

March 10, 2000

Representative Max Williams
12103 SW 135th Ave.
Tigard, Oregon 97223

Dear Representative Williams:

You have asked whether the limits set by ORS 244.040 (2) and (5) on gifts to members of the Legislative Assembly and their relatives are constitutional under the free expression provisions of Article I, section 8, of the Oregon Constitution. We believe the gift limits are likely unconstitutional under Article I, section 8.

As we describe below, we conclude that gifts addressed by ORS 244.040 are expression protected by Article I, section 8, that the gift limits are focused on the content of speech per se and not on some forbidden effect that may be regulated, and that the resulting restriction of expression is not saved by any historical exception or incompatibility exception.

We note that the gift limits in ORS 244.040 were originally referred by the Legislative Assembly and adopted by the people in 1974, and further amended by the Legislative Assembly in 1975. Both laws became effective prior to the Oregon Supreme Court's adoption of its current methodology for analyzing laws under Article I, section 8.

We also note that you have asked for an analysis under the Oregon Constitution and not the First Amendment to the United States Constitution. Under jurisprudence of the United States Supreme Court, the gift limits in ORS 244.040 might very well be upheld under the First Amendment.

The Law

ORS 244.040 (2) and (5) provide:

(2) No public official or candidate for office or a relative of the public official or candidate shall solicit or receive, whether directly or indirectly, during any calendar year, any gift or gifts with an aggregate value in excess of \$100 from any single source who could reasonably be known to have a legislative or administrative interest in any governmental agency in which the official has or the candidate if elected would have any official position or over which the official exercises or the candidate if elected would exercise any authority.

...

(5) No person shall offer during any calendar year any gifts with an aggregate value in excess of \$100 to any public official or candidate therefor or a relative of the public official or candidate if the person has a legislative or administrative interest in a governmental agency in which the official has or the candidate if elected would have any official position or over which the official exercises or the candidate if elected would exercise any authority.

"Gift" is defined in ORS 244.020 (8).¹ Certain items are excluded from the definition of "gift," such as campaign contributions, gifts from family members and certain food, beverage, travel, lodging and entertainment expenses. "Public official" is defined in ORS 244.020 (15)² and includes members of the Legislative Assembly. "Relative" is defined in ORS 244.020 (16)³ and includes the spouses of members of the Legislative Assembly.

Article I, section 8, of the Oregon Constitution provides:

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

Article I, section 8, Analysis

In *State v. Robertson*, 293 Or. 402, 649 P.2d 569 (1982), the Oregon Supreme Court established a basic framework for determining whether a law violates Article I, section 8. The framework separates laws that affect speech into three categories. In *City of Eugene v. Miller*, 318 Or. 480, 488, 871 P.2d 454 (1994), the court summarized the analysis as described in

¹ ORS 244.020 (8):

(8) "Gift" means something of economic value given to a public official or the public official's relative without valuable consideration of equivalent value, including the full or partial forgiveness of indebtedness, which is not extended to others who are not public officials or the relatives of public officials on the same terms and conditions; and something of economic value given to a public official or the public official's relative for valuable consideration less than that required from others who are not public officials. However, "gift" does not mean:

(a) Campaign contributions, as described in ORS chapter 260.

(b) Gifts from family members.

(c) The giving or receiving of food, lodging and travel when participating in an event which bears a relationship to the public official's office and when appearing in an official capacity, subject to the reporting requirement of ORS 244.060 (6).

(d) The giving or receiving of food or beverage if the food or beverage is consumed by the public official or the public official's relatives in the presence of the purchaser or provider thereof.

(e) The giving or receiving of entertainment if the entertainment is experienced by the public official or the public official's relatives in the presence of the purchaser or provider thereof and the value of the entertainment does not exceed \$100 per person on a single occasion and is not greater than \$250 in any one calendar year.

² ORS 244.020 (15):

(15) "Public official" means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services.

³ ORS 244.020 (16):

(16) "Relative" means the spouse of the public official, any children of the public official or of the public official's spouse, and brothers, sisters or parents of the public official or of the public official's spouse.

Robertson and State v. Plowman, 314 Or. 157, 838 P.2d 558 (1992), cert. denied, 508 U.S. 974, 113 S. Ct. 2967 (1993):

The first *Robertson* category consists of laws that “focus on the content of speech or writing” or are “written in terms directed to the substance of any “opinion” or any “subject” of communication.” *State v. Plowman, supra*, 314 Or. at 164, 838 P.2d 558 (quoting *State v. Robertson, supra*, 293 Or. at 412, 649 P.2d 569) (emphasis in original). Laws within that category violate Article I, section 8, “unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.” *State v. Robertson, supra*, 293 Or. at 412, 649 P.2d 569. The second *Robertson* category consists of laws that “focus[] on forbidden effects, but expressly prohibit[] expression used to achieve those effects.” *State v. Plowman, supra*, 314 Or. at 164, 838 P.2d 558. Laws in that category “are analyzed for overbreadth.” *Ibid.* Finally, the third *Robertson* category consists of laws that “focus[] on forbidden effects, but without referring to expression at all.” *Ibid.* Laws within the third category are analyzed to determine whether they violate Article I, section 8, as applied. *State v. Robertson, supra*, 293 Or. at 417, 649 P.2d 569.

Our analysis first considers whether gifts covered by ORS 244.040 are protected expression under Article I, section 8. If we find that the gifts are protected expression, we will then apply the methodology described in *Robertson*.

Note also that for purposes of this opinion, we do not think there is a difference under Article I, section 8, between gifts made to members of the Legislative Assembly and gifts made to relatives of the members. We have not analyzed such gifts separately. The principal reason a person with a “legislative interest” would give a gift to a relative of a member is to communicate with, influence or otherwise obtain the good will of the member. As such, we think a gift to a relative has the same communicative content as a gift made directly to the member.

1. Are gifts to members of the Legislative Assembly and their relatives protected expression under Article I, section 8?

We believe most of the gifts limited by ORS 244.040 are protected expression. For purposes of this analysis, we acknowledge that some “gifts” limited by ORS 244.040, such as bribes, may not be expression protected by Article I, section 8. Our discussion is not intended to cover gifts that involve bribery or other conduct that may otherwise be regulated.

First, we think most of the gifts limited by ORS 244.040 will be considered “lobbying” for purposes of Article I, section 8. We reach this conclusion because ORS 244.040 applies only to gifts from persons with a “legislative interest.” A gift is limited only if there is some *political advocacy* associated with the gift. A gift that has no connection to legislative activity is not covered. Further, Oregon law defines “lobbying” as including attempts to “obtain the good will of

legislative officials.”⁴ We think the giving of a gift by a person with a legislative interest to a member of the Legislative Assembly or a member’s relative is clearly an effort to “obtain the good will” of a legislative official. In sum, the gift limits apply only to persons who want to communicate with a member of the Legislative Assembly, through a gift, for a political purpose. The giving of the gift, by definition, pertains to, and is designed to influence, legislative action. Therefore, the gifts involve lobbying.

Second, lobbying is protected expression under Article I, section 8. In *Fidanque v. State ex rel. Oregon Government Standards and Practices Commission*, 328 Or. 1, 969 P.2d 376 (1998), the Oregon Supreme Court struck down a \$50 lobbyist registration fee under Article I, section 8. The court said, “Lobbying is political speech, and being a lobbyist is the act of being a communicator to the legislature on political subjects.” 328 Or. at 7. The court noted that obtaining the good will of legislative officials is bound up closely with the essential expressive nature of the profession and said, “Lobbying is expression [] for the purposes of the first *Robertson* category.” 328 Or. at 8.

We found several cases that address whether gift giving by lobbyists involves constitutionally protected expression. In *U.S. v. Sawyer*, 85 F.3d 713 (1st Cir. 1996), the United States Court of Appeals for the First Circuit addressed a lobbyist’s alleged violations of a similar Massachusetts gift statute (which was *not* challenged on constitutional grounds). The court said that endeavors by a lobbyist to develop contacts with legislators, including goodwill entertaining, with the goal of persuading and influencing legislators to benefit certain interests, are protected by the First Amendment. See 85 F.3d at 731.

In *Fair Political Practices Commission v. Superior Court of Los Angeles County*, 25 Cal. 3d 33, 599 P.2d 46, *cert. denied*, 444 U.S. 1049, 100 S. Ct. 740 (1980), the California Supreme Court upheld a law limiting gifts from lobbyists to \$10 per month against a First Amendment challenge. The court held that the gift limit was not a *direct* limit on the right to petition government under the First Amendment and said that the limit affected only the *form* of lobbyists’ ability to petition and that the gift limit did not have a “real and appreciable impact on the legitimate exercise of the rights of petition and speech.” See 25 Cal. 3d at 47, 48. For purposes of this analysis, the key point is the court’s statement that a gift limit does constitute a limitation on petition and speech rights, even though the court upheld the California law under the United States Constitution by finding the limitation was not substantial under the First Amendment. See 25 Cal. 3d at 47.

Third, there is a strong connection between the giving of gifts to members of the Legislative Assembly and their relatives and the giving of political campaign contributions. Political contributions are protected expression under Article I, section 8. See *VanNatta v. Keisling*, 324 Or. 514, 931 P.2d 770 (1997). Both gifts and campaign contributions are expressions of support made for political reasons. The act of giving is the protected expression.

In *VanNatta*, the court concluded that “many—probably most—” contributions to political campaigns and candidates are a form of expression under Article I, section 8. 324 Or. at 522. The court said that political contributions are:

⁴ ORS 171.725 (7):

(7) “Lobbying” means influencing, or attempting to influence, legislative action through oral or written communication with legislative officials, solicitation of others to influence or attempt to influence legislative action or attempting to obtain the good will of legislative officials.

protected as *an expression by the contributor* . . . the contribution, in and of itself, is *the contributor's expression of support for the candidate or cause*—an act of expression that is completed by the act of giving and that depends in no way on the ultimate use to which the contribution is put. 324 Or. at 522. (Emphasis in original.)

In its brief in *VanNatta*, as part of its argument that gifts of money are *not* expression, the state said:

The assumption that giving a gift of money to a candidate is protected expression necessarily implicates laws governing government standards and practices. When a gift becomes speech because it is a “general expression of support,” it is impossible to find a meaningful distinction between a gift of money to the candidate (who may, after all, be running for *re-election*) and a gift of money to an elected official. The level at which the court analyzes campaign contributions therefore implicates, for example: ORS 244.040 (5), which prohibits the offer of a gift with a value in excess of \$100 to an official; ORS 244.040 (2), which prohibits accepting such a gift; ORS 244.040 (1)(b) and (c) governing honoraria to public officials; and ORS 244.045, which limits the employment and lobbying activities of former public officials. (Respondent’s brief, page 30, footnote 31.)

We believe the *VanNatta* court’s reasoning regarding the expressive content of campaign contributions will also apply to gifts made to members of the Legislative Assembly or their relatives by persons with a “legislative interest.” That is, such a gift is an expression of general support of an officeholder or cause and is itself a particular political message protected by Article I, section 8.

Finally, we recognize that certain “gifts” made to members of the Legislative Assembly or their relatives will not be protected expression under Article I, section 8, and may be limited by law. For example, in *VanNatta* the court said the “law may prohibit certain forms of contributions such as giving bribes.” 324 Or. at 524. Further, in footnote 10, after stating that “many—probably most—” contributions to political campaigns and candidates are a form of expression under Article I, section 8, the court said:

We qualify our statement with the limiting word, “many,” because there doubtless are ways of supplying things of value to political campaigns or candidates that *would have no expressive content or that would be in a form or from a source that the legislature otherwise would be entitled to regulate or prevent*. To give but a few examples: A bribe may be an expression of support (with an anticipated quid pro quo), but it is not protected expression; a gift of money to a candidate from a corporation or union treasury may be expression but, if it is made in violation of neutral laws regulating the fiscal operation of corporations or unions, it is not protected; a donation of something of value to a friend who later,

and unexpectedly, uses that thing of value to support the friend's political campaign is not expression. (Emphasis added.)

However, ORS 244.040 is not targeted only at gifts that have no expressive content or only at gifts that flow from transactions that may otherwise be regulated. Instead, ORS 244.040 covers *all* gifts from persons with a legislative interest. The statute limits both gifts, such as bribes, that do not involve protected expression and gifts that convey a political message and that are protected expression. Further, as described below, the general desire to prevent corruption or the appearance of corruption is not a sufficient basis for limiting all gifts to members of the Legislative Assembly or their relatives.

2. Are the gift limits in ORS 244.040 category one laws under *Robertson*? Do they focus on the content of speech? Are they written in terms directed to the substance of any opinion or subject of communication?

The ORS 244.040 gift limits appear to be category one laws as described in *Robertson*. The law is targeted at the content of speech, *i.e.*, support of a member of the Legislative Assembly for political reasons. As such, the limits are directed at protected expression *per se* and not to any harm. The law limits certain identified expression regardless of the specific nature of the communication or the effects the communication produces. No distinction is made between gifts made to develop "good will" and gifts made to ensure a particular official act or result.

In both *VanNatta* and *Fidanque*, the Oregon Supreme Court examined laws whose purposes were to protect the integrity of the elections and legislative processes. In each case, the court found that the laws fit within the first *Robertson* category as statutes addressed not to a harm, but to speech *per se*. See Op. Att'y Gen. No. 8266, March 10, 1999.

In *Fidanque*, the court found that a fee imposed on lobbyists had the effect of limiting lobbying and therefore was a direct restraint on protected expression. The court said that "[l]obbying is expression, for the purposes of the first *Robertson* category." 328 Or. at 8. The court described lobbying as political speech and said that "being a lobbyist is the act of being a communicator to the legislature on political subjects." 328 Or. at 7. The court also said that lobbyists are defined, in part, by their involvement in attempting to obtain the good will of legislative officials and that such attempts are "bound up closely with the essentially expressive nature of the profession." 328 Or. at 7-8. Thus, since a lobbying fee restricted lobbying, it also restricted expression. The same reasoning applies to the gift limit. Most gift giving limited by ORS 244.040 involves protected expression. A law that directly limits gifts therefore directly limits expression *per se* and fits within the first *Robertson* category.

In *VanNatta*, the court decided that the laws imposing contribution limits were targeted at the content of speech, *i.e.*, political support for a candidate, and fell under the first level of Article I, section 8, scrutiny. 324 Or. at 537. Regarding contribution limits and prohibitions, the court said, "By their terms, those provisions are targeted at protected speech." 324 Or. at 537-538.

As in *VanNatta*, the ORS 244.040 gift limits are targeted expressly at the content of speech, *i.e.*, support for an officeholder for political reasons. Gifts from persons with a legislative interest to members of the Legislative Assembly or their relatives are protected expression. ORS 244.040 limits that expression. Therefore, the gift limits are speech-focused and fall under the first level of Article I, section 8, scrutiny.

3. Does any historical exception apply to save the gift limit?

No. We did not find any historical exception that removes the restrictions on expression represented by the gift limits in ORS 244.040 from the protection of Article I, section 8. We did find "bribery" laws enacted in 1864, but those laws will not provide a historical exception for the much broader restrictions of ORS 244.040.

As described in *Robertson*, a law that limits the substance of a subject of communication might nevertheless survive an Article I, section 8, challenge if it is "wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." 293 Or. at 412. In *Moser v. Frohnmayer*, 315 Or. 372, 845 P.2d 1284 (1993), the court said that "the 'party opposing a claim of constitutional privilege' has the burden of demonstrating that a restriction on speech falls within an historical exception." 315 Or. at 376, quoting *State v. Henry*, 302 Or. 510, 515-525, 732 P.2d 9 (1987).

In *VanNatta*, the court found no historical exception that would save political contribution limits. 324 Or. at 538. In footnote 23, the court said:

The earliest indication that we have found of Oregon's distrust of the role that money plays in the political process is the 1909 "Corrupt Practice Act Governing Elections." That Act prohibited certain corporations (such as banks and public utilities) from contributing to candidates. Title XXVII, ch. XII, § 3510. It also limited candidate expenditures to 15 percent of the annual salary for the elective office. *Id.* at § 3486.

The earliest statute we found that addresses gifts to holders of public office is in the General Laws of Oregon, 1845-1864, Criminal Code, sections 601 and 602,⁵ adopted October 1864 (page 550). These sections prohibit using gifts to "bribe" public officials. The statutes prohibit the "corrupt" giving of a gift with the intent to influence the vote of a public officer or with the intent to influence the officer to act in a particular manner or to produce or prevent any particular result. Further, section 622 prohibits lobbying members of the Legislative Assembly without disclosing the lobbyist's interest in the particular measure involved.

The 1864 laws can be distinguished from the gift limits in ORS 244.040 and do not provide the basis for a historical exception for ORS 244.040 (2) and (5). ORS 244.040 does not require any corrupt intent, intent to influence any vote, or intent to influence an officer to act in a particular manner or produce any particular result. ORS 244.040 is broader in its prohibition against all gifts that exceed \$100, regardless of any corrupt intent or the presence of any quid pro quo. While Oregon or federal law *might* contain a historical exception for laws prohibiting the bribery of public officials, there is *no* historical exception for the broader category of gifts covered by ORS 244.040. Note that bribery of public officials is already prohibited under ORS 162.015 and 162.025.

⁵ (The Deady laws can be traced to current ORS 162.015 and 162.025 (sections 179 and 180, chapter 743, Oregon Laws 1971). (See D&L- 612, H-1878, B&C-1878, LOL-2029, OL-2029, OC-14-405, OCLA-23-607 and ORS 162.220 and 162.230, both repealed by section 432, chapter 743, Oregon Laws 1971).

Finally, Article II, section 8, of the Oregon Constitution, directs the Legislative Assembly to enact laws that, among other things, prohibit undue influence in elections. We do not believe this section will provide any constitutional protection for the gift limits in ORS 244.040 or serve as the basis of a historical exception. In *VanNatta*, the court accepted that there is a difference between "elections" and "political campaigns." The court interpreted Article II, section 8, to apply only to *elections* and not to undue influence arising out of political contributions and expenditures during *political campaigns*. 324 Or. at 529. It follows that Article II, section 8, will not apply to allow limits on gifts to members of the Legislative Assembly or their relatives and will not supply a historical exception for gifts limited under ORS 244.040.

4. Does the incompatibility exception apply?

No. The acceptance of gifts by members of the Legislative Assembly is not *necessarily* incompatible with the performance of the duties of office. Actual harm to legislative office or the legislative process is not a "highly likely" effect at the time *each* gift exceeding \$100 is made.

Under the "incompatibility exception," expression that may not constitutionally be prohibited may be restrained because it is incompatible with the performance of one's special role or function. See, e.g., *In re Lasswell*, 296 Or. 121, 673 P.2d 855 (1983); *Oregon State Police Association v. State of Oregon*, 308 Or. 531, 783 P.2d 7 (1989) (Linde, J., concurring); and *In re Fadeley*, 310 Or. 548, 802 P.2d 31 (1990). Several requirements must be met for the incompatibility exception to apply: "[A] professional's speech must actually vitiate the proper performance of the particular professional's official function, under the facts of the specific case," *VanNatta* at 541; the incompatibility must be shown to be a highly likely result of the expression, *Lasswell* at 126; the incompatibility must be assessed at the time the expression occurs and not assumed at the time of enactment of the provision that restricts expression, *Fadeley*, 310 Or. at 582 (Unis, J., concurring in part, dissenting in part); and the speech in question must pose a serious and imminent threat to the process in which the speech is involved. *In re Schenck*, 318 Or. 402, 430, 870 P.2d 185 (1994).

In *Fadeley*, the court considered an Article I, section 8, challenge to provisions of the Code of Judicial Conduct that prohibited the personal solicitation of campaign contributions by a judge or judicial candidate. Citing the incompatibility exception, the court upheld the restriction on solicitations and said that the solicitation was incompatible with the profound public interest in a judiciary that is both honest in fact and honest in appearance. The court said:

A democratic society that, like ours, leaves many of its final decisions, both constitutional and otherwise, to its judiciary is totally dependent on the scrupulous integrity of that judiciary. A judge's direct request for campaign contributions offers a quid pro quo or, at least, can be perceived by the public to do so. Insulating the judge from such direct solicitation eliminates the appearance (at least) of impropriety and, to that extent, preserves the judiciary's reputation for integrity. 310 Or. at 563.

In *VanNatta*, the court rejected the argument that the incompatibility exception should remove campaign contribution limits from the protection of Article I, section 8. The court said that contribution limits do "not address specific cases of official misconduct, and it cannot be contended that the expression in question (contributions) actually impairs performance of, e.g.,

legislative functions in all cases There is no necessary incompatibility between seeking political office and the giving and accepting of campaign contributions." *VanNatta* at 541.

We believe the reasoning in *VanNatta*, and not the reasoning in *Fadeley*, will apply with respect to the gift limits in ORS 244.040. Thus, while fundraising by judicial candidates may threaten the integrity or the appearance of the integrity of the judiciary *in every case*, the giving of gifts to members of the Legislative Assembly and their relatives will not actually impair performance of legislative functions in *all cases*.

First, legislative and judicial offices and the decisions made by judges and legislators are inherently different. Judges make final decisions, including decisions on the constitutionality of statutes enacted by the Legislative Assembly. Legislators enact laws that are subject to judicial review. Moreover, legislative office is inherently more political than judicial office. Most *ex parte* contacts with judges are prohibited, while the Legislative Assembly is designed for political debate. Hence, the lobbying of members of the legislature, including efforts to develop good will, is a constitutionally protected activity. Further, judges are governed by the Code of Judicial Conduct, which, in part, is aimed at preventing the *appearance* of impropriety. In fact, both *Lasswell* and *Fadeley* involved professions governed by a separate set of professional rules. Legislators are not subject to a separate code of professional rules.

In his dissent in *Fadeley*, Justice Unis discussed some of the differences between judicial office and other offices:

I recognize that a state need not treat candidates for judicial office the same as candidates for other elective offices. A judicial office is different in key respects from other elective offices. The state may, subject to constitutional constraints, regulate the conduct of its judges with the differences in mind.

For example the contours of the judicial function make inappropriate the same kind of particularized pledges of conduct in office that are the very stuff of campaigns for most non-judicial offices. A candidate for the mayoralty can and often should announce his determination to effect some program, to reach a particular result on some question of city policy, or to advance the interests of a particular group. It is expected that his decisions in office may be predetermined by campaign commitment. Not so the candidate for judicial office. He [or she] cannot, consistent with the proper exercise of his [or her] judicial powers, bind himself [or herself] to decide particular cases in order to achieve a given programmatic result. Moreover, the judge acts on individual cases and not broad programs.

Morial v. Judiciary Com'n of State of Louisiana, 565 F.2d 295, 305 (5th Cir 1977), *cert. denied* 435 U.S. 1013, 98 S. Ct. 1887, 56 L.Ed.2d 395 (1978). A state may require candidates for judicial

office to maintain a higher standard of conduct than can be expected in other types of elective contests. Judges and lawyers are members of a responsible profession, and their adherence to their profession's ethical standards may require abstention from what, in other circumstances, would be constitutionally protected behavior. See, e.g., *In re Lasswell, supra*.

310 Or. at 589-590.

Second, ORS 244.040 does allow some gifts. Specifically, gifts with an aggregate value of \$100 or less per calendar year are allowed, as are items excluded from the definition of gift,⁶ such as certain expenses related to food, beverage, travel, lodging and entertainment. Since some gifts are allowed, it is difficult to argue generally that all gifts from persons with a legislative interest are necessarily incompatible with the integrity of the legislative process. The law does not state directly or infer any harm that occurs only with gifts whose value exceeds \$100.

Finally, as with contribution limits in *VanNatta*, the notion that gifts to elected officials are necessarily a bad thing and by themselves will lead to corruption, bribery or other impropriety is unsubstantiated in the law. There is no evidence that a highly likely effect of gift giving involving legislators is actual harm to any legislative office or the legislative process itself.

In sum, we do not denigrate the desirability of a Legislative Assembly that is free from corruption and the appearance of corruption. Further, the public's stake in an assembly that is honest in appearance and fact is also profound. However, we believe the incompatibility exception will not apply to save the gift limits in ORS 244.040 because giving and accepting gifts will not "actually vitiate the proper performance" of the duties of a member of the Legislative assembly in every case. Due to the nature of legislative office and the role that lobbying plays in the legislative process, gifts generally do not pose the same "serious and imminent threat to the process" as do fund-raising solicitations from a judge. There is no *necessary* incompatibility between holding legislative office and accepting gifts from persons with a legislative interest. The theory that gifts necessarily and inherently corrupt officeholders is not enough to support the incompatibility exception.

5. Are the gift limits in ORS 244.040 category two laws under *Robertson*? That is, is the law written in terms that are directed at a harm that may be proscribed, even though it expressly prohibits expression used to achieve the harm?

No. The gift limits in ORS 244.040 are directed at speech, not at a specified actual harm. The law does not identify a harm that may be regulated. It prohibits certain expression per se, regardless of whether it causes harm. Therefore, the gift limits in ORS 244.040 are not category two laws.

Category two consists of laws that focus on forbidden effects, but expressly prohibit expression used to achieve those effects. Category two laws are analyzed for overbreadth. *City of Eugene v. Miller*, 318 Or. 480, 488, 871 P.2d 454 (1994). A law may "expressly prohibit expression" in two ways: (1) The law identifies communicative conduct as a proscribed means of achieving a forbidden effect, or (2) The law does not explicitly refer to communicative conduct but can be violated only by means of expression. *Oregon State Bar v. Smith*, 149 Or. App. 171, 187, 942 P.2d 793 (1997).

⁶ See footnote 1.

Under decisions of the Oregon Supreme Court, in order to be "valid as a law that focuses on a harmful effect of speech, the law must 'specify expressly or by clear inference what "serious and imminent" effects it is designed to prevent.'" *Moser v. Frohnmayer*, 315 Or. at 379. The harm must be one that the legislature has a right to restrict or prohibit, *VanNatta* at 539, and the harm must necessarily result from the act of creating the expression. *State v. Stoneman*, 323 Or. 536, 546, 547, 920 P.2d 535 (1996). Finally, the statute must avoid overbreadth.

In *VanNatta*, the court rejected the argument that contribution limits and prohibitions were targeted at proscribing a particular harm that could be inferred. The harm was alleged to be "the existence of undue influence in the political process, or at least the appearance thereof." *VanNatta* at 539. The court said that the harm must be one that the legislature has a right to restrict or prohibit and that the harm necessarily has to occur by the act of creating the expression. *VanNatta* at 539.

With respect to the harm, the court said that "where expressive conduct is involved, the legislative target must be clear and a legally permissible subject of regulation or prohibition, and the means chosen to deal with it must not spill over into interference with other expression." The court also indicated that "the 'harm' that legislation aims to avoid must be identifiable from [the] legislation itself, not from social debate and competing studies and opinions." *VanNatta* at 539.

Finally, the court said that the harm alleged to be associated with political contributions did not necessarily occur each time a contribution was made. *VanNatta* at 540.

Similar reasoning applies to the gift limits. ORS 244.040 does not itself or in its statutory context identify any harm that a limit on gifts aims to avoid. Presumably, the law is aimed at bribery or corruption or the appearance thereof. But these harms are not named or implied within the statute itself. As indicated in *VanNatta*, it is not sufficient to select a general theory (i.e., that gifts to members of the Legislative Assembly or their relatives will result in corruption or undue influence in the legislative process) and label it as a harm. The law does not target a harm that the legislature has a right to restrict.

Assuming that bribery, corruption or undue influence in the legislative process are the "harms" targeted by the gift limits, ORS 244.040 does not clearly target those harms. The law sets a much broader target and also restricts gifts that are part of legitimate lobbying. These gifts involve no corrupt intent and do not threaten the integrity of legislative or administrative processes. In other words, the legislative target is imprecise, and ORS 244.040 spills over into interference with other protected expression. The law is overbroad.

Finally, ORS 244.040 does not proscribe expression only when it actually or necessarily produces, or is likely to produce, the harm. The limits presume that the harm will automatically follow from the expression. Expression will be penalized even when it does not produce any harm. This presumption makes the law speech-focused and not harm-focused. See Op. Att'y Gen. No. 8266, March 10, 1999.

- 6. Are the gift limits in ORS 244.040 category three laws under *Robertson*? Can the gift limits be treated as a law that focuses on forbidden effects without referring to expression at all? Can the law be applied without affecting protected expression?**

No. As described above, we believe that most of the gifts covered by ORS 244.040 involve protected expression and that the law is targeted at expression and not at a specific harm. In our view, the gift limits cannot be viewed as laws that do not refer to expression at all. Therefore, the gift limits in ORS 244.040 are not category three laws.

The third *Robertson* category consists of laws that focus on forbidden effects, but *without referring to expression at all*. Laws within this category must be analyzed to determine whether they violate Article I, section 8, as applied. *City of Eugene*, 318 Or. at 488. A category three law could be challenged on vagueness grounds or because the law, when applied in a particular case, extends to expression protected by Article I, section 8. *Oregon State Bar*, 149 Or. App. at 187.

For ORS 244.040 to fit within the third *Robertson* category, it would seem that a court must make several findings: First, that the gift limits are focused on forbidden effects, *i.e.*, targeted at a harm; and second, that the giving of gifts to members of the Legislative Assembly by persons with a legislative interest is not protected expression in every case.⁷

As described in the discussion of category two laws, we do not believe the gift limits in ORS 244.040 sufficiently target a "harm" or "forbidden effect" that may be restricted. Again, the harm is not identified in the law, the law is not narrowly tailored to address the likely harm, and the harm does not occur every time a gift is made.

If a court decided that the gift limits were directed at a harm rather than speech, the limits still could not be a category three law unless the court also found that gifts from persons with a legislative interest do not involve protected expression in every case.

Assuming a court got this far in a category three analysis, we believe ORS 244.040 would still be unconstitutional under Article I, section 8, as applied to gifts from lobbyists. In other words, gifts from persons with a legislative interest who are *not* registered lobbyists might not involve protected expression. But gifts from registered lobbyists with a legislative interest will involve protected expression. It is clear that the activities covered by the term "lobbying"⁸ include efforts to "obtain the good will of legislative officials" and that the giving of gifts⁹ by lobbyists can be part of those efforts. In *Fidanque*, the Oregon Supreme Court said that lobbying is political speech and "expression [] for purposes of the first *Robertson* category." 328 Or. at 7,8. As such, the gift limits in ORS 244.040, *as applied* to gifts from lobbyists, would be unconstitutional under Article I, section 8.

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⁷ This seems to be the only way the gift limits in ORS 244.040 could be viewed as laws that do not refer to expression, which is a necessary component of a category three law.

⁸ See footnote 4.

⁹ See footnote 1.

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city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

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