



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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October 18, 2001

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

Advisory Opinion No. 11-2001

Dear Mr. Bopp:

Your request for an advisory opinion on behalf of the New Jersey Committee for Life concerning contemplated issue advocacy communications by that organization was considered by the Commission at its meeting of October 18, 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). Because the facts and issues presented in your request are similar to those addressed in Advisory Opinion 10-2001, issued on October 4, 2001 to you on behalf of the Natrional Right to Life Committee, Inc. (hereafter, NRLC), that opinion is incorporated by reference in this response and a copy is attached.

Submitted Facts

In your letter to the Commission dated October 5, 2001, and received by the Commission on October 10, 2001, you submitted an amplified fact record on behalf of the New Jersey Committee for Life (hereafter, NJCL), and your letter is hereby incorporated in this request. In Advisory Opinion 10-2001, at page 2, the Commission declined to issue an opinion to NJCL because NJCL's fact record represented that NJCL did not file reports with the Commission, but Commission records indicated that an entity under the name "New Jersey Committee for Life, Inc., Political Action Committee," at the same address as that given for NJCL, was filing reports as a continuing political committee. NJCL in this request is renewing its request for an opinion pursuant to the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 et seq. (hereafter, the Reporting Act), concerning contemplated issue advocacy communications NJCL anticipates making prior to the November 6, 2001 general election in this State.

In your letter, you represent that NJCL and the New Jersey Committee for Life Political Action Committee (hereafter, NJCLPAC) are “separate, but related” organizations. You write that both organizations share the same physical address, but are “separate legal entities.” Specifically, NJCLPAC maintains a separate organizational depository (as required by N.J.A.C. 19:25-4.5(a)) and does not commingle its funds with NJCL’s funds. Solicitations made by NJCLPAC are deposited in NJCLPAC’s organizational depository, and the contemplated “issue advocacy expenditures for communications” by NJCL would not be made from an account owned or controlled by NJCLPAC and would not be made from funds solicited by NJCLPAC. You conclude: “Consequently, NJCL is a separate entity from NJCLPAC and its ensuing issue advocacy communications and expenditures are not related to NJCLPAC.”

In all other respects, the facts submitted are identical to those submitted by NJCL in Advisory Opinion 10-2001 (attached), and therefore are not repeated here. The questions presented are also identical to those in Advisory Opinion 10-2001, except that one additional question has been presented and is addressed below.

Question Presented

Do issue advocacy expenditures undertaken by NJCL generate reporting or other requirements for NJCL pursuant to the Reporting Act?

Commission Response

The Commission finds that the amplified fact record clarifies the issues raised in Advisory Opinion 10-2001, and accordingly NJCL can be treated for purposes of this opinion as a separate organization entitled to make expenditures for issue advocacy communications as set forth in Advisory Opinion 10-2001 without coming under the requirements of the Reporting Act. Critical to this determination is the fact record submitted by NJCL to the effect that the funds of NJCL and NJCLPAC are not commingled, and that funds solicited by NJCLPAC will not be used for the contemplated issue advocacy expenditures. As was discussed in Advisory Opinion 10-2001, an organization that makes issue advocacy expenditures is not subject to the Reporting Act solely because of that activity. That result applies in this opinion also because of the separate funding of NJCL and NJCLPAC.

In addition to the questions submitted in Advisory Opinion 10-2001, NJCL has asked in this request whether or not issue advocacy communication expenditures are considered “political communications” within the meaning of N.J.A.C. 19:25-10.11(c), and subject therefore to the reporting at N.J.A.C. 19:25-12, reporting of Expenditures; Independent Expenditures.

N.J.A.C. 19:25-10.11(c) provides as follows:

(c) Any political communication not prepared, made or circulated with the consent or cooperation of a candidate and incurred or paid for by any other person or entity shall be reported in accordance with N.J.A.C. 19:25-12.

As noted in Advisory Opinion 10-2001, the standards for a “political communication” are set forth in subsections (a) and (b) of N.J.A.C. 19:25-10.10, see pages 3-4 of that opinion. Since an issue advocacy communication that is not coordinated with a candidate cannot fall within the scope of either subsection (a) or (b) of the political communication rule at N.J.A.C. 19:25-10.10, it follows also that an issue advocacy communication cannot be construed as a political communication under subsection (c) of N.J.A.C. 19:25-10.11.

Accordingly, the Commission finds that NJCL is entitled to the same holding expressed to the National Right to Life Committee in Advisory Opinion 10-2001, with the addition of the paragraph above regarding subsection (c) of N.J.A.C. 19:25-10.11.

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

OCT 10 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
New Jersey Committee for Life

ELEC RECEIVED

OCT 10 2001

Mailing Address
490 Somerset Street

Day Telephone No. 908-753-5311

North Plainfield, NJ 07060

Evening Telephone No. fax 908-769-0824

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

Yes No

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

- | | | | |
|----------------------------------|--------------------------|-----------------------------------------|--------------------------|
| Candidate committee | <input type="checkbox"/> | Recall committee | <input type="checkbox"/> |
| Joint candidates committee | <input type="checkbox"/> | Recall defense committee | <input type="checkbox"/> |
| Political committee | <input type="checkbox"/> | Lobbyist | <input type="checkbox"/> |
| Continuing political committee | <input type="checkbox"/> | Legislative agent | <input type="checkbox"/> |
| Political party committee | <input type="checkbox"/> | Personal financial disclosure statement | <input type="checkbox"/> |
| Legislative leadership committee | <input type="checkbox"/> | Other (please describe): _____ | <input type="checkbox"/> |

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. ~~I hereby consent to an extension of the 10-day response period provided in N.J.S.A. 19:44A-6 to a 30-day period for Commission response which shall expire on the date of Commission decision of the completed application.~~ (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.

10/9/01

Dated:

James Bopp, Jr.

Signature

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

I. Pertinent Facts and Contemplated Activities for Questions 1-8.

The National Right to Life Committee, Inc. ("NRLC") and the New Jersey Committee for Life's ("NJCL") 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.

II. Relevant Law for Questions 1-8.

New Jersey Administrative Code § 19:25-1.7 defines "political committee" as:

any group of two or more persons acting jointly, or any corporation . . . , which is organized to, or does, aid or promote, the nomination or election or defeat of any candidate or candidates for public office . . . , if the persons, corporation . . . raises or expends \$1,500 or more to aid or promote the election or defeat of a candidate or candidates

N.J.A.C. § 19:25-10.10 defines "political communication" as any communication (1) circulated or broadcast within 90 days of an election; (2) to an audience substantially comprised of persons eligible to vote; (3) that contains a "statement or reference concerning the governmental or political objectives or achievements" of a candidate; and is (4) coordinated with the candidate. N.J.A.C. § 19:25-10.11(c) states that any "political communication" that is not coordinated with a candidate must be reported in accordance with § 19:25-12.

Pursuant to N.J.A.C. § 19:25-12.7 and 12.8, an "independent expenditure" occurs when a group spends more than \$800 of its own funds to support or oppose a candidate or candidates and the money is spent without coordination with the candidate or candidates. If the "independent expenditure" is made by a person or group that does not otherwise have a reporting obligation under the Act, the "independent expenditure" must be reported to the Commission.

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?**

- Question 3.** If “issue advocacy” can be considered communications that “aid or promote” the election or defeat a candidate, are such communications subject to the disclaimer requirement mandated by N.J.S.A. § 19:44A-22.3?
- Question 4.** If expenditures on “issue advocacy” did not render NRLC or NJCL a political committee, would such expenditures that are not coordinated with a candidate, if distributed within 90 days of an election to an audience substantially comprised of persons eligible to vote, be considered “political communications” under N.J.A.C. § 19:25-10.10?
- Question 5.** If the answer to Question 4 is affirmative, would such expenditures be reportable under N.J.A.C. § 19:25-10.11(c) in accordance with N.J.A.C § 19:25-12?
- Question 6.** Would expenditures of more than \$800 on “issue advocacy” by NRLC or NJCL, assuming they do not otherwise have a reporting obligation under the Act, be considered “to support or defeat a candidate” and, thus, subject to regulation as “independent expenditures” under N.J.A.C. § 19:25-12.7 and 12.8?
- Question 7.** If the answer to Question 6 is affirmative, would such “issue advocacy” be required to include the disclaimer mandated by N.J.A.C. § 19:25-12.7(c) and the additional disclaimer statement mandated by N.J.A.C. § 19:25-13.3? Would such “issue advocacy” be required to include the disclaimers as mandated by N.J.A.C. § 19:25-13.2?
- Question 8.** Are issue advocacy communication expenditures considered “political communications”, as listed in § 19:25-10.11(c), and subject to the reporting requirements of N.J.A.C 19:25-12?

- 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.

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.

Statement of Result NRLC and NJCL Seek and Statement of Reasoning Supporting Result for Question 1.

NRLC and NJCL take the position that “issue advocacy” should not be considered communications that “aid or promote” the election or defeat of a candidate because such communications are constitutionally protected issue advocacy and cannot be used to determine whether an organization is subject to regulation. Issue advocacy is afforded absolute protection under the Constitution. “[T]he Supreme Court adopted a bright-line rule to determine when political expression may be regulated. This bright-line rule requires the use of express or explicit words of advocacy of the election or defeat of a candidate before the communication may be regulated. . . . The [Supreme] Court therefore refused to adopt a standard allowing regulation of any advertisement that mentions a candidate’s stand on an issue.” *Perry v. Bartlett*, 231 F.2d 155, 160 (4th Cir. 2000) (citing *Buckley v. Valeo*, 424 U.S. 1, 42-43 (1976)).

Statement of Result NRLC and NJCL Seek and Statement of Reasoning Supporting Result for Question 2.

First, NRLC and NJCL take the position that such communications are constitutionally protected issue advocacy and cannot be used to determine whether an organization is subject to regulation as a “political committee.” Second, even if such communications are constitutionally regulable, NRLC and NJCL cannot be required to shoulder the burdens of a “political committee” since their major purpose is not to expressly advocate the election or defeat of a candidate or candidates. As discussed above, issue advocacy is afforded absolute protection under the Constitution. *See Buckley*, 424 U.S. at 42-43. The Supreme Court has made clear that an organization whose “major purpose” is not to make communications that expressly advocate the election or defeat of a candidate cannot be required to shoulder the burdens imposed upon a political committee. *Buckley*, 424 U.S. at 79; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252-53, 262 (1986) [hereinafter “*MCFL*”].

Statement of Result NRLC and NJCL Seek and Statement of Reasoning Supporting Result for Question 3.

NRLC and NJCL take the position that the disclaimer mandated by N.J.S.A. § 19:44A-22.3 would not be required because 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 v. Ohio Elections Comm’n*, 514 U.S. 334, 346-350 (1995). 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).

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).

Statement of Result NRLC and NJCL Seek and Statement of Reasoning Supporting Result for Question 8.

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” under § 19:25-10.11(c). Issue advocacy is afforded absolute protection under the Constitution. *Buckley*, 424 U.S. at 79.

Such issue advocacy communications lack any “explicit appeal for the election or defeat of a candidate” as described in § 19:25-10.10(a) and are not prepared “with the cooperation of, prior consent of, in consultation with, or at the request or suggestion of the candidate” as listed in § 19:25-10.10(b)(4). Further, the issue advocacy communications are not “prepared, made or circulated with the consent or cooperation of a candidate” as described in § 19:25-10.11(c).

While both § 19:25-10.11(a) and (b) explain that a political communication is defined as per § 19:25-10.10, § 19:25-10.11(c) lacks any such definition of a “political communication” in accordance with § 19:25-10.10. Thus, we seek the Commission’s opinion as to whether other independent political communications, such as issue advocacy expenditures, not made in cooperation with a candidate and not containing express words of advocacy are reportable under § 19:25.11(c).