



FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 14, 1990

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1989-28

James Bopp, Jr.
Brames, McCormick, Bopp & Abel
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Terre Haute, Indiana 47808-0410

Dear Mr. Bopp:

This responds to your two letters dated October 24 and May 15, 1989, which request an advisory opinion on behalf of the Maine Right to Life Committee, Inc. ("MRLC"), concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the financing of MRLC newsletters that contain candidate surveys.

Your letters, and the documents submitted with them, indicate that MRLC has previously published several newsletters for public distribution that present the views of Federal candidates, including their responses to MRLC surveys, on policy issues such as abortion. MRLC proposes to issue similar newsletters in the future; in particular, in May 1990 before the June 12 primary election in Maine. Your May 15 letter sets forth several "issues" on which you request an advisory opinion from the Commission. These questions, in essence, present the more basic issue as to whether MRLC may use its general corporate treasury funds to finance the pre-election newsletters.

The factual basis of the request is presented in your letters and in other materials submitted by you. You explain that MRLC is a statewide, nonprofit, section 501(c)(4) membership organization incorporated in 1974 in the State of Maine. It was formed "to promote the sanctity of all human life, including unborn children, and to educate the public on issues relating to abortion, infanticide, and euthanasia." MRLC itself is "not associated with any political candidate, campaign committee, or political party," but in 1981 it established a separate segregated fund, the Maine State Right to Life Political Action Committee (MRLCPAC). This

political committee makes contributions to candidates for Federal and State elective offices who "take a prolife stand on the issues of abortion, infanticide, and euthanasia."

MRLC prepares and distributes a bimonthly newsletter, Life for ME, "containing educational articles and news of local chapter activities." Prior to elections, the newsletter includes the results of a survey of candidates for Federal and State office. The survey is taken by means of an MRLC questionnaire, and candidate responses to the survey indicate their positions on "prolife issues." Your May 15 letter states that funding for the newsletter comes from the general treasury of MRLC, and not from the treasury of MRLCPAC. MRLC's treasury includes corporate contributions.

Your request indicates that MRLC solicits donations from business entities and corporations, and it allows them to become "members." Donations are also regularly received by MRLC from businesses and corporations.¹ In addition, during 1989, MRLC began soliciting business advertising from "pro-life businesses" to defray the costs of printing and mailing Life for ME.² These solicitations have been mailed to businesses who "have been...supporter[s] of MRLC in the past... ." MRLC has also invited inquiries from business entities that would be interested in larger ads.

With respect to the newsletter issues which carry candidate survey responses and other candidate viewpoints on MRLC policy positions, your request included copies of MRLC newsletters from May 1984 and November 1988. These issues include candidate responses to numerous MRLC questions concerning possible amendments to the U.S. Constitution such as the "Human Life Amendment," overturning the Supreme Court decision in Roe v. Wade, and an "abortion-neutralization" amendment to the Equal Rights Amendment. In addition, the surveys sought Federal candidates' responses that would indicate their support or opposition to federal legislation such as "human life bills," as well as "pro-life amendments" to appropriation bills prohibiting federal funding for abortions and the funding of organizations which make referrals for abortions. The 1988 candidate survey also presented other legislative proposals such as barring the denial of "beneficial medical treatment" for newborn infants and for handicapped, chronically ill, and elderly persons. Each of these questions was posed in a manner whereby a "yes" reply by the candidate would be readily recognized as the "pro-life response" favored by MRLC.

The 1984 survey questions and results were published in the May/June 1984 issue of the MRLC newsletter and included the names of seven Federal candidates. Each of them was recorded as making no response to the survey. The 1988 survey questions, along with the results, were published in the November 1988 newsletter and identified six Federal candidates. Four of them were recorded as making no response to the survey. One gave "yes" answers to all ten questions, and the sixth candidate gave "no" answers to two questions but did not respond to the others. An introduction to the published survey responses in both 1984 and 1988 briefly notes the forthcoming elections and states that the survey report "does not represent an endorsement" of any candidate by MRLC. The reader was advised to contact candidates who had not responded at all; the 1988 issue emphasized that it "is vital that your local candidate hear from you on this issue."

In addition to the survey results for Congressional candidates, the November 1988 newsletter includes a front page feature, with headlines and photos, covering the two major party presidential candidates in the 1988 general election and their vice-presidential running mates. The top headline in bold, large type states: **NOVEMBER ELECTION ISSUE 1988!** A lower headline in smaller bold type says: **Take-along Issue For Election Day!**

This front page feature has separate photos of George Bush and Michael Dukakis who are also identified by political party affiliation. In contrast to the Congressional candidates identified in the reported survey results, the presidential candidates did not receive an MRLC survey. Their views on abortion issues are reported with references to their past official records and publicly stated positions. In addition, their positions are conveyed by means of four brief quotations about them which are attributed to the National Right to Life Committee("NRLC") and the National Abortion Rights Action League("NARAL"). With respect to Mr. Bush, the opinion from NRLC is that he "has been a consistent supporter of pro-life efforts," while the NARAL view is that he "is anti-choice and supports President Reagan's opposition to abortion." For Mr. Dukakis, the NRLC assessment is: "This is the most pro-abortion presidential ticket in history." The NARAL opinion indicates that Mr. Dukakis "has been a consistent and strong supporter of reproductive rights for women."

Your request includes the above-described 1984 and 1988 MRLC newsletters and various other documents pertaining to the activities of MRLC including its sources of funding and its fundraising solicitations. You indicate that MRLC proposes to continue publishing similar newsletters with costs paid from its general treasury funds, not by MRLCPAC. You explicitly state that MRLC expects to publish a voter guide survey issue in May 1990, just before the June primary election in Maine. You request an advisory opinion as to whether the Act and Commission regulations prohibit or permit this proposed activity.

The Act generally prohibits any corporation from using its corporate treasury funds to make "a contribution or expenditure in connection with any [Federal] election." 2 U.S.C. 441b(a). However, the Act does permit a corporation to use its corporate treasury funds to administer a separate segregated fund that will be used for political purposes. 2 U.S.C. 441b(b)(2)(C). Such a fund is a political committee and, like other political committees, is subject to the Act's recordkeeping and reporting requirements. 2 U.S.C. 431(4)(B); see generally 2 U.S.C. 432-434.

In a 1986 decision, the United States Supreme Court held that the First Amendment precluded application of 2 U.S.C. 441b to require a small, informally organized, incorporated advocacy group to finance its independent expenditures from a separate segregated fund. FEC v. Massachusetts Citizens for Life ("MCFL"), 479 U.S. 238(1986). The holding in MCFL was explicitly limited to incorporated advocacy groups that satisfy a three part test, including the requirement that the corporation was not established by a business corporation and had a firm policy against accepting funds from business corporations. Id. at 263-264. Furthermore, in MCFL, the Court concluded that the administrative and financial burdens of establishing a separate segregated fund for election expenditures would impermissibly discourage some small, informal corporations from engaging in any political speech.

Your request indicates that MRLC has accepted funds from business corporations in the past. It also has a current policy of actively soliciting and accepting such funds whether in the form of donations or the purchase of advertising space in its bi-monthly newsletter. For these reasons MRLC does not qualify for the limited exception from 2 U.S.C. 441b carved out in the cited MCFL opinion. See Advisory Opinions 1988-22 and 1987-7. Accordingly, MRLC is subject to the prohibitions of 2 U.S.C. 441b.³

Section 441b prohibits both contributions and expenditures in connection with any Federal election. 2 U.S.C. 441b(a),(b)(2) and 11 CFR 114.2(b). Commission regulations provide, however, that expenditures by corporations for certain specific nonpartisan activities conducted in connection with Federal elections are not prohibited by the Act. 11 CFR 114.4(b), see 2 U.S.C. 431(9)(B)(ii).

Given the factual context you present, the regulations most relevant here permit a corporation to prepare, and distribute to the general public, nonpartisan voter guides consisting of questions posed to candidates concerning their positions on campaign issues and the candidates' responses to those questions. 11 CFR 114.4(b)(5)(i). The regulations set out several factors for deciding whether a voter guide is nonpartisan. 11 CFR 114.4(b)(5)(i)(A) through (F).

Corporations that qualify as tax exempt organizations under 501(c)(3) or (c)(4) of the Internal Revenue Code, and that do not support, endorse or oppose candidates or political parties, need not comply with these factors in preparing and distributing their voter guide materials, but such materials may not favor one candidate or political party over another. 11 CFR 114.4(b)(5)(ii). The Commission has previously held that a tax exempt corporation becomes an organization that supports, endorses, or opposes candidates if it establishes a separate segregated fund. Such a corporation must therefore comply with the cited guidelines if it prepares voter guide materials. Advisory Opinion 1984-17. Because MRLC has established MRLCPAC as a separate segregated fund that contributes to candidates for Federal office, MRLC must follow the nonpartisan voter guide requirements.

The regulations set forth several factors that the Commission may consider in determining whether a voter guide is nonpartisan. 11 CFR 114.4(b)(5)(i)(A), (i)(B), (i)(C), (i)(D), (i)(E), and (i)(F). Factor (C) states, in pertinent part, that the wording of the questions does not suggest or favor any position on the issues covered. Factor (D) provides that the guide expresses no editorial opinion concerning the issues presented, nor indicates any support or opposition to any candidate. The 1984 MRLC voter guide conforms with these nonpartisan factors, but the 1988 voter guide does not.

The 1984 candidate survey questions were limited only to abortion and "right to life" issues. Two questions asked the respondent candidates whether, if elected, they would vote for ratification of two specific constitutional amendments the texts of which were set forth in the questions. Two additional questions asked whether the candidates would vote in favor of legislation "to restore protection for the lives of unborn children" and to impose "restrictions on the use of public funds for abortion." Although MRLC's favored policy positions on these issues are apparent from its name, the title of its newsletter, and from other articles in the newsletter containing the voter guide, the survey questions in context with the rest of the newsletter are not so explicitly partisan

as to convert an otherwise nonpartisan voter guide into one that improperly conveys election messages and candidate advocacy. Compare Advisory Opinion 1984-17 where the newsletter, in addition to a voter guide, also included a report of specific candidate endorsements made by another organization and urged readers to favor those candidates when voting in the forthcoming election. See also Advisory 1987-7. In the situation presented here, however, neither the other parts of the newsletter, the introduction to the survey results, nor the results themselves, instruct the reader as to what the MRLC-preferred candidate response should be. The report identifies seven Federal candidates by name and political party affiliation, but each name is followed with the letters NR. These letters are defined to mean "No response: candidate did not respond to survey questionnaire." On the page next preceding the candidate survey results, the newsletter includes the general suggestion that "if a candidate in your area is listed as 'no response,' you may want to contact him or her personally."

The foregoing pertinent characteristics of the 1984 MRLC voter guide indicate that it satisfies the nonpartisan factors set forth in Commission regulations at 11 CFR 114.4(b)(5)(i). As a result, MRLC expenditures for that guide, or for a 1990 MRLC voter guide which is materially indistinguishable from the 1984 voter guide, would not be prohibited corporate expenditures under 2 U.S.C. 441b. See 2 U.S.C. 437f(c)(1), see also Advisory Opinion 1984-17. By contrast and for the reasons discussed below, the 1988 general election voter guide submitted with your request does not satisfy the nonpartisan factors in Commission regulations, and expenditures by MRLC for that guide are prohibited by 2 U.S.C. 441b.

The November 1988 "Election Issue" of the MRLC newsletter has a lower front page headline stating that Federal candidate surveys are enclosed. The front page also displays photos of both the Republican and Democrat presidential candidates along with several editorial opinions about their views on abortion. One opinion characterizes George Bush as "a consistent supporter of pro-life efforts," and another describes Michael Dukakis as a candidate on "the most pro-abortion presidential ticket in history." These presidential candidates were not, however, included in the candidate survey; they received no questions and provided no responses. See factors (A) and (B) in 11 CFR 114.4(b)(5)(i).

The candidate survey portion of the 1988 newsletter includes 10 questions prepared by the National Right to Life Committee only for Congressional candidates.⁴ Four of these questions are posed in language explicitly indicating the favored "pro-life" response to the question. All questions are framed so that only a "yes" or "no" answer is expected. A bold-type message emphasizes: "**PLEASE NOTE: A 'yes' response indicates agreement with the National Right to Life position on each question.**"⁵ Six Federal candidates are listed, and four of them are designated as making no response to all ten survey questions. One candidate is designated as giving "yes" answers to all questions; another is shown as giving "no" answers to the first two questions and not answering the others.

The foregoing aspects of the 1988 voter guide are not in compliance with the nonpartisan factors set forth in Commission regulations at 11 CFR 114.4(b)(5)(i). As discussed with respect to the 1984 voter guide, factors (C) and (D) provide that, to assure a voter guide's nonpartisan character, the questions should not be worded in a manner that favors any position on the issue

presented. In addition, no editorial opinions concerning the issues, or in support or opposition to any candidate, should be included.

The 1988 voter guide includes several questions that are posed with explicit unambiguous references to MRLC's positions on "pro-life" or "right to life" issues. Other references in the guide make clear that "yes" responses conform to the "right to life" position, and the survey response format does not allow for a responding candidate to explain a disfavored "no" response, or a non-response to one or more of the questions. The presidential candidate features on the front page of the 1988 voter guide are replete with partisan editorial references to the candidates' positions on abortion, reproductive choice, Federal funding of abortions, and a "Human Life Amendment" to the Constitution. The report of the 1988 Congressional candidate survey results identifies one candidate who responded in full agreement with the "right to life" position and one who responded contrary to that position; four other named candidates made no responses to the survey questions.

Accordingly, if the 1990 MRLC voter guide contains partisan election messages similar to those discussed above with regard to the 1988 voter guide issue, it may not be lawfully financed with the general treasury funds of MRLC or any other corporation. Such expenditures could, however, be made by a separate segregated fund established by MRLC, pursuant to 2 U.S.C. 441b(b)(2)(C) and (b)(4)(C), provided the fund is comprised of voluntary contributions lawfully solicited and accepted in accordance with the Act and Commission regulations. Because you proposed that MRLC use its general treasury funds for the 1990 voter guide, and not contributions made to a separate segregated fund, this opinion does not express or imply any conclusions as to whether or not MRLCPAC satisfies the requirements of the Act and Commission regulations for the lawful solicitation of contributions to a separate segregated fund.

One of your questions asks whether the so-called "press exemption" in the Act would apply to MRLC and permit it to make payments from general treasury funds for public distribution of its voter guide newsletters without regard to the prohibitions of 2 U.S.C. 441b. The Commission answers this question in the negative. The Commission has previously concluded that the news media exception, 2 U.S.C. 431(9)(B)(i), applies to a press entity engaged in the normal press-business of covering and commenting on political campaigns and requires that the press entity derive revenues from the sale of subscriptions (or single issues) and advertising. Advisory Opinion 1980-109; see also Advisory Opinions 1987-8, 1982-58, and 1980-90. MRLC prints 10,000 copies of each newsletter issue, and approximately 4,700 of these are mailed. The rest are hand distributed. Its public distribution of the newsletter is without charge. In addition, while MRLC's specific corporate purposes include publication and distribution of articles on particular subjects from a "prolife" viewpoint, MRLC is essentially a nonprofit, tax exempt corporation with charitable, social, benevolent, and educational purposes. It is not engaged in the news media business, and is not the type of entity contemplated by Congress when it adopted the cited press exemption in 1974. See Advisory Opinion 1980-109; also see MCFL, 479 U.S. 238, at 250, 251.

Finally, the Commission recognizes that "issues" numbered I, II, and III in your May 15, 1989 letter pose questions that are predicated on whether or not the MRLC voter guides "constitute express advocacy." This advisory opinion explains the extent to which your proposed activity is permitted or prohibited by the Act and regulations. It addresses only the issues necessarily raised

by 2 U.S.C. 441b and relevant Commission regulations at 11 CFR 114.4(b)(5).⁶ The Commission has not interpreted the Court's decision in MCFL as requiring the Commission in all circumstances to determine whether a given election message constitutes "express advocacy" in applying 2 U.S.C. 441b to corporate expenditures made in connection with Federal elections.

This response constitutes an advisory opinion concerning application of the Act or regulations prescribed by the Commission to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Lee Ann Elliott
Chairman for the Federal Election Commission

Enclosures (AOs 1988-22, 1987-8, 1987-7, 1984-17, 1982-58, 1980-109, and 1980-90)

P.S. Chairman Elliott and Commissioner Aikens voted to approve this opinion and will file concurring opinions at a later date.

1/ MRLC records do not differentiate between corporate donations and those from other business entities. In 1985 and 1986, MRLC received respectively \$87 and \$175 from corporations or other businesses. These donations represented less than .5% of its total donations in 1985 and approximately 1% in 1986. In 1984, business donations to MRLC represented slightly over 5% of total donations.

2/ The cost for an ad of business card size is \$25 per issue, or \$100 to run the same ad for a year.

3/ The United States Supreme Court heard oral argument on October 31, 1989, in an appeal from the United States Court of Appeals decision in Michigan State Chamber of Commerce v. Austin, 856 F.2d 783(6th Cir. 1988), appeal pending, sub nom. No. 88-1569. The Sixth Circuit had decided that, based on MCFL, it was unconstitutional for a Michigan statute to prohibit the Michigan Chamber from using its general funds to buy a newspaper advertisement supporting a state candidate, even though more than 75% of the Chamber's treasury consisted of funds received from business corporation members. The Supreme Court's decision on this appeal could affect the conclusions of this advisory opinion. That effect, if any, may be determined through the submission by MRLC of a new advisory opinion request after the Court's opinion is rendered.

4/ The newsletter also included five separate questions that were sent to candidates for the Maine legislature as well as the responses(or non-responses) of those candidates. This portion of the voter guide does not present any issues with respect to application of 2 U.S.C. 441b and Commission regulations at 11 CFR Part 114.

5/ In addition, a note or "Key" explaining how to interpret the symbols used to present the response of each named candidate states that the letter "Y" signifies a "Yes response to question, pro-life response".

6/ Your letter of May 15, 1989, sets forth five specific "issues" on which you ask the Commission to issue an advisory opinion based on the facts presented. The Commission notes that its advisory opinions are rendered with respect to application of the Act and Commission regulations to a specific and prospective activity or transaction proposed by the requesting person. 2 U.S.C. 437f(a)(1), 11 CFR 112.1(a and 112.1(b). The Commission has the discretion to identify for itself those legal issues which are raised by a given factual situation presented in an advisory opinion request, and it decides whether and how those issues should be addressed in the advisory opinion. While the Commission's formulation of the legal issues presented may frequently correspond with those expressly posed by a requester, that is neither required, nor always the case.