

State Regulation of Political Robocalls: New Hampshire Leads the Way in Enforcement

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With the 2011 off-year elections approaching and the 2012 presidential primaries just around the corner, candidates, political committees, corporations and trade associations planning to make prerecorded political messages by telephone (a.k.a. automated calls or robocalls) must be aware of the myriad federal and state regulations in this area. Many states - as well as the federal government - impose disclosure, disclaimer and other requirements on the caller.

Perhaps nowhere are the consequences of violating these laws more apparent than in New Hampshire. In that state, a prerecorded political message must identify the name of the candidate or organization the caller is calling on behalf of as well as the name of the person or organization paying for delivery of the message. Of equal importance, such disclosures must occur in the first 30 seconds of the audio message. To back up these requirements, there is a civil penalty of \$5,000 per violation of New Hampshire's political robocall law.

A very recent enforcement action involving these laws concluded with an August 29, 2011 consent agreement signed by the New Hampshire Attorney General and the New Hampshire Democratic Party (the N.H. Democratic Party). The agreement resolved a complaint stemming from the N.H. Democratic Party's delivery of prerecorded political audio messages on September 13, 2010 involving then-state representative Bill O'Brien. According to the consent agreement, the messages were delivered through a third-party vendor to 394 New Hampshire households and contained the voice of N.H. Democratic Party Chairman Ray Buckley discussing Bill O'Brien. The consent agreement notes that the audio message at

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issue failed to include the name of the person or organization paying for delivery of the messages. As part of the settlement agreement, the state party paid a \$5,000 fine.

New Hampshire also is relatively unique in that it separately prohibits anonymous push polling. A "push poll" is campaign advocacy call, either automated or live, that presents itself as a legitimate research poll, but has questions and answers structured so as to influence or "push" the views of the recipient in a particular direction.

In order for a call to be considered a push poll in New Hampshire, the following three conditions must be met:

1. The call is on behalf of, in support of, or in opposition to any candidate for public office;
2. The recipient is asked questions relative to opposing candidates which state, imply or convey information about the candidate's character, status, record or political stance; and
3. The call is conducted in a manner likely to be construed by the voter to be a survey or poll to gather statistical data for entities that are independent of any political party, candidate or interest group.

Push poll calls are only legal in New Hampshire if certain identification disclaimers are included at the beginning of the calls.

The Attorney General's Office in New Hampshire has historically investigated and taken push polling complaints seriously. Wiley Rein professionals have expertise both in prospectively advising clients about the requirements under New Hampshire's laws as well as in representing various entities before the Attorney General's Office concerning these laws.