaimers on certain political polls.²⁷⁵ Their arguments are typical of the concerns raised in the context of any legislative debate on bills affecting push polling and political telephone solicitation.

One of their arguments was that, if the legislature wanted to regulate political polling, it should have exempted issue elections; issue elections, as opposed to candidate elections, are not a problem. This appears to be true. Although there is evidence that issue groups have commissioned push polls opposing candidates who did not espouse their views, the fact remains that most were opposing candidates in the context of candidate elections. Although push polls undoubtedly do occur in the context of issue elections, the vast majority of reported push polls involve candidate elections.

Another argument raised by lobbyists and pollsters was that requiring the interviewer to initially identify the sponsor of the poll may encourage respondents to change their answers to certain questions. Allowing the interviewer to identify the sponsor of a poll after the questioning is completed should serve to eliminate this concern.

A third argument was that, even if sponsorship identification at the end of a poll does not bias the integrity of the immediate poll it could seriously bias subsequent polls involving the same respondent, which are used to monitor changes in opinion based on events occurring in the campaign. This argument addresses what are known as "panel design" surveys. A panel design survey is one in which the same person is interviewed two or more times in order to determine the pattern of individual changes that occur as a result of specific campaign events or advertising.²⁷⁶ The more common political survey is the cross-sectional

cooperation. *See id.* at 6-7.

273. *See* Telephone Interviews with Diane K. Bowers, President, Council for Marketing and Opinion Research (July 3, 1996 & Dec. 29, 1997).

274. *See id.*

275. *See* H.B. 1005, C.S./H.B. 1151 and S.B. 964 (Fla. 1996).

276. *See* ASHER, *supra* note 98, at 108-09.

design, which is not concerned with interviewing the same person more than once.

Panel design surveys are rarely used by candidates, campaigns, political parties, committees or special interest groups. Perhaps one in thirty or one in fifty polls are panel designs.²⁷⁷ Academic, research, and media pollsters sometimes use panel design surveys to highlight *how and why* changes in the electorate occur.²⁷⁸

Requiring a disclaimer at the end of a poll could bias subsequent interviews in a legitimate panel design survey. The extent of the bias is unknown, but it is possible that knowing the sponsor might encourage respondents to refuse to participate in subsequent surveys, refuse to answer specific questions, or alter their answers in subsequent surveys to reflect their bias against the sponsor.

A fourth argument was that, if interviewers are required to identify the sponsor of a poll, they might consciously or unconsciously bias the way they ask the questions (by voice inflection or other means) or interpret answers in a biased way to obtain answers which support their own views or favored candidate.²⁷⁹ Most interviewers are told or can reasonably figure out who is sponsoring a poll.²⁸⁰ Ideally, interviewers for legitimate polls are well informed about the purposes of the research and the intention of the overall poll and specific questions so they can encourage reluctant respondents to participate, recognize whether a respondent has fully answered a question, and understand when and how to ask follow-up questions for clarification.²⁸¹ In some surveys, however, it may be necessary to hide the sponsorship of the study from

277. See Telephone Interview with Jim Kane, Editor/Pollster, THE FLORIDA VOTER (Nov. 6, 1996); Telephone Interview with Prof. Suzanne Parker, Director, Florida State University Survey Research Laboratory (Nov. 12, 1996) (stating that panel design surveys are extremely rare).

278. See Telephone Interview with Prof. Suzanne Parker, Director, Florida State University Survey Research Laboratory (Nov. 12, 1996).

279. Other prominent national pollsters have expressed similar concerns. See *Legislators Return Way's Polling Bill to Committee*, CHARLOTTESVILLE DAILY PROGRESS, Jan. 18, 1995, at B1 (quoting Scott Keeter, political science professor and pollster for Virginia Commonwealth University, who was a panelist at AAPOR's 1996 Annual Conference panel discussion on push polling).

280. See ASHER, *supra* note 98, at 78.

281. See *id.*; FLOYD J. FOWLER, JR., SURVEY RESEARCH METHODS 115-16 (Applied Social Research Methods Series Vol. 1 rev. ed. 1988) (stating that interviewers need to know the specific purposes of the project, *including the sponsorship* and details regarding the purpose of specific questions); PAUL J. LAVRAKAS, TELEPHONE SURVEY METHODS: SAMPLING, SELECTION, AND SUPERVISION 117-19 (Applied Social Research Methods Series Vol. 7, 1987).

the interviewers and supervisors to prevent conscious or unconscious bias on their part.²⁸²

Even if a sponsorship identification requirement introduced a new type of bias into the polling process, it would be one of several interviewer biases which already exist, such as interviewer demeanor, skills, personal characteristics, social distance, race, and ethnicity.²⁸³

282. See Alan Bayer et al., *A Statement of Concern About House Bill #1065: A Bill Relating to Political Campaign Telephone Calls*, at 2 (Jan. 24, 1995) [hereinafter *Statement on Virginia HB 1065*], reprinted in FLORIDA HOUSE PUSH POLLING REPORT, *supra* note 4, at Exhibit Q. A case in point is a 1992 University of Virginia survey in the City of South Boston and Halifax County on the controversial issue of whether or not South Boston should revert to town status. *See id.* The City and County were litigating the issue at the time of the survey. *See id.* Neither the interviewers nor their supervisors were told who sponsored the poll in an effort to eliminate unconscious interviewer bias which might affect the results. *See id.*

283. See ASHER, *supra* note 98, at 76-81. The actual conduct of the interview may measurably affect responses to public opinion polls. Interviewer effect occurs where uncertainty with the process prompts respondents to look for clues as to how to respond in the survey instrument itself and in the interviewer. *See id.* at 76-77. A number of factors impact an interviewer's ability to bias a survey:

- **DEMEANOR:** An interviewer's general demeanor, competence, and performance, including the ability to establish a rapport with respondents, may affect survey results.
- **SKILLS:** The less structured a survey, the more the interviewer must provide guidance and exercise judgment. For example, open-ended questions require the interviewer to be a good listener and prober.
- **PERSONAL CHARACTERISTICS:** Respondents answer differently depending on the gender of the interviewer. For example, women tend to be more pro-feminist in responding to questions from women interviewers and more traditional when responding to male interviewers, particularly on gender-specific issues such as abortion.
- **SOCIAL DISTANCE BETWEEN INTERVIEWER AND RESPONDENT:** If the interviewer is obviously of higher social status, the respondent may provide answers intended to win approval of the interviewer. The interviewer's manner of speech also plays into a respondent's replies, since it may reflect geographic origin, social class, age group, or level of education.
- **RACE/ETHNICITY:** An interviewer's race or ethnicity can affect responses to a poll. For example, black respondents are more likely to be more positive about the American political system when interviewed by whites. Similarly, white respondents are less likely to reveal attitudes about racial hostility when interviewed by blacks as opposed to whites. Similar patterns of racial-interviewer effects occur with other minorities, such as Hispanics. Generally, respondents try to give answers that will not offend the interviewer, particularly on matters of race or ethnicity.

Pollsters have adopted procedures to recruit, screen, train, supervise, and monitor interviewers in an effort to minimize such bias.²⁸⁴ These procedures could be expanded to address and reduce interviewer bias resulting from the interviewer revealing the sponsor of a poll.

A fifth argument was that many polls have multiple sponsors who collectively fund a common set of questions. Would all the sponsors have to be listed? If so, the length of the disclaimer could become unwieldy and the associated costs of the poll would be greatly increased.²⁸⁵ Whether this is a valid concern depends in large measure on the specific requirements drafted into the sponsorship disclosure statute.

H. Future Trends

Absent legislative restrictions, the push polling problem is likely to accelerate in the future. One of the main attractions of push polling and telephone advocacy is that conversations are one-on-one with virtually no written record. Hence there is no paper trail outside of the scripts used by interviewers.²⁸⁶ Conversely, mass media ads in newspapers, radio, and television are seen by hundreds or thousands of people and are open to ready scrutiny by the media and the public.²⁸⁷ The stealth nature of the push poll makes it an attractive tool for influencing voters with minimal danger of exposing a candidate to the bright light of public opinion. Also, if employed late in a campaign—perhaps during the last 72 hours—the candidate being attacked may never have an effective chance to reply. The push poll may not even be discovered until after the election.

The polling industry's recent efforts to curb push polling by developing voluntary guidelines, although well-intentioned, seem destined to fail for several reasons.

Id. at 76-81.

284. *See generally* FOWLER, JR., *supra* note 281, at 107-26 (discussing the significance of interviewer selection, training, supervision, and procedures in reducing interviewer-related survey errors).

285. Virginia pollsters raised the same concern in opposition to proposed legislation requiring a disclaimer on virtually all types of public opinion surveys conducted in Virginia. *See Statement on Virginia HB 1065*, *supra* note 282, at 3.

286. *See supra* notes 102-04 and accompanying text (discussing stealth nature of push polls). Campaigns and pollsters generally refuse to release the questions or contents of negative suppression or push polls. *See, e.g.*, Lopez, *supra* note 96; Woods, *supra* note 66.

287. *See FEC Hearing Transcript*, *supra* note 25, at 112 (comments of Representative Tom Petri).

- *Negative Advertising Works*

“Politics is a contact sport.”²⁸⁸

—1988 Vice-Presidential Candidate Lloyd Benson

Despite numerous media impressions to the contrary, negative advertising has been a part of the American political landscape from the very beginning.²⁸⁹ Indeed, today’s attack ads appear relatively tame compared to those of yesteryear.²⁹⁰ Andrew Jackson was accused of being a murderer and an adulterer.²⁹¹ Opponents assailed Thomas Jefferson as an imbecile lacking in character and fortitude,²⁹² a “seducer of slave girls,” and a “howling atheist” who would lead the country to ruin.²⁹³ The difference is that today’s negative attacks reach more

288. STEPHEN ANSOLABEHHERE & SHANTO IYENGAR, GOING NEGATIVE: HOW ATTACK ADS SHRINK AND POLARIZE THE ELECTORATE 115 (1995) (1988 Vice-Presidential Candidate Lloyd Benson) (quoting, JACK GERMOND & JULES WITCOVER, WHOSE BROAD STRIPES AND BRIGHT STARS? 409 (1989)).

289. See Bruce Auster, *Accentuating the Negative—Quietly*, U.S. NEWS & WORLD REP., Sept. 30, 1996, at 43 (reporting that bare knuckle political attacks date back to the beginning of the Republic); Ann Grimes, *See How They Ran: The Changing Role of the Presidential Candidate*, WASH. MONTHLY, v.23, n.12, at 59 (since the first truly popular presidential election in 1840, Americans have found elections “too lengthy, too costly, too nasty and too silly”); Kathleen Kennedy Townsend, *No More Name-Calling!*, LADIES HOME J., Apr. 1996, at 93 (“Since the very first contested presidential election, mudslinging and character attacks have been as constant as the democratic process itself.”).

290. See Auster, *supra* note 289 (stating that today’s negative advertising employs a “kindler, gentler attack ad”).

291. See Townsend, *supra* note 289.

292. See Auster, *supra* note 289.

293. Townsend, *supra* note 289. There are other historical examples of vicious negative presidential campaigning. For instance:

- Abraham Lincoln was labelled an ape. Townsend, *supra* note 289.
- In 1912, William Howard Taft and Teddy Roosevelt used terms to describe each other like “puzzlement,” “fathead,” “egotist,” and “demagogue.” Grimes, *supra* note 289.
- Grover Cleveland was attacked for having an illegitimate child (“Ma, ma, where’s my pa?”). *Terry Dolan, RIP*, NAT’L REV., Jan. 30, 1987, at 24 (obituary).
- Senator Joe McCarthy made a memorable characterization of “Alger, I mean Adlai, Stevenson” (referring to alleged Soviet spy Alger Hiss). *See id.*
- Lyndon Johnson released a now infamous 1964 TV spot portraying a little girl holding a daisy, followed by a hydrogen bomb explosion (insinuating that Barry Goldwater would blow up the world if elected). *See id.*

people as a result of mass media and the growing amount of money involved in political campaigns.²⁹⁴

Why do candidates go negative? Because it generally is effective.²⁹⁵ Early studies suggest that not only does negative campaigning work when initiated by a candidate, but that it often may be the most effective response to an opposing candidate's negative campaign.²⁹⁶ Push polling is another tool in the arsenal of a candidate seeking to go negative.

NCPP President Sheldon Gawiser believes it will be tough to persuade campaigns to stop using push polls as long as they are effective in changing public opinion.²⁹⁷ Professor Larry Sabato, one of the nation's leading experts on push polling, accurately predicted that the use of push polls would increase in the 1996 elections based on their effectiveness during the 1994 campaigns.²⁹⁸

- *Industry Guidelines Lack Uniformity*

Only the AAPC has come out with voluntary guidelines on push polling for its members.²⁹⁹ AAPOR, one of the oldest and largest trade associations of professional pollsters, acknowledges its opposition to push polling but has not yet developed any specific guidelines.³⁰⁰ Both NCPP and CMOR acknowledge the problem³⁰¹ but have not offered a solution. Thus, the industry itself has not adopted a unified approach to address the problem. This fragmentation and lack of uniformity will likely inhibit a voluntary solution to the problem.

294. See Hollis, *supra* note 48.

295. See Auster, *supra* note 289; David Wagner, *Campaign Pit Bulls Maul Candidate Chances*, INSIGHT ON THE NEWS, Aug. 5, 1996, at 11. Ron Sachs, former spokesman for Florida Governor Lawton Chiles, has commented that negative campaigning is a "sorry tactic, . . . but it works." Hollis, *supra* note 48.

296. See generally ANSOLABEHRE & IYENGAR, *supra* note 288, at 115-27 (discussing "the spectacle" of negativity in competing campaigns).

297. See Greg Pierce, *Inside Politics*, "Push Comes to Shove," WASH. TIMES (D.C.), May 21, 1996, at A7.

298. See Lowe, *supra* note 99.

299. See *supra* note 255 and accompanying text.

300. See *supra* notes 257-63 and accompanying text.

301. See *supra* notes 264-74 and accompanying text.

- *Existing Ethical Standards in the Industry Have Not Curbed Push Polling*

“Push polls are unethical as campaign tools and abominable as a polling technique.”³⁰²

— Everett Carll Ladd, Director, University of Connecticut’s Roper Center For Public Opinion Polling

The AAPOR, the AAPC and the NCPP all have voluntary codes of ethics in place which effectively prohibit the practices associated with push polling. Nonetheless, push polling has thrived. Without an effective enforcement mechanism, there is no reason to believe that the industry’s voluntary guidelines directed specifically at push polling will be successful in curbing existing and future abuses.³⁰³

- *A Cottage Industry of Telemarketers May Function Outside Industry Guidelines*

Push polling and political telephone solicitation have spawned a new cottage industry of political telemarketers who may or may not be members of, or responsive to, the guidelines of traditional polling trade associations.³⁰⁴ According to one leading academic pollster, these aggressive entrepreneurs may actually incite more negative phone advocacy and polling because they “ignite the latent fear in every campaign manager that the other side may be employing the [same]

302. Carol Goar, ‘*Push Polling’ an Ugly Tactic in U.S. Race*, TORONTO STAR, July 4, 1996, at A17.

303. See *Political Sleaze Grows*, BOSTON HERALD, Feb. 15, 1996, at A34 (editorial) (reporting that “tsk-tsk” disapproval by the fraternity of pollsters does not seem to be much of a bar to the growth of suppression push polling).

304. See SABATO & SIMPSON, *supra* note 1, at 255 (citing *The Political Pages: 1995-96 Guide to Political Consultants, Products, and Services*, CAMPAIGNS AND ELECTIONS 17, at 74-79 (Feb. 1995), which lists well over 100 political consulting firms specializing in persuasive phoning); see also AAPC Declaration, *supra* note 78 (characterizing push polling as telemarketing); AAPOR Statement, *supra* note 242 (same); and Goar, *supra* note 302 (reporting that push polling is typically done by companies operating outside the known community of consultants and pollsters). According to the AAPC, there is “no overlap whatsoever between legitimate polling firms and firms that conduct” push polls. AAPC Declaration, *supra* note 78, at 2.

technique already.”³⁰⁵ As such, push polling is likely to increase in the future.³⁰⁶

V. DRAFTING LEGISLATION

A. *Scope of Regulation Should Be Limited*

Any federal or state statute in this area should be drafted as narrowly as possible, in order not to adversely impact legitimate scientific polling. Legal and practical concerns dictate that the statute should: apply only to political polling and political telephone solicitation, and not to other types of public opinion polling. It also should target push polls, seeking to distinguish them from legitimate scientific surveys. Statutory burdens should be imposed on push polls, not legitimate surveys, to the extent possible.

The key to distinguishing between scientific surveys and push polls lies in identifying the intent of the poll sponsor. A push poll sponsor seeks to persuade or dissuade respondents, whereas the sponsor of a legitimate poll is seeking to gauge the public’s opinion or reaction to certain issues or facts. However, this distinction does not provide a solid basis for good statutory criteria because it requires an evidentiary showing of the poll sponsor’s subjective intent.

A better approach, utilized in the Florida legislation, is to determine the poll sponsor’s intent using the objective factors inherent in the polling process: sample size, length of call, targeting, name identification, existence of negative message, request for demographic information, modification of script based on preference question/question order, and timing.

No single factor is dispositive in determining whether a poll is a push poll. In order to be effective, the legislation should use a combination of the above factors to establish statutory criteria differentiating push polls from legitimate polls, and then seek to regulate only the former.

B. *Substance of Regulation*

The principal legislative options available to regulate push polls are sponsorship disclaimers, filing requirements, or a combination of the two. The same options exist for direct political telemarketing and attack phone banks. The disclaimer option is the best approach.

305. SABATO & SIMPSON, *supra* note 1, at 255 (citation omitted).

306. See AAPOR Panel Discussion, *supra* note 4, at 14 (comment by Mr. Edelman, audience member, observing that push polling appears to have a great future).

1. Disclaimer Requirement

Push pollsters should be required to identify the sponsor—the person commissioning, sponsoring, or paying for the poll—or the polling organization at some point during the call. Allowing the pollster the flexibility to provide the disclaimer at the end of the call enable the pollster to minimize respondent bias. In addition, this would allow live interviewers to transfer respondents to a computerized disclaimer message, thereby eliminating unconscious interviewer bias resulting from the interviewer knowing the poll sponsor's identity.

Alternatively, the pollster could be given the choice of providing the disclaimer information during the call or at some later time. One type of delayed disclaimer could provide the respondent with a toll-free number to call for the disclaimer information. This would enhance the pollster's ability to control interviewer bias since the toll-free number could be staffed by individuals who are not interviewers or could provide a computer-generated message.

2. Filing Requirement

Poll sponsors could be required to file copies of push poll scripts with the appropriate election officials within 24 hours of commencing the poll, along with other pertinent information such as: the name of the sponsor and/or payor of the poll; the name of the polling organization; total sample size, geographic area covered and any special characteristics of the population included in the poll; the time period during which the poll was conducted; the number of persons contacted who responded to each specific poll question and the number contacted who did not respond; and poll results.

A major concern with filing requirements is that they put a campaign's strategy on display for all the world to see, including other candidates in the race. Such exposure would allow an opposing campaign to more effectively counter with its own advertising.³⁰⁷ Therefore, a filing requirement may actually provide the opposing side with an unjustifiable advantage.

As such, a disclaimer requirement offers the best balance between the state's interest in maintaining the integrity of the electoral process and preventing fraud, and the rights of candidates and others to engage in robust, unfettered political speech. It is less invasive than a filing requirement. A sponsorship disclaimer introduces the elements of accountability and responsibility into the political advertising process. It also provides respondents with perhaps the only effective tool to

307. See *FEC Hearing Transcript*, *supra* note 25, at 112 (comments of U.S. Representative Tom Petri).

timely evaluate slanted campaign messages and deliberate misrepresentations masquerading as science.

VI. CONCLUSION

Push polls are a form of unregulated political telemarketing that is pervasive at the national, state and local levels. Push polls occur primarily in candidate elections. The use of push polls rose dramatically in 1994. The practice continued to flourish in the 1996 election cycle, and appears destined to increase in future elections absent legislation to curb the practice. Florida's new law is a bold attempt to resolve the problem within the constraints of first amendment free speech guarantees.

Push polls jeopardize the integrity of the electoral process and, in effect, perpetuate a fraud on the citizenry by masking persuasive telemarketing techniques in a shroud of scientific sincerity. As such, push polls appear to be an appropriate subject for state regulation in the same manner as written and broadcast political advertisements.

Finally, phone banks and other forms of direct political telemarketing are closely linked with push polls. Any legislation aimed at regulating push polling must also address these related forms of political telemarketing, since failure to do so would allow push pollsters to avoid regulation by simply re-phrasing their poll questions as scripted statements.

APPENDIX A

Model Disclaimer Statute

The following statute is offered for discussion purposes only. At the time of this printing, this draft statute has not been enacted by any legislative body, although it has served as the basic model for bills introduced in the Florida House of Representatives³⁰⁸ and the Connecticut Senate.³⁰⁹

xxx Definitions.—

As used in this chapter, the following terms have the following meanings unless the context clearly indicates otherwise:

(1) "Persuasion poll" means any paid telephone survey, or series of telephone surveys that are similar in nature, designed to include or aggregating more than 1000 calls, which references a candidate or group of candidates other than in a basic preference question, and to which any one or more of the following apply:

(a) A list or directory is used, exclusively or in part, to select respondents belonging to a particular subset or combination of subsets of the population, based on demographic or political characteristics such as race, sex, age, ethnicity, party affiliation, or like characteristics.

(b) The poll takes less than 3 minutes to complete, excluding any sponsorship identification.

(c) The poll fails to make demographic inquiries on factors such as age, household income, or status as a likely voter, sufficient to allow for the tabulation of results based on relevant subset(s) of the population consistent with standard industry practices.

(d) The pollster or polling organization does not collect or tabulate survey results.

(e) The poll is commenced within 10 days of an election.

However, this definition does not include any poll supporting a particular candidate which fails to reference another candidate or candidates, other than in a basic preference question.

(2) "Basic preference question" means a question which provides a respondent with a non-descriptive list of candidates' names and asks which candidate the respondent supports in a particular race.

(3) "Political telephone solicitation or contact" means any telephone call to a residence, other than a poll or survey, supporting or opposing any candidate, elected official, political party or political organization.

308. See H.B. 281, Reg. Sess. (Fla. 1997) (as introduced).

309. See C.B. 30, Gen. Assembly, Jan. Sess. (Conn. 1997).

yyy. Persuasion Polls; political telephone solicitations; requirements.—

(1)(a) No person or organization shall authorize, commission, conduct, or administer a persuasion poll or political telephone solicitation or contact by telephone or telephonic device unless, during each call, the caller identifies the person(s) or organization(s) sponsoring or authorizing the call by stating "Paid political advertisement by (Name of person(s) or organization(s)) , and, identifies the organization making the call, if different from the sponsor, by stating "Call conducted by (Name of organization) ."

(b) If any person or organization identified as either sponsoring or authorizing the call is not required to file any documents with election officials pursuant to Chapter ____, a valid, current, publicly-listed telephone number and address for the person or organization shall also be disclosed.

(c) If any person or organization sponsoring or authorizing the call is affiliated with a candidate, the disclosure shall include the candidate's name and the office sought by such candidate.

(d) If the call is an independent expenditure, the disclosure shall also state that no candidate has approved the call.

(2) There is no violation of this section if the respondent voluntarily terminates the call or asks to be called back before the required disclosures are made, unless the respondent is in any way encouraged to do so by the person or organization initiating the call.

(3) No person or organization shall state or imply false or fictitious names or telephone numbers when providing the disclosures required under this section.

(4) All oral disclosures required by this section shall be made in a clear and intelligible manner, and shall be repeated in like fashion upon request of the call recipient. Disclosures made by any telephonic device must offer respondents a procedure to have the disclosures repeated.

(5) This section does not apply to a persuasion poll or political telephone solicitation or contact if the individuals participating in the call know each other prior to the call.

zzz. Registered agents; requirements; registration.—

(1) Any person or organization who conducts a paid persuasion poll or political telephone solicitation or contact shall, prior to conducting such business, have and continuously maintain, for at least 180 days following the cessation of business activities in the state, a registered agent for the purpose of service of process, notice, or demand required or permitted by law, and shall file with the division notice of such registered agent. Conducting business in this state includes both placing telephone calls from a location in this state and calls from other states or nations to individuals located within this state. Such registered agent

must be an individual resident of the state, a domestic corporation, or a foreign corporation authorized to do business in the state. This subsection does not apply to any entity already lawfully registered to conduct business in the state.

(2) The division shall create and maintain such notice forms as are necessary, and prescribe the format to elicit, at a minimum, the following:

(a) The name, address, and telephone number of the registered agent; and

(b) The name, address, and telephone number of the person or organization conducting business in this state.

(3) The person or organization conducting such business shall notify the division of any changes in the information required in subsection (2).

(4) A person or organization who violates this section (insert desired criminal or civil penalty).

APPENDIX B

A Primer on Key Scientific Polling Concepts

This appendix discusses question wording and format, as well as sample size and design, which are important characteristics of legitimate public opinion surveys. An understanding of these basic scientific polling concepts is essential to distinguishing between legitimate scientific opinion surveys and push polls. Differentiating between the two is critical because legitimate surveys are not problematic and thus do not currently warrant state regulation.

1. *Question Wording & Format*

Question wording and format are tools used by push pollsters to influence voter opinion.³¹⁰ Unfortunately, the limitless number of ways to draft and ask a question render such criteria practically useless in developing statutory guidelines on push polling.

(a) Wording

There are an endless number of ways to draft a poll question. In addition, wording problems and ambiguities can arise on even routine topics in legitimate surveys, even where pollsters have the best of intentions.³¹¹ For example, a seemingly straightforward question like “ ‘Have you taken a vacation in the last few years?’ ” may elicit more than one truthful response.³¹² Does the “ ‘last few years’ ” mean one year, two years, three years, or more?³¹³

Question wording, whether or not designed to influence respondents’ answers, can bias responses and skew poll results.³¹⁴ Examples include:

- Use of Loaded Words³¹⁵
 - “Do you support killing babies?” versus “Do you support a woman’s right to terminate an unwanted pregnancy?”
 - The public is much more likely to support spending for the “poor” than spending for “welfare.”

310. See ASHER, *supra* note 98, at 42.

311. See *id.* at 45.

312. See *id.*

313. See *id.*

314. See *id.* at 46.

315. See *id.* at 42.

- **Posing Argumentative Questions**

These questions often inform respondents with slanted background information, using either actual or hypothetical questions.³¹⁶ For example, Cambridge Research Associates asked the following question in a 1982 statewide survey on behalf of Ohio gubernatorial candidate William Brown:

“As you may know, in 1974, Jerry Springer [former mayor of Cincinnati and gubernatorial candidate], who had gotten married six months earlier, was arrested on a morals charge with three women in a hotel room. He also used a bad check to pay for the women’s services, and subsequently resigned as mayor of his city. Does this make you much more likely, somewhat more likely, somewhat less likely, or much less likely to support Jerry Springer for governor this year?”³¹⁷

- **Asking Compound Questions**

“ ‘Have you stopped using illegal drugs?’ ” is actually two questions—“ ‘Did you ever use illegal drugs in the past?’ ” and “ ‘Are you currently using illegal drugs?’ ”³¹⁸

- **Providing False or Misleading Information**

This includes the use of outright lies, distortions, innuendo, and misrepresentations to elicit specific responses or bias a respondent against a candidate.³¹⁹

Because the wording of a question is limited only by the ingenuity of the drafter, it is not practical to try to identify a push poll by question wording.

b) Order & Context

1) Order

The placement of a question can be significant.³²⁰ “Question order can dramatically affect responses to survey items by altering the

316. *See id.* at 47-48.

317. *Id.* at 48.

318. *See id.* at 44.

319. *See id.*

320. *See id.* at 52.

framework and context within which the question is answered.³²¹ Even with completely legitimate questions, depending on the subject, question order can encourage consistency in responses or divergence.³²² Consider the following two survey questions:

“Do you think the United States should let Communist newspaper reporters from other countries come in here and send back to their papers the news as they see fit? Do you think a Communist country like Russia should let American newspaper reporters come in and send back to America the news as they see it.”³²³

When asked in the order given, there was much less support for letting communist reporters come to the United States than when the questions were asked in reverse order.³²⁴ Why? Because it was difficult for the respondent to deny communist reporters the right to report from the United States if they had already supported allowing American reporters in Russia.³²⁵

Push pollsters know how to use question order to their advantage in influencing voters. One common technique is to ask a preference question at the beginning of a poll, provide negative information through intervening questions, and then ask a similar preference question at the end. The intervening questions—often lies, distortions, or misrepresentations—are designed to get the respondent to change his or her mind about supporting a particular candidate.³²⁶

2) Context

The substantive framework in which the questions are placed can affect responses.³²⁷ For example, a survey question eliciting opinions about expanding the deployment of U.S. military forces worldwide posed in the context of the successful bombing of Iraq would likely elicit more supportive responses than if it were placed in the context of a general survey on the huge national debt.³²⁸

Also, the social and political context at the time of the interview can alter responses to exactly the same question.³²⁹ For example, if the

321. *Id.*

322. *See id.*

323. *Id.* at 54.

324. *See id.*

325. *See id.*

326. *See generally id.* at 52-56.

327. *See id.* at 55.

328. *See id.*

329. *See id.* at 56.

preceding question about deploying U.S. forces worldwide were asked immediately following the June 1996 terrorist bombing of U.S. army barracks in Saudi Arabia, the same question would likely generate more negative responses than if it were asked prior to the bombing.

2. Sampling

“Sampling is the selection of a subset of respondents from a broader population. In a good sampling process this subset will be representative of the broad population.”³³⁰ Despite a common perception that slanted or loaded questions are the primary characteristic of a push poll, one of the keys to identifying push polls lies in the principles of sample design and sample size.³³¹ Push poll respondents are generally selected based on some particular demographic characteristic, such as age, race, sex or ethnicity.³³² In addition, push polls tend to contact an unjustifiably large number of respondents, far more than scientific survey principles would deem necessary or practical economic considerations would dictate prudent.

a) Sample Design

“The aim of a good sampling design is to select a sample that is appropriate for the research topic, and within the investigator’s budget.”³³³ Sampling is used “[b]ecause it is impossible to interview an entire population”—whether of the State of Florida, of all senior citizens, or of a particular district.³³⁴ “The key requirement of the sample is that it must enable the researcher to generalize from the sample results to the broader population.”³³⁵ In other words, the sample must be a *representative* one.

A key element in telephone sampling design involves selection of the sample frame. A sample frame is “the set of materials from which a sample of telephone households is selected” to be interviewed.³³⁶ After selecting a sample frame, the interviewer can either choose numbers randomly or systematically.³³⁷ A simple random sample means that

330. *Id.* at 57.

331. *See id.* at 57.

332. *See id.* at 58.

333. *Id.* at 58.

334. *Id.*

335. *Id.*

336. *See* James M. Lepkowski, *Telephone Sampling Methods in the United States*, in *TELEPHONE SURVEY METHODOLOGY* 73, 75 (Wiley Series in Probability and Mathematical Statistics 1988).

337. *See id.* at 77.

everyone has an equal chance of being selected.³³⁸ A systematic approach would involve choosing, for example, every ninth person from the sample frame.³³⁹

Originally, telephone directories served as sample frames. However, largely due to the proliferation of unlisted and unpublished telephone numbers (currently about 30% of the population, and growing), the use of telephone directories often does not yield a representative sample of the population being studied. Despite their shortcomings, telephone directories are still used in smaller community and local surveys because of their low cost.

Three major sample frames currently used for more sophisticated telephone surveys are Random Digit Dialing (RDD), Directory/List-Based Designs, and Multi-Frame Sampling.

RDD involves randomly generating the telephone numbers to be called.³⁴⁰ Typically, the area code and prefix (colloquially, "exchange") of desired respondents are known to the pollster. The pollster can then use a computer or random-number table to randomly select the suffix, or last four digits, of the phone number.³⁴¹ Both listed and unlisted numbers are generated in this way.³⁴² Theoretically, anyone within the area code and prefix being polled has an equal chance of being selected.³⁴³ This process is usually coupled with instructions to the interviewer about selecting particular respondents in each household contacted (i.e. oldest male in the first household, youngest female in the second household, etc.). RDD techniques generally provide a fairly representative sample.

Some basic geographic targeting of respondents is possible through RDD. However, the technique generally does not lend itself to push polling, which seeks to target specific respondents, since the interviewer does not know the precise demographics (i.e. race, religion, ethnicity, party affiliation, sex) of respondents prior to the call.³⁴⁴

The essence of Directory and List-Based Designs involves using some type of directory or list as the sample frame from which telephone numbers are selected.³⁴⁵ One type of commercial list commonly used

338. *See id.*

339. *See id.*

340. *See id.* at 81.

341. *See id.*

342. *See id.*

343. *See LAVRAKAS, supra* note 281, at 33.

344. Leyla Mohadjer, *Stratification of Prefix Areas for Sampling Rare Populations*, in TELEPHONE SURVEY METHODOLOGY 161, 173 (Robert M. Groves et al. eds., Wiley Series in Probability and Mathematical Statistics 1988) (stating that sample frames used for RDD are generally inadequate for the purpose of stratification).

345. *See Lepkowski, supra* note 336, at 78.

is the city directory.³⁴⁶ The city directory, along with other list-assisted procedures, is designed to simplify sampling operations or to enhance the efficiency of the RDD model.³⁴⁷

Other types of lists are better for targeting specific respondents. For example, a master address list provides detailed geographic information about potential respondents.³⁴⁸ It also may contain some demographic information which allows the interviewer to further stratify the sample by household characteristics such as income and household size.³⁴⁹

Stratification is the process of dividing the population into subsets, or strata, according to some characteristic of interest to the investigator.³⁵⁰ For example, a candidate might obtain a list of registered voters in his or her district who have children enrolled in public schools to poll on education issues. Then, the investigator can sample either randomly or systematically from the stratified list.³⁵¹

Other commercial lists can be used as a means to stratify, or target, respondents. One such list is available from Donnelley Marketing Information Services (DMIS), which combines telephone directory lists with state motor vehicle records to break down telephone prefixes demographically.³⁵² The proliferation of the Internet and other computer-based sources of information is likely to enhance the ability of commercial firms and pollsters to access or generate lists of respondents with particular demographic characteristics such as ethnicity, race, and sex.

Multi-frame sampling combines the previous two approaches. A sample is selected from a directory or commercial list frame. Simultaneously, an RDD sample is selected from the frame of all possible telephone numbers. Numbers are called in both samples and interviews attempted. Although the statistical theory underlying multi-frame sampling is beyond the scope of this report, suffice it to say that the results of the different sample frames are mathematically combined in an effort to reduce bias and produce a more reliable estimate of public opinion. The important point to remember about multi-frame sampling

346. *See id.*

347. A significant problem with a straight RDD model is the high number of unfruitful calls due to the fact that many of the numbers generated will be businesses (nationally, less than 25% of all possible numbers are *residence* numbers), will not be working, or will be disconnected or temporarily not in service. FOWLER, JR., *supra* note 281, at 31-32.

348. *See* Lepkowski, *supra* note 336, at 79.

349. *See id.*

350. *See id.* at 80.

351. *See id.*

352. *See* Mohadjer, *supra* note 344, at 163-64. DMIS lists, which are published annually, break down telephone prefixes by such factors as age, race, ethnicity, sex, and household income. *Id.*

in the context of push polls is that it employs a list or directory as a basis for at least one sample.

It is the stratification of certain directory and list-assisted sample frames and multi-frame sampling designs which allows push pollsters to reach a particular target audience—in essence, to be telemarketers. Targeting allows sponsors to tailor a more effective message, which results in more cost-effective advertising.³⁵³ However, it is important to note that targeting and stratification are not exclusive to push polls. Legitimate polls may target specific subsets of a population in order to obtain a sufficiently-large sample of respondents.³⁵⁴ It is important to note that list-assisted sample frames are rarely appropriate if the pollster is seeking to generalize results to the entire population, whether on a statewide or district-wide basis.³⁵⁵

b) Sample Size

How can a sample of 1,500 people accurately reflect the opinions of an entire nation? Although statistical and probability theories laboriously explain it, the best way to answer the question is to analogize statistical sampling to a blood test.³⁵⁶ You only need a few drops of blood from a patient to perform an accurate test for blood type, since any particular drop has properties identical to the rest of the patient's blood.³⁵⁷ In the same way, even a relatively small sample can approximate the population, provided the properties of the sample are representative of the broader population.³⁵⁸ Poorly selected large samples do not guarantee accurate results.³⁵⁹

Sample size tends to be driven by cost and the amount of acceptable statistical error.³⁶⁰ It is critical that the interviewer select a sample size that suits both the purpose and budget of the project, since the major cost in public opinion surveys is in interviewing the sample.³⁶¹

One major consideration which helps to determine sample size is how large a sampling error can be tolerated in the poll.³⁶² Sampling error is the difference between the sample estimates and the true population value. In other words, sampling error measures how much

353. See AAPOR Panel Discussion, *supra* note 4, at 3 (comment by Mr. McInturff).

354. See *infra* notes 368-71 and accompanying text (discussing legitimate respondent targeting).

355. LAVRAKAS, *supra* note 281, at 23.

356. See ASHER, *supra* note 98, at 64.

357. *See id.*

358. *See id.*

359. *See id.*

360. *See id.*

361. *See id.*

362. *See id.*

the poll can be "off." This is a familiar measurement to many; the media often quotes the sampling error when reporting poll results.

For example, a September 1996 presidential preference poll of 809 randomly-selected registered Florida voters by the Mason-Dixon Political/Media Research Inc. had an overall sampling error of plus or minus three and one-half percent.³⁶³ The poll showed President Clinton leading in Florida with forty-seven percent compared to Bob Dole's forty-two percent.³⁶⁴ Factoring in the three and one-half percent sampling error, the actual figures for the President were likely to be between 43.5 percent and 50.5 percent (47 percent plus or minus 3.5 percent). How likely it is that the actual value will fall in this range is measured by the confidence level. A confidence level of ninety-five percent is typically used, which means that if 95 out of 100 samples were selected, those favoring the President would have ranged from 43.5 percent to 50.5 percent.

Sampling error can be reduced by increasing the sample size with additional representative respondents; however, the incremental increase in accuracy is often not worth the additional interviewing costs.³⁶⁵ A four percent overall sampling error is usually considered acceptable to balance the need for accuracy with the costs of interviewing.³⁶⁶

There are at least two important caveats which apply. The four percent average sampling error in some cases may be too high. In addition, the sampling error for subsets of the sample can be substantially higher.³⁶⁷

First, a four-percent sampling error, or 3.5 percent in the case of the September 1996 Mason-Dixon presidential preference poll, may be unacceptably high. The Mason-Dixon poll showed the President with between 43.5 percent and 50.5 percent of the vote. Mr. Dole's support ranged from 38.5 percent to 45.5 percent (42 percent \pm 3.5 percent). Therefore, Mr. Dole may actually have been ahead in Florida despite the fact that the poll showed President Clinton with a five-point lead (47 percent) at the time the survey was taken. (Clinton's actual number might have been as low as 43.5 percent while Dole's support could have been as high as 45.5 percent.) The sampling error causes the poll results to be inconclusive. If greater accuracy were desired, the pollster would have to use a larger sample size to reduce the sampling error.

363. Michael Griffin, *Poll: Women Giving Clinton Edge in State*, ORLANDO SENTINEL, Sept. 20, 1996, at A1.

364. *Id.*

365. See DELANEY, *supra* note 2, at 204 (stating bigger is not always worth the price in terms of statistical accuracy). The margin of error for a sample of 1200 respondents is only about one percent (1%) less than for a sample of 600. *Id.* at 205.

366. See ASHER, *supra* note 98, at 65.

367. *See id.*

Second, as the original sample is increasingly divided into smaller and smaller subsets, the sampling error for each subset goes up. For example, the overall sampling error in the Mason-Dixon poll was 3.5 percent, based on interviews with 809 registered Florida voters. The sampling error for non-Hispanic whites, making up 645 of the 809 interviews, was 3.9 percentage points.³⁶⁸ The sampling error for non-Hispanic, white Democrats increased to 5.8 percent.³⁶⁹

If the sampling error is expected to be too high for a particular subset of interest, it is often more cost-efficient to target the subset in the sampling design process rather than to conduct hundreds or possibly thousands of extra interviews to get a sufficient number in the target group.³⁷⁰ For example, if the Mason-Dixon pollsters were primarily interested in the opinions of Hispanic, female Republicans, they would probably have created or obtained a list of potential Hispanic voters instead of conducting a random sample throughout Florida. Another way to locate Hispanic voters would be through geographic stratification—targeting telephone interviews to counties with large Hispanic populations, such as Dade or Hillsborough, by selecting area codes and telephone exchanges in those areas.³⁷¹ Either approach would have increased the likelihood of reaching Hispanic voters.

368. Griffin, *supra* note 363.

369. *Id.*

370. See Mohajer, *supra* note 344, at 161 (stating that using RDD to sample rare populations is often very costly because of the extensive screening necessary to obtain a sufficient number of respondents).

371. *Id.*

