



State of New Jersey

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October 4, 2001

James Bopp, Jr., Esq.
Bopp, Coleson & Bostrom
1 South 6th Street
Terre Haute, Indiana 47807-3510

Advisory Opinion No. 10-2001

Dear Mr. Bopp:

Your request for advisory opinions on behalf of the National Right to Life Committee, Inc., (hereafter, NRLC), and the New Jersey Committee for Life, (hereafter, NJCL) concerning contemplated issue advocacy communications by those organizations was considered by the Commission at its meeting of October 4, 2001, and the Commission has directed me to issue the following response pursuant to the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 et seq. (hereafter, the Reporting Act). For the reasons stated herein, the Commission issues this opinion in response to the NRLC, but declines to issue an opinion in regard to NJCL.

Submitted Facts

You write that the primary purpose of the NRLC and NJCL is to administer and expend funds to encourage support for “pro-life issues, policies and programs.” Both organizations, you write, engage in “non-partisan voter education, including, but not limited to, voter guides, pamphlets, telephone calls, informative Internet sites, and television advertisements.” Each organization plans to spend at least \$1,500 within 90 days of the November 6, 2001 general election in this State on what you describe as “issue advocacy communications” to an audience substantially comprised of New Jersey voters. Specifically, you state as follows: “These issue advocacy communications will mention one or more gubernatorial candidates’ name and praise or criticize the candidate for his position on pro-life issues and actions while in office, without using express or explicit words advocating the election or defeat of a candidate.” You state that

the communications will not be coordinated with a candidate, and that neither organization has undertaken the proposed activity you describe.

The advisory opinion request forms submitted by NRLC and NJCL represent that the organizations do not currently file reports with the Commission. However, Commission records indicate that an entity under the name, "New Jersey Committee for Life, Inc., Political Action Committee," submitted a Continuing Political Committee (CPC) Registration Statement (Form D-4) on December 1, 1977, and has been filing reports as a CPC with the Commission since that date. The most recent report filed on behalf of the "New Jersey Committee for Life, Inc., Political Action Committee," with an identical address as that appearing on this request, was a Committee-Sworn Statement, filed on January 17, 2001, to the effect that the expenditures of the CPC would not exceed \$3,700 in the aggregate in the 2001 calendar year (Form A-3).

Because there is a potential discrepancy between the facts presented in the advisory opinion request form submitted on behalf of NJCL and the records of the Commission, the Commission respectfully must decline to issue any opinion concerning NJCL until such time as NJCL clarifies or otherwise amplifies its submitted fact record. Specifically, prior to addressing the questions submitted by NJCL, the Commission must be advised whether or not NJCL and "New Jersey Committee for Life, Inc., Political Action Committee," are identical or related organizations, a fact that could materially affect the outcome of the opinion. Further, the Commission must be advised whether or not any expenditure for the communications described in the NJCL advisory opinion request would be made from an account owned or otherwise controlled by an organization subject to reporting as a CPC in this State, or from funds solicited by an organization subject to reporting as a CPC in this State.

In regard to NRLC, the Commission has no record of that organization being registered or filing reports in this State as a CPC. Therefore the fact record appears complete and a response as to that organization is ripe pursuant to the advisory opinion provisions of the Reporting Act (see N.J.S.A. 19:44A-6f). Although seven separate questions have been submitted by NRLC, the central question as perceived by the Commission is whether or not issue advocacy advertising, as described in the submitted facts, gives rise to recordkeeping and reporting requirements under the Reporting Act.

Question Presented

Do issue advocacy expenditures undertaken by NRLC generate reporting or other requirements for NRLC under the Reporting Act?

Commission Response

Under the constitutional parameters for the protection of First Amendment rights of political expression established by the U.S. Supreme Court in its progenitor campaign finance opinion in Buckley v. Valeo, a communication made independently of any candidate or political committee must contain explicit words of advocacy of election or defeat of a candidate in order to be subject to the campaign recordkeeping and reporting requirements of federal or State legislation; Buckley v. Valeo, 424 U.S. 1, 40-45. This construction restricts application of reporting requirements to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." Buckley, at 44, note 52.

Mindful of that precedent, the Commission promulgated a rule specifically intended to comport with the express advocacy standard articulated by the U.S. Supreme Court in Buckley, *supra*, and reiterated in Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238 (1986); see Summary statement for proposed amended rule N.J.A.C. 19:25-11.10, Political communication, at 23 N.J.R. 1299 (a), May 6, 1991. That rule was subsequently recodified as N.J.A.C. 19:25-10.10, Political communication contributions (see 27 N.J.R. 312, adopted at 27 N.J.R. 1643, April 17, 1995), and sets forth the criterion for determining whether or not a communication falls within the ambit of express advocacy. Subsection (a) of that rule provides, as follows:

(a) The term "political communication" means any written or electronic statement, pamphlet, advertisement or other printed or broadcast matter or statement, communication, or advertisement delivered or accessed by electronic means, including, but not limited to, the Internet, containing an explicit appeal for the election or defeat of a candidate which is circulated or broadcast to an audience substantially comprised of persons eligible to vote for the candidate on whose behalf the appeal is directed. Words such as "Vote for (name of candidate)," "Vote against (name of opposing candidate)," "Elect (name of candidate)," "Support (name of candidate)," "Defeat (name of opposing candidate)," "Reject (name of opposing candidate)," and other similar explicit political directives constitute examples of appeals for the election or defeat of a candidate.

In the absence of words or text that fall within the ambit of subsection (a) as quoted above, a communication made by an organization cannot be a "political communication" under this subsection. The fact record submitted by NRLC states as a conclusion that the NRLC communications will be "issue advocacy communications." Specifically, NRLC states: "These issue advocacy communications will mention one or more gubernatorial candidates' names and praise or criticize the candidate for his position on pro-life issues and actions while in office, without using express or explicit words advocating the election or defeat of a candidate." (See Item 3. I., Pertinent Facts and Contemplated Activities, etc.). The NRLC has not submitted any further information on the precise wording of its contemplated communications, nor has it submitted any text or message against which the Commission might apply the "political communication" definition cited above. Consequently, while the Commission concurs that an issue advocacy communication cannot be subject to reporting as a "political communication" under N.J.A.C. 19:25-10.10(a), nothing contained in this opinion should be construed to express any opinion on whether or not a text or message which has not been submitted to the Commission by NRLC comes within the scope of "other similar explicit political directives" or otherwise comes within the rule.

The NRLC has brought to the attention of the Commission the Fourth Circuit holding in Perry v. Bartlett, 231 F.2d 155, 160 (4th Cir. 2000) in support of the proposition that the effect of the Supreme Court holding in Buckley is that a State may not regulate a communication merely because the communication "...mentions a candidate's stand on an issue." While the Commission appreciates having that opinion called to its attention, the broad proposition cited by NRLC does not address the text of any specific communication before the Commission. Further, that opinion is not controlling in New Jersey, and is only one of several federal and State court opinions that have applied the express advocacy criterion articulated in Buckley. Without endorsing or rejecting any of the following authorities, the Commission is aware, for example, that the holding in FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987), *cert. denied* 484 U.S. 850 (1987), found "express advocacy" in a communication that did not contain the precise words

listed by the U.S. Supreme Court in Buckley. Further, other Circuit Courts appear to have rejected the Furgatch reasoning, see Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991), *cert. denied* 502 U.S. 820 (1991) and Maine Right to Life Committee v. FEC, 914 F. Supp. 8 (D.Me. 1996), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997). While these authorities from other jurisdictions are instructive, the Commission is compelled only to apply its political communication rule at N.J.A.C. 19:25-10.10 as written and as consistent with the U.S. Supreme Court opinions previously noted.

The NRLC has also noted that subsection (b) of the “political communication” rule provides an alternative possibility for regulation over a communication, and reads as follows:

(b) A written statement, pamphlet, advertisement or other printed or broadcast matter or statement, communication, or advertisement delivered or accessed by electronic means, including but, not limited to, the Internet, that does not contain an explicit appeal pursuant to (a) above for the nomination for election or for the election or defeat of a candidate shall be deemed to be a political communication if it meets the following conditions:

1. through 3. (Deleted)

4. The production, circulation or broadcast of the communication, or any cost associated with the production, circulation or broadcast of the communication, has been made in whole or in part with the cooperation of, prior consent of, in consultation with, or at the request or suggestion of the candidate. (emphasis added)

The fact record submitted by NRLC states that the NRLC communications “...will not be coordinated with a candidate” (see Item 3. I., Pertinent Facts and Contemplated Activities, etc.). Since the facts as submitted are that the communications will not be coordinated with a candidate, paragraph 4 quoted above becomes controlling; that is, in the absence of coordination with a candidate Subsection 10.10(b) is not applicable to the NRLC communications.

The NRLC has cited N.J.A.C 19:25-12.7, Independent expenditures defined, and N.J.A.C 19:25-12.8, Reporting of independent expenditures, as rules with possible reporting implications for NRLC. However, subsections (a) and (b) of N.J.A.C 19:25-12.7 specifically provide that in order for an independent expenditure to be subject to reporting it must be made “...to support or defeat a candidate....” The fact record submitted by NRLC states that the communications will be “issue advocacy communications” (see Item 3. I., Pertinent Facts and Contemplated Activities, etc.). The Commission understands that fact statement to mean that the communications will not meet the criteria set forth in N.J.A.C. 19:25-10.10(a) or (b) for a “political communication,” quoted above. As a result, the Commission finds that such a communication cannot be construed “...to support or defeat a candidate...” within the meaning of the independent expenditure reporting rules at N.J.A.C 19:25-12.7 and 12.8.

Similarly, the NRLC has cited the definition of “political committee” in N.J.A.C 19:25-1.7, which in pertinent part, provides:

"Political committee" means any group of two or more persons acting jointly, or any corporation, partnership or any other incorporated or unincorporated association which is organized to or does aid or promote the nomination, election or

defeat of any candidate or candidates for public office, or which is organized to, or does aid or promote the passage or defeat of a public question in any election if the persons, corporation, partnership, or incorporated or unincorporated association raises or expends \$1,500 or more to so aid or promote the nomination, election or defeat of a candidate or candidates or the passage or defeat of a public question. (emphasis added)

Again, the NRLC fact record represents that its contemplated communications will not come under the ambit of “express advocacy.” Therefore, under that fact record, the contemplated NRLC communications do not “aid or promote” a candidate within the meaning of the “political committee” definition quoted above.

Finally, the NRLC notes that there are statutory and regulatory requirements for identification on political communications, and asks whether or not these are applicable to its contemplated issue advocacy communications. N.J.S.A. 19:44A-22.3 requires identification of a committee, group or person that “...makes, incurs or authorizes an expenditure for the purpose of financing a communication aiding or promoting the nomination, election or defeat of any candidate...” The Commission has promulgated rules at N.J.A.C. 19:25-13.1 *et seq.* to implement those statutory political identification requirements. However, that statute was specifically enacted in response to the U.S. Supreme Court opinion in McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) limiting political identification requirements to only those political communications subject to campaign reporting requirements; see the Legislative findings and declaration, at N.J.S.A. 19:44A-22.2. Accordingly, N.J.S.A. 19:44A-22.3 limits expenditures that come under the political identification requirement to those “...that the committee, group or person is required to report to the Election Law Enforcement Commission pursuant to (the Reporting Act)...” Therefore, since for the reasons discussed above the contemplated NRLC issue advocacy expenditures do not fall under the Reporting Act, neither do those expenditures come under the provisions of the political identification requirements cited herein.

Thank you for submitting this request, and for your interest in the work of the Commission.

Very truly yours,

ELECTION LAW ENFORCEMENT COMMISSION

By: _____

GREGORY E. NAGY

Legal Director

ELEC RECEIVED

SEP 24 2001



ADVISORY OPINION REQUEST

A person, committee or entity subject to, or reasonably believing he, she or it may be subject to, any provision or requirement of the Campaign Reporting Act may request that the Commission provide an advisory opinion pursuant to N.J.S.A. 19:44A-6. Such request must be in writing (please type or print) and must include the following:

1. This request for an Advisory Opinion is being submitted on behalf of:

Full Name of Person, Committee or Entity
National Right to Life Committee, Inc.

Mailing Address
419 7th Street, N.W., Suite 500

Day Telephone No.
202-626-8800

Washington, DC 20004-2293

Evening Telephone No.
fax 202-737-9189

2. Indicate if the above named person, committee or entity currently files reports with the Commission:

Yes [] No [X]

a. If yes, indicate in what capacity it is filing:

- Candidate committee [] Recall committee []
Joint candidates committee [] Recall defense committee []
Political committee [] Lobbyist []
Continuing political committee [] Legislative agent []
Political party committee [] Personal financial disclosure statement []
Legislative leadership committee [] Other (please describe): []

b. If no, indicate if the above named person, committee or entity has in the past filed reports with the Commission, giving elections (i.e., 1992 general election) or calendar years, and identify filing capacity:

The committee has not filed reports with the Commission in the past.

c. If reports are or were filed under a different name than that appearing in 1 above, provide that name:

[]

3. Please provide below a statement of the cognizable question of law arising under the Campaign Reporting Act, including specific citations to pertinent sections of the Campaign Reporting Act and Commission regulations (if known). See Attachment A.

[]

5. Please provide below a statement of the result that the person, committee, or entity seeks, and a statement of the reasoning supporting that result.

See Attachment C.

6. Person who is submitting request on behalf of committee or entity listed in Item 1 above:

Full Name: James Bopp, Jr.

Mailing Address:

Bopp, Coleson & Bostrom

Day Telephone No.

812-232-2434

One South Sixth Street

Evening Telephone No.

812-232-2434

Terre Haute, IN 47807-3510

Fax Number:

812-235-3685

a. Official Capacity of Person Requesting Opinion:

Candidate

Treasurer

Organizational Treasurer

New Jersey Attorney representing requesting person, committee or entity

Other (please describe): Indiana Attorney representing
requesting committees

7. ~~Whereby consent to an extension of the 10 day response period provided in N.J.S.A. 19:47A-6(b) is granted for a period of 30 days for Commission response which period shall start on the date of Commission receipt of the completed advisory opinion request. (CROSS OUT THIS PARAGRAPH IF CONSENT IS WITHHELD).~~

8. A request for an advisory opinion will not be considered filed until a fully completed and signed application is received by the Commission.

9/21/01

Dated:



Signature

Further, N.J.S.A. § 19:44A-22.3 states that:

“any group other than such a committee, or any person makes, incurs or authorizes an expenditure for the purpose of financing a communication aiding or promoting the nomination, election or defeat of any candidate or providing political information on any candidate which is an expenditure that the committee, group or person is required to report to the Election Law Enforcement Commission . . . , the communication shall clearly state the name and business or residence address of the committee, group or person, . . . , and that the communication has been financed by that committee, group or person.

Moreover, pursuant to N.J.A.C. § 19:25-12.7(c), “[a] communication that is paid for by means of an ‘independent expenditure’” shall include a disclaimer as required in N.J.A.C. § 19:25-13. An “independent expenditure” communication must include a political identification statement stating the name and address of the committee, person or group, clearly state that the committee, person or group financed or “paid for” the communication and include an additional statement, mandated by N.J.A.C. § 19:25-13.3.

In addition, N.J.A.C. § 19:25-13.2 requires that whenever “a person or group making independent expenditures pursuant to N.J.A.C. § 19:25-12.8, makes, incurs or authorizes an expenditure for the purpose of financing a communication aiding or promoting the nomination, election or defeat of any candidate which is an expenditure that the . . . person or group is required to report pursuant to the Act, the communication shall clearly state the name and business or residence address of the . . . person or group, . . . and the communication shall clearly state that the communication has been paid for by that . . . person or group.”

- Question 1.** **Would expenditures by NRLC or NJCL on “issue advocacy”, as described above, be considered communications that “aid or promote” the election or defeat of a candidate?**
- Question 2.** **If the answer to question 1 is affirmative, then if NRLC or NJCL made separate expenditures of at least \$1,500 on “issue advocacy,” would such expenditures make NRLC or NJCL a “political committee” under N.J.A.C. § 19:25-1.7 even if their major purpose is not to “aid or promote” the election or defeat of a candidate, i.e., expend more than 50 percent of its disbursements to aid or promote the election or defeat of a candidate?**

4. **Please provide below a full and complete statement of all pertinent facts and contemplated activities that are the subject of the inquiry. Your statement must affirmatively state that the contemplated activities have not already been undertaken by the person, committee or entity requesting the opinion, and that the person, committee or entity has standing to seek the opinion, that is the opinion will affect the person's or committee's reporting or other requirements under the Act. (Attach additional sheets if necessary).**

In anticipation of making certain communications regarding the gubernatorial race during this 2001 election season, NRLC and NJCL would like an advisory opinion concerning the application of certain election law statutes and regulations. Such an opinion is necessary so that NRLC and NJCL can be fully apprised of their responsibilities under the statutes/regulations. Such opinion will affect NRLC and NJCL's reporting or other requirements under the Act. NRLC and NJCL's specific questions are set forth in question 3.

Pertinent Facts and Contemplated Activities

NRLC and NJCL's primary purpose is to administer and expend funds to encourage support, among the general public, for pro-life issues, policies and programs. NRLC and NJCL also engage in non-partisan voter education including, but not limited to, voter guides, pamphlets, telephone calls, informative Internet sites, and television advertisements.

NRLC and NJCL plan separately to spend at least \$1,500 within 90 days of the November 2001 general election on issue advocacy communications to an audience substantially comprised of persons eligible to vote in the New Jersey gubernatorial election. These issue advocacy communications will mention one or more gubernatorial candidates' name and praise or criticize the candidate for his position on pro-life issues and actions while in office, without using express or explicit words advocating the election or defeat of a candidate. Such communications will not be coordinated with a candidate. NRLC and NJCL have not already undertaken the foregoing proposed activities.

Tornillo, 418 U.S. 241, 258 (1974); *Clifton v. FEC*, 114 F.3d 1309, 1313 (1st Cir. 1997).

Statement of Result NRLC and NJCL Seek and Statement of Reasoning Supporting Result for Question 4.

NRLC and NJCL take the position that such communications are constitutionally protected issue advocacy and cannot be regulated at all; thus, such “issue advocacy” should not be considered “political communications.” Issue advocacy is afforded absolute protection under the Constitution. *Buckley*, 424 U.S. at 79. Factors contextually external to the words actually expressed are irrelevant to whether a communication expressly advocates the election or defeat of a candidate.

Statement of Result NRLC and NJCL Seek and Statement of Reasoning Supporting Result for Question 5.

NRLC and NJCL take the position that such communications are constitutionally protected issue advocacy and cannot be regulated at all. Issue advocacy is afforded absolute protection under the Constitution. *Buckley*, 424 U.S. at 79.

Statement of Result NRLC and NJCL Seek and Statement of Reasoning Supporting Result for Question 6.

NRLC and NJCL take the position that such communications are constitutionally protected issue advocacy and cannot be regulated at all; thus, such “issue advocacy” should not be considered “independent expenditures.” Issue advocacy is afforded absolute protection under the Constitution. *Buckley*, 424 U.S. at 79.

Statement of Result NRLC and NJCL Seek and Statement of Reasoning Supporting Result for Question 7.

NRLC and NJCL takes the position that such communications are constitutionally protected issue advocacy and cannot be regulated at all. Issue advocacy is afforded absolute protection under the Constitution. *Buckley*, 424 U.S. at 79; *see also McIntyre*, 514 U.S. at 346-350. Further, “a person has a First Amendment interest in not being compelled to make statements he does not wish to make.” *Yes For Life Political Action Comm. v. Webster*, 84 F. Supp. 2d 150, 152 n.3 (D. Me. 2000) (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573-574 (1995)); *Miami Herald Publ’g. Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *Clifton v. FEC*, 114 F.3d 1309, 1313 (1st Cir. 1997).