



FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL

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September 18, 2003

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Comment on

ADR 2003-25

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FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL

Re: **Advisory Opinion Request 2003-25**

Dear Mr. Norton:

I am writing on behalf of the Campaign Legal Center regarding Advisory Opinion Request 2003-25, submitted on behalf of Jonathan Weinzapfel and the Weinzapfel for Mayor Committee. Democracy 21 joins in these comments.

Mr. Weinzapfel has been nominated by the Democratic Party as its candidate for Mayor of the city of Evansville, Indiana. The general election for Mayor of Evansville will be held on November 4, 2003. Mr. Weinzapfel and his mayoral campaign committee (established under state law and not registered with the FEC) inquire whether the committee may finance a television advertisement featuring (and narrated by) U.S. Senator Evan Bayh (D-IN) for which a storyboard has been provided (entitled "Committed") (i) with funds contributed to such committee in compliance with Indiana's campaign finance laws but not necessarily federal campaign finance law, and (ii) without making an in-kind contribution to Senator Bayh's re-election campaign in 2004. The advertisement would begin running in October 2003 and run no later than November 4, 2003. Senator Bayh is likely to be a candidate for re-election in 2004.

Two provisions of federal campaign finance law are relevant to resolving these questions. 2 U.S.C. § 441i(f) indicates that a candidate for state or local office must spend only federal funds for communications described in 2 U.S.C. § 431(20)(A)(iii) – *i.e.*, public communications that promote, support, attack or oppose a clearly identified candidate for federal office (regardless of whether such communications expressly advocate the election or defeat of a federal candidate). 11 C.F.R. § 300.71 implements this basic requirement.

Moreover, 2 U.S.C. § 441a(a)(7)(B)(i) indicates that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a [federal] candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 11 C.F.R. §§ 109.20-109.23 are among the regulatory provisions designed to implement this requirement.

1. 2 U.S.C. § 441i(f)

The applicability of the non-federal funds prohibition of 2 U.S.C. § 441i(f) turns on whether a public communication financed by a state or local candidate promotes, supports, attacks or opposes a clearly identified federal candidate (as opposed to merely mentioning a federal candidate) – a question which then turns on the specific facts presented in a given case. The required fact-specific analysis leads us to conclude that the contemplated spending on “Committed” would not be subject to the non-federal funds prohibition of 2 U.S.C. § 441i(f). Along these lines, we note that:

- the advertisement exclusively concerns the performance and election of a candidate for local office (indeed, every sentence spoken by the narrating Senator Bayh except the initial “Hi, I’m Evan Bayh” mentions and is focused on Mr. Weinzapfel) and expressly advocates that candidate’s election;
- each of Senator Bayh’s statements of opinion briefly and directly serve to associate certain accomplishments, capabilities, and perspectives with Mr. Weinzapfel without elaboration, attribution, or association that would bolster the Senator in this context (*e.g.*, elaboration, attribution, or association that would indicate Senator Bayh’s record);
- the general election involving Mr. Weinzapfel is imminent (November 4, 2003), while no election involving Senator Bayh will occur this year (indeed, the general election for his Indiana U.S. Senate seat is over one year away).

This conclusion is evidently limited to the facts presented by this Advisory Opinion request. Indeed, it is important for the FEC to ensure that its eventual response is carefully drafted and limited to the facts at hand, for, as the Commission stated in its August 27, 2003 letter to the requestor’s counsel, “[t]he actual content of the communication, in addition to its context, is indispensable where the question presented requires the Commission to determine whether the communication ‘promotes, supports, attacks, or opposes’ a candidate for Federal office.” We strongly agree that both the actual content and the context are indispensable to the required determination – and render it dependent on the specific facts of a given case.

In this vein, we would point out that there has been a long history of state parties’ improperly using soft money to pay for advertising benefiting federal candidates. Given this track record, and the fact that the Bipartisan Campaign Reform Act’s prohibition on this practice by state and local parties employs the same statutory test as that applicable to advertising by state and local candidates (*i.e.*, requiring exclusively hard money if the communication promotes, supports, attacks or opposes a clearly identified federal candidate, 2 U.S.C. §§ 441i(b)(1), 431(20)(A)(iii)), the Commission should make clear that its Advisory Opinion in this case is limited to the facts and circumstances involving this state candidate advertising and is not in any way applicable to issues that may arise regarding advertising financed by state and local parties.

2. 2 U.S.C. § 441a(a)(7)(B)(i)

The Commission's regulations at 11 C.F.R. § 109.21 (purporting to implement 2 U.S.C. § 441a(a)(7)(B)(i))¹ indicate four "content" standards – one of which a communication must meet (along with a conduct element) in order to be considered a "coordinated communication" by the agency under such regulations. The content standards include: a communication which is an electioneering communication as defined in 11 C.F.R. § 100.29; a public communication which disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or any agent of the foregoing; a public communication which expressly advocates the election or defeat of a federal candidate; or certain public communications publicly distributed within 120 days of a general or primary federal election.

The communication at issue in this Advisory Opinion request would not meet any of these content standards. It would not disseminate, distribute, or republish campaign materials prepared by Senator Bayh (also rendering 11 C.F.R. § 109.23 inapplicable) or expressly advocate Senator Bayh's election. The advertisement would not be an "electioneering communication," for it would not be publicly distributed within 60 days before a general election or 30 days before a primary election for an office sought by Senator Bayh (the Indiana primary is on May 4, 2004). Likewise, it would not be publicly distributed within 120 days of a general or primary election for an office sought by Senator Bayh. Under the Commission's regulations, this failure to meet any of the specified content standards alone prevents it from being considered a "coordinated communication."

Thank you in advance for your consideration of these comments.

Sincerely,



Glen Shor
FEC Program Director
The Campaign Legal Center

¹ These regulations do not fully and properly implement the coordination standard of 2 U.S.C. § 441a(a)(7)(B)(i), and our application of them in this instance is not in any respect an endorsement of them (we apply them here only because they are what the Commission will apply in resolving this Advisory Opinion request). Under the coordination regulations that existed prior to December of 2000 – which better reflected the statute – the facts at hand likewise would not support a finding of "coordination," because such facts do not indicate the presence of an "expenditure" (*i.e.*, spending "for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(9)(A)(i)).