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**FEDERAL ELECTION COMMISSION**  
999 E Street, N.W.  
Washington, D.C. 20463

MAY 22 2001

**FIRST GENERAL COUNSEL'S REPORT**

**SENSITIVE**

MUR: 4999

DATE COMPLAINT FILED: 04/04/00

DATE OF NOTIFICATION: 04/20/00

DATE ACTIVATED: 8/02/00

SOL: 2/01/05

STAFF MEMBER: Roy Q. Luckett

COMPLAINANT: John Mason

RESPONDENTS: Edward M. Bernstein  
A Lot of People Supporting Ed Bernstein and  
Michael W. Kern, as treasurer  
Edward M. Bernstein and Associates, Inc.

RELEVANT STATUTES: 2 U.S.C. § 431(8)(A)(i)  
2 U.S.C. § 431(9)(A)(i)  
2 U.S.C. § 431 (11)  
2 U.S.C. § 431(17)  
2 U.S.C. § 441a(a)(7)(B)(i)  
2 U.S.C. § 441a(a)(f)  
2 U.S.C. § 441b(b)(2)  
11 C.F.R. 100.7(a)(1)(iii)(A)  
11 C.F.R. § 100.8(a)(1)  
11 C.F.R. § 100.10  
11 C.F.R. 100.8(a)(1)(iv)(A)  
11 C.F.R § 100.22(a)  
11 C.F.R § 100.23  
11 C.F.R. § 109.1(c)

INTERNAL REPORTS CHECKED: Dun & Bradstreet Dunsprint Service  
Commission Indices

FEDERAL AGENCIES CHECKED: None

**I. GENERATION OF MATTER**

John Mason<sup>1</sup> ("Complainant") filed a complaint on April 4, 2000 alleging that certain persons and entities violated sections of the Federal Election Campaign Act of 1971, as amended, (the "Act") and the Commission's regulations. Specifically, the April 4<sup>th</sup> complaint alleges respondents are in violation of the Act for coordinating the making and receipt of prohibited campaign contributions under 2 U.S.C. § 441b and failing to report such contributions.

**II. FACTUAL AND LEGAL ANALYSIS**

**A. THE COMPLAINT**

On April 4, 2000, John Mason, Chairman of the Republican Party of Nevada, filed a complaint against Edward M. Bernstein, A Lot of People Supporting Ed Bernstein, Michael M. Kern, as Treasurer, and Edward M. Bernstein and Associates, Inc. The complaint alleges that Edward M. Bernstein and Associates, Inc. television and billboard advertisements since February 2000, while ostensibly advertisements for the law firm, actually represent prohibited corporate contributions by the Bernstein law firm for Edward M. Bernstein's senatorial campaign. Specifically, Mr. Mason asserts that in February 2000, the candidate dramatically changed his law firm's advertising message to reflect the themes of Bernstein's senate advertising campaign. According to the complaint, the new advertisements and billboards, instead of featuring only Mr. Bernstein speaking directly to the camera, on the radio, or with his picture on a billboard, now constituted testimonials by others about how much

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<sup>1</sup> Mr. Mason, the complainant, serves as Chairman of the Nevada Republican Party.

"Ed Bernstein Cares." This new message, which the complainant avers was still airing and posted on billboards in the Las Vegas area (as of April 4, 2000), "outlines how much Candidate cares for the people of Nevada."

Mr. Mason asserts that the theme "Ed Bernstein Cares" was also used in Mr. Bernstein's formal announcement of his candidacy. On March 13, 2000, at a press conference held at the home of David Emerick, a former client of Mr. Bernstein who was severely injured on his job as a maintenance worker, the candidate announced his candidacy for United States Senate.

Mr. Mason contends that "[j]ust like the law firm's new ads, the theme of his press conference, announcement speech and the platform upon which he based his candidacy was 'Ed Bernstein cares.' "

Mr. Mason also notes "[i]n the time since his formal announcement, the law firm has more than doubled its past television buys with the new advertising message echoing the issues highlighted by the Candidate and his campaign." Likewise, Mr. Mason avers that the new Bernstein and Associates billboards echo the themes of the Bernstein senatorial campaign.

The April 4, 2000 complaint also avers that the Commission has already addressed the issues involved in the Bernstein matter in MUR 3918. As background, in MUR 3918, Joel Hyatt, senior partner of Hyatt Legal Services, ran for U.S. Senate in the State of Ohio. The Commission found that the law firm's payments for ads were excessive contributions to Hyatt's campaign because they echoed Hyatt's campaign themes and the candidate controlled the content and themes of the firm's advertisements.

On May 10, 2000, Mr. Mason submitted an Addendum to the complaint against Edward M. Bernstein and Associates, Inc. et al. In this addendum, complainant asserts that the candidate's law firm has continued to violate the Federal Election Campaign Act through its coordination of prohibited contributions. Namely, Mr. Bernstein's law firm has purchased additional air time for new commercials. Mr. Mason adds that these new law firm ads continue to advance Mr. Bernstein's candidacy for U.S. Senate. Complainant also enclosed a videotape containing a number of Bernstein - and -Associates television advertisements.

## **B. RESPONSES TO THE COMPLAINT**

### **1. Response of Edward M. Bernstein**

Mr. Bernstein did not respond to the complaint.<sup>2</sup>

### **2. Response of the Bernstein for Senate campaign**

On June 20, 2000, the Bernstein for Senate campaign (A Lot of People Supporting Ed Bernstein and Michael W. Kern, as treasurer) responded to the complaint. Attachment 1. The response asserts that the complaint does not allege any facts that would indicate any involvement by any employee or consultant of the Bernstein for Senate campaign. Respondents further add that its media consultant, StrubleOppel Communications,<sup>3</sup> has never worked for Edward M. Bernstein and Associates; the law firm retains its own media consultants, Explosive Media.

<sup>2</sup> While Mr. Bernstein does not respond to the complaint, the response of Bernstein and Associates, the law firm of which he is both founder and senior partner, discusses his activities regarding this matter.

<sup>3</sup> According to its website, [www.strubleoppel.com](http://www.strubleoppel.com), StrubleOppel Communications is a political media firm based in Washington, D.C. that specializes in the following services: electronic and print advertising; corporate imaging; message development; graphic design; crisis and strategic communications; web site development; media training and speech writing; internal communications; and targeted media placement.

Respondents also assert that the only fact alleged by Mr. Mason is that Mr. Bernstein, the candidate, is also the founder and senior partner of Edward M. Bernstein and Associates. Respondents aver that there is no precedent of the Federal Election Commission suggesting that candidates for federal office must give up their livelihood. Likewise, there is no precedent suggesting that a candidate for federal office mandates changing the activities of the individual's business. Taking into consideration these factors, respondents believe there is no basis for the complaint either in fact or law and the complaint should be immediately dismissed.

### **3. Response of Edward M. Bernstein and Associates, Inc.**

On June 20, 2000 Counsel for the law firm of Edward M. Bernstein and Associates submitted a response to the allegations in the complaint. Attachment 2. The response categorizes the complaint as "frivolous," noting that even if the ads for the law firm were testimonials to Mr. Bernstein's good character, no violation of the Federal Election Campaign Act has occurred, since the ads were for the promotion of the firm's business and not for the purpose of influencing the election of candidate Bernstein. *Id.* The response avers that there is a sharp contrast between the ads in question in the Hyatt MUR and the ads being run by Edward M. Bernstein and Associates. In particular, the Hyatt ads focused on public policy themes of health care and crime, two issues which Hyatt consultants knew would likely be raised in the campaign. In contrast, counsel of the respondent asserts that the Bernstein ads contain no issues at all, noting that:

an objective look at the transcripts for two previous ad campaigns run in 1994 and 1999 and the transcripts of ads being run in 2000 reveals a remarkable similarity. In fact, it reveals that the current advertisements are in essence unchanged from advertisements the firm has typically produced. No new themes are introduced. No new issues are raised.

*Id.*, pg. 2.

The response also notes that the Bernstein campaign is distinguishable from the Hyatt MUR in its use of media consultants. The response asserts that “[i]n the Hyatt MUR, the Commission objected to, among other things, the use of the same media consultant by both the Hyatt campaign and the Hyatt law firm.” *Id.* The response adds that Mr. Bernstein has taken great care to establish his Senate campaign as a separate and distinct entity from his law firm by hiring campaign media consultants StrubleOppel Communications, who have never worked for the law firm. The law firm retains its own media consultants, Explosive Media.

The response also disputes the complaint’s implication that Mr. Bernstein’s failure to appear in the law firm’s ads in some way violates the Federal Election Campaign Act. The response states that “[i]n the past, Mr. Bernstein has, from time to time, not appeared in the firm’s ads.” Rather, the response adds that the Commission did not object to Hyatt not appearing in his firm’s ads; the Commission’s objection was due to the Hyatt ads’ introduction of issues of health care and crime, given that they were crafted by a consultant who worked both for the campaign and law firm.

Finally, the response avers that policy implications arising from Mr. Mason’s complaint warrant its immediate dismissal. The response asserts that if the Commission were to proceed on the theory that references to Mr. Bernstein’s character in the firm’s ads violate the Act, “any candidate for federal office would be required to take any mention of themselves out of their business’ advertisements. Such a decision would have an extremely deleterious impact on

personal service businesses such as law firms." *Id.*, pg. 3. Furthermore, "if the Commission decided a candidate could neither appear in ads for his/her business nor be mentioned in the ads, it would seriously limit the ability of certain individuals to become candidates for federal office."

*Id.*

### C. BERNSTEIN AND ASSOCIATES LAW FIRM ADVERTISEMENTS

The complainant and respondent have each submitted information concerning Edward M. Bernstein and Associates' law firm advertisements. The information has come in the form of a videotape of Bernstein television advertisements with accompanying transcripts<sup>4</sup>, and six additional transcripts of Bernstein and Associates television commercials. The advertisements cover the years 1994, 1999, and 2000. The two 1994 advertisements submitted to this Office by the respondents focus on the perspectives of Edward M. Bernstein and Associates

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<sup>4</sup> There are three other video clips present in the complainant's videotape. First, there is a commercial that the complainant describes as "previously used" and is entirely in Spanish. The commercial consists of a gathering of people, each with a small flag representing the country of their respective nationality. The camera focuses on approximately ten of the people gathered, and one by one these individuals raise their flag and enthusiastically state the name of the country that the flag represents. The Spanish speaking countries represented include, but are not limited to, Chile, Mexico, Cuba, Argentina, Panama, Dominican Republic, Guatemala, and Venezuela. Edward Bernstein appears at the end of the commercial holding a set of the miniature flags and states in Spanish, "Take the first step." The gist of Mrs. Nancy Bernstein's statement, who also appears in the advertisement, is that no matter where you come from, if you are involved in an accident, Bernstein and Associates speaks your language. Although the advertisement does not appear to be recently produced, the commercial was apparently still airing as of March 23, 2000.

Second, the videotape contains a segment of the Ed Bernstein show with guest Congresswoman Shelley Berkley, which aired on March 13, 2000, shortly after the announcement of his candidacy. This situation necessitates a discussion of whether the media exception applies and will be discussed in more detail in the analysis section of this report.

Finally, there is a television news story that appears to be incomplete. Apparently, the complainant intended to present a television news story of Bernstein's announcement and how the old Bernstein commercials and new version contrast. However, the news story only depicts an image of Mr. Bernstein in an older advertisement for a few seconds before it abruptly ends.

attorneys Robert Galloway and Gary Segal. In the transcript of one of the advertisements, attorney Robert Galloway stresses the importance of establishing a feeling of trust between the client and the attorney. Attachment 3. Mr. Galloway also notes that it is important for the client to feel that the attorney cares about them. The word "cares" is underlined. Underneath Mr. Galloway's statement is the tagline, "Edward M. Bernstein & Associates, Attorneys at Law." At the bottom of the transcript is Ed Bernstein's statement, which says, "I'm Ed Bernstein. My attorneys work hard to earn your trust." The other 1994 advertisement, featuring Mr. Gary Segal, comments on how the law firm strives to protect the client's rights and empathize with their frustrations. Attachment 4. The same tagline is employed. Ed Bernstein's quote in this advertisement: "I'm Ed Bernstein. Gary knows how often an accident causes anger and stress. We'll make sure you receive the compensation you deserve."

In the two 1999 advertisements submitted by respondents, the law firm continues to use the same tagline used in its 1994 advertisements, namely, "Edward M. Bernstein & Associates, Attorneys at Law." One advertisement features Maria Fernandez-Atkinson, a legal assistant employed at the Firm (also featured in a 2000 advertisement), and Nancy Bernstein, Mr. Bernstein's wife. Attachment 5. The gist of this advertisement is a testimonial to Ed Bernstein's legal service to the Latino community in the Las Vegas area. No other members of the firm are mentioned. Nancy Bernstein stresses that "Ed is a person that doesn't give up and he believes in what is right and that is why he continues helping injured people." The second advertisement is another testimonial to Ed Bernstein's commitment to the legal needs of the Latino Community. Attachment 6. The advertisement, which features only



Maria Fernandez-Atkinson, touts that "no one else has made a greater effort to help injured people in our community than Ed Bernstein." Ed Bernstein apparently makes the statement, "Take the first step" at the end of the advertisement. *Id.*

The majority of the transcripts submitted by the respondent to this Office focus on advertisements produced in 2000. All five of the advertisements are employee testimonials that discuss attributes of Ed Bernstein's character. The complainant's videotape displays the actual commercials of three of the transcripts.

One of the three videotaped advertisements, entitled "Maria," apparently first aired on February 28, 2000, features Maria Fernandez-Atkinson, a legal assistant employed at the firm. Attachment 7. The advertisement begins with a close-up head shot of Ms. Fernandez-Atkinson recounting an instance where Mr. Bernstein went to a client's mobile home in 116 degree weather to discuss his case when the client was unable to come to the office. *Id.* She concludes that Mr. Bernstein's actions are indicative of the "kind of care that he takes with his clients and with everyone that he meets." At one point during the commercial, the screen goes black, with a message in white lettering superimposed. At this juncture, the message "Ed Bernstein is Different" is displayed. The final image in this advertisement is a woman identified as Mrs. Nancy Bernstein seated in a leather office chair behind a desk with the Bernstein and Associates logo superimposed at the bottom right side of the screen. Mrs. Bernstein states the new tagline "Edward M. Bernstein and Associates, the first step in getting the care you need."

A second advertisement displayed on the videotape, entitled "Paul," apparently first aired on February 29, 2000 and features Paul Haire, an attorney with the law firm. Attachment 8.

Mr. Haire is seen on camera in an office, and discusses a situation where Mr. Bernstein assigned an employee to watch over the children of one of his clients. From that experience, Mr. Haire states that he learned from Mr. Bernstein that "our firm was more about helping the family every bit as much as helping the individual client." He also states that Mr. Bernstein "instilled in me that day the desire to treat the client's family as I would my own." There are three other visual images seen throughout this advertisement. First, there are two instances where the screen goes black, with a message in white lettering superimposed. The first instance occurs when Mr. Haire's voice can be heard recounting the client's inability to appear at a court hearing because there was no babysitter. At this juncture, the message "Ed Bernstein is Different" is displayed. The second message, "Ed Bernstein cares," is shown when Mr. Haire notes that Ed Bernstein directed that the client bring the children to the firm's office for supervision. The final image is the same image projected in the "Maria" advertisement: A woman identified as Nancy Bernstein seated in a leather office chair behind a desk with the Bernstein and Associates logo superimposed at the bottom right side of the screen stating the tagline "Edward M. Bernstein and Associates; the first step in getting the care you need."

The third and final advertisement shown on the videotape apparently began airing on May 4, 2000 and once again features Paul Haire. Attachment 9. This advertisement is similar to the "Paul" ad that aired on February 29, 2000 in that Mr. Haire is seen on camera in an office. Paul Haire notes that "Ed has a number of qualities that serve him well in no matter what he does." Among the qualities mentioned: sensitivity to the needs of the client; an ability to hear the opinions of others before voicing his own opinion, and the capacity to take "what seems to be the very best of those [opinions] and combine them into an opinion that seems to be the right answer

every single time there is a problem.” In addition, like the “Paul” advertisement, messages are superimposed over a black screen with Mr. Haire’s voice in the background. Where the previous “Paul” ads employ the messages “Ed Bernstein is Different,” and “Ed Bernstein Cares,” the new commercials use the messages “Ed Bernstein Cares” and “Ed Bernstein Listens.” This advertisement is distinguishable from all of the 2000 advertisements, however, in its omission of Mrs. Bernstein reciting the tagline “Edward M. Bernstein and Associates, the first step in getting the care you need.” Instead, only the logo is shown.

The fourth 2000 transcript is from a thirty second television advertisement featuring Patti Donoghue, an attorney with the Firm. Attachment 10. In this advertisement, Patti Donoghue notes that Ed Bernstein’s philosophy of the law firm is to create a sense of family distinct from what people would experience when they enter other law firms. Ms. Donoghue adds that “the firm pretty much is Ed’s philosophy, so how we do business here is how Ed does business everywhere.”

The testimonial of a non-attorney employee represents the final 2000 transcript. Attachment 11. Cristian Falcon states in a 30 second television commercial that “[w]hat Ed has taught me is to care about people.” She also notes that “[w]e listen, we care and that is what Ed has taught me.”

## **D. ANALYSIS**

### **1. Coordination of Election - Related Communications**

#### **a. Applicable Law**

The FECA specifically prohibits corporations from using general treasury funds to make contributions or expenditures – in cash or in-kind -- in connection with Federal elections.

2 U.S.C. § 441b(a). For purposes of Section 441b, "contribution or expenditure includes "anything of value" provided to a candidate or committee in connection with any Federal election. 2 U.S.C. § 441b(b)(2). "Anything of value" includes in-kind contributions. 11 C.F.R. § 100.7(a)(1)(iii)(A) and 11 C.F.R. § 100.8(a)(1)(iv)(A).

2 U.S.C. § 441a(a)(7)(B)(i) states that expenditures made<sup>5</sup> "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate . . . ."

The Commission has considered potential coordination that took place prior to the effective date of 11 C.F.R. § 100.23 under the standards set forth in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). In addressing the issue of what constitutes "coordination" with a candidate, the *Christian Coalition* court discussed two general ways in which coordination could occur: first, that "expressive coordinated expenditures made at the request or the suggestion of the candidate or an authorized agent" would be considered coordinated; and second, "absent a request or suggestion, an expressive expenditure becomes 'coordinated' where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode or intended audience (e.g., choice between newspaper or radio advertisement); or (4) 'volume' (e.g., number of copies of printed materials or frequency of media spots." *Id.* at 92. The court also found that coordination might be established if an

<sup>5</sup> By its terms, 2 U.S.C. § 441a(a)(7)(B)(i) applies only "for purposes of this subsection," 2 U.S.C. § 441a(a)(7). However, the Commission has consistently regarded coordinated expenditures made by corporations as contributions by those organizations prohibited by 2 U.S.C. § 441b(a). This interpretation was adopted by the court in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999).

individual had a certain level of decision-making authority for both the spender and the campaign and the spender made the expressive expenditures to assist the campaign. *Id.* at 96-97.

**b. Alleged Contribution from Edward M. Bernstein  
and Associates to the Bernstein Campaign**

The information currently available indicates that there is reason to believe that Edward M. Bernstein & Associates, Inc. may have coordinated its communications with the Bernstein for Senate campaign and that those communications may have been at least in part influencing a Federal election. We advance this view given that:

- Mr. Bernstein may have had a high level of decision-making authority regarding the advertising campaigns of both the Bernstein law firm (as the 100% stockholder of the incorporated law firm that made the advertisements, as well as the president of the media consulting firm responsible for the creative marketing of the ads) and the campaign (as the candidate);
- the heightened frequency of the law firm's advertisements, as demonstrated by a reported near 50% increase in advertising buys from February 2000 to March 2000, coincided with Mr. Bernstein's announcement of candidacy for U.S. Senate on March 13, 2000;
- the law firm ads airing during late February 2000 and thereafter were substantially distinguishable from earlier Bernstein and Associates commercials to the extent that they appear to make indirect reference to the candidate's qualifications for public office for the purpose of influencing the election;
- the timing of the changes to the Bernstein and Associates' billboards appear to coincide with Mr. Bernstein's announcement of candidacy, and the content of the new billboards may have been made for the purpose of influencing the election; and

- the themes introduced by the law firm advertisements appear to coincide and conform with the Bernstein campaign's messages.

### 1) Potential Coordination

The information available at this time appears to indicate that Mr. Bernstein may have had a high level of decision-making authority regarding the advertising campaigns of both the Bernstein law firm and the campaign. It appears that Mr. Bernstein, as both candidate and 100 percent shareholder of the spender, may satisfy the coordination standard enunciated in both *Christian Coalition* and 11 C.F.R. § 100.23(c), which recognizes coordination where the candidate has exercised control or decision-making authority over the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of the communication in question. The candidate owns 100% of the capital stock in his incorporated law firm. In addition, he is the president of Explosive Media, the company responsible for the law firm's television advertisements. The fact that StrubleOppel Communications handles the campaign advertisements does not detract from the likelihood that the candidate exerts influence over both the law firm's advertising decisions and the campaign advertisements. If StrubleOppel advances a particular campaign theme or strategy, it seems likely that the candidate would play a substantial role in the approval or rejection of such strategies. In addition, since the law firm used the candidate's own advertising agency, Bernstein could readily change the content, timing, or frequency of his law firm's advertisements.

In fact, some evidence suggests that Bernstein may have exercised his authority over the law firm's advertising by doubling the firm's television ad buys during the month he announced his candidacy. According to a *Las Vegas Review-Journal* article dated April 6, 2000, in February

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2000, Mr. Bernstein reportedly spent \$30,880 on television advertisements in the three Las Vegas network stations. In March, Mr. Bernstein reportedly spent \$57,280 for the same three stations. These numbers represent a nearly 50% increase between February 2000, when Mr. Bernstein did not announce his candidacy, and March 2000, the month he became a candidate. Thus, the information presently available suggests that coordination may have occurred between Mr. Bernstein's law firm and his Senate campaign.

**2) Communications for the Purpose of Influencing the Federal Election**

**a) Distinctions among the 1994, 1999, and 2000 Television Advertisements**

The advertisements displayed during this period also appear to make indirect reference to the candidate's qualifications for public office. Contrary to the assertions of the respondents, the advertisements submitted from 1994, 1999, and 2000 respectively, appear to be somewhat distinguishable. The 1994 advertisements focus on the qualities of the law firm as a whole, not Edward M. Bernstein individually. The common theme for these ads is how the firm functions as a collective, working for the client's rights. Even Ed Bernstein tailors his statements to evoke the collective in each ad: "My attorneys work hard to earn your trust;" and "We'll make sure you receive the compensation you deserve."

While the 1999 and 2000 advertisements may represent a shift in the law firm's marketing strategy from Edward M. Bernstein and Associates the collective to Edward Bernstein the individual, the distinctions between these advertisements are also substantial. The respondent apparently submitted the two 1999 advertisements in an attempt to demonstrate that these pre-candidacy announcement advertisements were substantially similar to the 2000 advertisements. Like the 2000 advertisements, employees offer testimonials relating to

Ed Bernstein's character: "Ed is a person that doesn't give up and he believes in what is right and that is why he continues helping injured people." And like the 2000 advertisements, Ed Bernstein the individual is the primary focus: "I'm proud to say that no one else has made a greater effort to help injured people in our community than Ed Bernstein." What sets the 2000 series of advertisements apart from the 1999 advertisements, and the 1994 advertisements for that matter, however, is the scope of the communication.

Unlike the 1999 advertisements, the 2000 advertisements have expanded the scope of Ed Bernstein's qualifications outside his legal practice. These advertisements convey the message that Ed Bernstein has qualities that can be applied to circumstances other than the law. The 1999 advertisements provided to the Commission do not address this characteristic; the crux of those ads is Ed Bernstein's abilities in helping injured people, clearly within the confines of his practice. The new advertisements provided make statements like "the firm pretty much is Ed's philosophy, so how we do business here is how Ed does business everywhere," and "that's the kind of care that he takes with his clients and with everyone that he meets." Or, "Ed has a number of qualities that serve him well in no matter what he does." If the advertisement solely was for the purpose of advancing Mr. Bernstein's law firm interests, it is not clear why there would be a need to mention his ability to adapt his firm's philosophy to other ventures. The statement intimating that Ed Bernstein provides a high level of care to his clients and everyone he meets also seems to be geared toward prospective voters.

Likewise, the advertisement exclaiming that "Ed has a number of qualities that serve him well in no matter what he does" can also be construed as an attempt to influence prospective voters. This advertisement, which aired in May 2000, might be used to convey the message to



potential voters that the skills used in his everyday legal practice, namely, his sensitivity to the needs of others, the ability to hear the opinions of others before voicing his own, and the capability to combine the best opinions presented into an opinion that seems to be the right answer, could be applied to other activities, including political life. The use of the superimposed messages "Ed Bernstein Cares" and "Ed Bernstein Listens" further accentuate the advertisement's purpose to influence the voter.

**b) Changes in the Bernstein and Associates Billboards**

It also appears that the billboards used by the law firm may have been made for the purpose of influencing the election.<sup>6</sup> The complaint states that the earlier Bernstein and Associates pre-candidacy announcement billboards featured only a picture of Ed Bernstein with the slogan "Take the First Step." Neither the complainant nor the respondent offer additional information concerning the content of the Firm's ads contemporaneous to Mr. Bernstein's announcement of his candidacy. The only information that this Office has discovered pertinent to the content of the billboards in question comes in the form of a letter distributed over the Internet. On June 19, 2000, attorney Chuck Gardner<sup>7</sup> sent a letter to Mr. Rob Bare, Bar Counsel for the State Bar of Nevada. Attachment 12. In this letter, Mr. Gardner describes the appearance of a recent Bernstein billboard contemporaneous with his announcement of candidacy:

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<sup>6</sup> The Commission should be advised that a *Las Vegas Review-Journal* article dated April 6, 2000 acknowledges that at the time of the complaint Mr. Bernstein's billboard signs "did not increase from the 21 he has always used."

<sup>7</sup> Chuck Gardner is a registered Democrat who has served as a former deputy attorney general of Nevada. The gist of his letter to the State Bar of Nevada alleges that Mr. Bernstein's billboard is actually a client testimonial disguised as an employee testimonial. Client testimonials are illegal in attorney advertisements in the state of Nevada.

On the left is a photo of what appears to be a family – mom, dad, and small child. In the middle above the firm logo is the statement in large letters, “Ed Bernstein cares.” There is smaller print that cannot be safely read from the roadway. To read it you must make a U-turn, park along the side of the road, get out of the car, and walk around to the front of the billboard. From this vantage one can read the words “Maria Fernandez-Atkinson Legal Assistant.” The object is to make the billboard appear to the public to be a client testimonial, unlawful under our rules, which it unquestionably does, while reserving the strained argument for the bar that the testimony comes not from a client, but from the attorney’s paralegal, in print so small that no one can read it.

*Id.*, pg. 2.

While this Office has yet to see this particular billboard, such a description raises the question whether the law firm made this business communication for the purpose of influencing an election. The picture of a family and the large message “Ed Bernstein Cares” can be construed as a campaign message intimating that Mr. Bernstein cares for the people of Nevada. Obviously, more information is needed. Namely, a determination on the size of the logo in relation to the message “Ed Bernstein Cares” would be important; a small logo in proportion to message could indicate an intention to conceal the law firm’s involvement in the advertisement. It would also be helpful to ascertain the timing of this billboard (when it was first displayed), the number of billboards that have used this new billboard, and obtain a comparison between this new billboard and billboards displayed the timing of this new billboard.

**c) Common Use of Themes**

The themes introduced by the law firm advertisements appear to coincide with the Bernstein campaign’s messages. The complaint argues that Mr. Bernstein based his candidacy on the platform “Ed Bernstein Cares” in his March 13, 2000 candidacy announcement. Respondents did not address or elaborate about this issue in their response to the complaint. If it

is discovered that the Bernstein campaign used such a message as a slogan or an integral part of its campaign at the outset, it would appear likely that the subsequent law firm advertisements and billboards that contained the message "Ed Bernstein Cares" would be a communication made for the purpose of influencing an election.

Even the Bernstein campaign's early television advertisements appear to suggest a link to the themes expressed in the law firm advertisements. For instance, a Bernstein campaign television advertisement that began running the week of June 5, 2000 highlighted respondent's character through a testimonial featuring Sandy Heverly, an anti-drunk driving activist.

Attachment 13. Ms. Heverly recalls Mr. Bernstein's work on the issue, noting that he helped organize a holiday taxi service. Ms. Heverly adds, "Four hundred people that were potential killers removed from the roadways because of Ed Bernstein caring enough to make a difference."

*Id.*, pg. 2. This advertisement is similar to the 2000 law firm advertisements through its use of testimonials about Ed Bernstein's character. It is also similar in advancing the message that "Ed Bernstein cares." The timing of the June 5, 2000 advertisement is significant considering that it aired so close to the May 4, 2000 Paul Haire advertisement which used the superimposed message "Ed Bernstein Cares." Such proximity could clearly have an impact on the minds of a potential voter in making a decision on a candidate for Federal Office.

**c. Coordination and In-Kind Contributions**

When factoring the possible coordination between the law firm and the Bernstein campaign, the heightened frequency of the law firm advertisements, the law firm's substantial change in advertising, and the similarity between the themes articulated in the law firm's advertisements and the Bernstein campaign's early advertisements, it appears that the law firm's

communications may amount to a prohibited contribution. Accordingly, this Office recommends that the Commission find reason to believe that Edward M. Bernstein and Associates, and Edward M. Bernstein, as an officer, violated 2 U.S.C. § 441b. In addition, this Office recommends that the Commission find reason to believe that A Lot of People Supporting Ed Bernstein and Michael W. Kern, as treasurer violated 2 U.S.C. § 441b.

**2. Media Exception**

**a. Applicable Law**

The Act and the Commission's regulations exclude, under certain circumstances, costs associated with the production or dissemination of news stories, commentaries or editorials from the definitions of "contribution" and "expenditure." 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. §§ 100.7(b)(2) and 100.8(b)(2). In *Readers' Digest Ass'n. v. FEC*, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981), the court, interpreting the Act, stated that the media exemption applies when the distribution of news or commentary falls within the media entity's "legitimate press function." The Commission has interpreted the media exemption broadly, consistent with Congress's admonition that the Act was not intended "to limit or burden in any way the first amendment freedom of the press." H. R. Rep. No. 943, 93d Cong., 1<sup>st</sup> Sess., at 4 (1974). *See, e.g.*, Advisory Opinion 1982-44 (cable television network's donation of time to national party committees for broadcasts in which candidates and other party leaders discussed issues and solicited contributions was protected by media exemption).

Section 431(9)(B)(i) identifies only "broadcasting station[s], newspaper[s], magazine[s], or other periodical publication[s]" as press entities entitled to the exemption. The Commission has interpreted the term "broadcasting station" to include broadcasting facilities licensed by the

Federal Communications Commission; networks of such facilities; or cable television operators, producers or programmers. Explanation and Justification of 11 C.F.R. § 114.4(e), 44 Fed. Reg. 76,734, 76,735 (1979) (FCC licensees and networks); 11 C.F.R. §§ 100.7(b)(2), 100.8(b)(2) (cable operators, producers or programmers).<sup>8</sup>

In addition to the "legitimate press function" test, the Commission must also determine whether the press entity is owned or controlled by any political party, political committee or candidate. This test is a straightforward inquiry into whether the complaint, response, or other data available to the Commission suggest that a media entity is so owned or controlled. *See, e.g.,* MUR 3645. If it is, it qualifies for the exemption only in certain narrowly defined situations described in the regulations. *See* 11 C.F.R. §§ 100.7(b)(2)(i) and (ii) and 100.8(b)(2)(i) and (ii).

**b. Ed Bernstein Show**

In January 1989, over 11 years prior to the announcement of his candidacy, the Ed Bernstein Show premiered as a program which included a roster of rotating segments on such topics as consumer advice, health and fitness, as well as an interview segment.<sup>9</sup> Through the years, the show evolved into an interview-only format.<sup>10</sup> In the March 12, 2000 edition of the program, Ed Bernstein and Congresswoman Shelley Berkley (D - Nevada) discussed issues concerning nuclear waste disposal and gambling laws affecting the State of Nevada.

<sup>8</sup> Similarly, the Commission has effectively interpreted the exemption for newspapers, magazines, or other periodical publications as reaching entities that "act[ ] as a news and commentary provider via computer linkages, performing a newspaper or periodical publication function for computer users" by creating editorial content in a manner similar to newspapers or periodicals. Advisory Opinion 1996-16. This matter deals with a broadcast, rather than a print or quasi-print, entity.

<sup>9</sup> *Las Vegas Review-Journal*, "Lawyer Sharpens Interviewing Skills with Weekly Show," April 25, 2000.

<sup>10</sup> *Id.* At the time of the March 12, 2000 segment at issue, the program was a half-hour interview with one guest.

The information currently available suggests that the media exception does apply to this matter. A review of a segment of the March 12, 2000 edition of the Ed Bernstein Show reveals that the program was acting in its "legitimate press function." The program consisted of commentary on issues of the day by Bernstein and his guest, Representative Berkley, without reference to either of their candidacies. Considering that the program had regularly been on the air for 11 years at the time of the segment at issue, and based on a review of Mr. Bernstein's interview of Representative Berkley and information currently available regarding the basic format of the program, there is no indication that the actions of Mr. Bernstein deviated from legitimate press activity.<sup>11</sup>

Regarding the issue of media ownership and control, there is no indication that Mr. Bernstein owned the television stations that broadcast his program. KNRV-TV and KVBC-TV, NBC affiliated televisions that broadcast the Ed Bernstein Show<sup>12</sup>, are owned and operated by Sunbelt Communications. A Dun and Bradstreet search of Sunbelt Communications does not indicate that Mr. Bernstein owns or controls this media entity. As such, the media exception applies, precluding further discussion of this matter.

Accordingly, this Office recommends the Commission find no reason to believe that KNRV-TV, KVBC-TV, or Sunbelt Communications violated any provision of the Act in connection with this matter.

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<sup>11</sup> A videotape copy of the Ed Bernstein Show segment at issue is on file with the Central Enforcement Docket.

<sup>12</sup> Id.

#### **IV. PROPOSED DISCOVERY**


Many, and perhaps most, of the facts relevant to this matter are not yet in the Commission's possession. This Office will seek production of any other 1999 television advertisements aired by the law firm before Mr. Bernstein's candidacy announcement to determine whether the new ads contain a closer nexus to the campaign. This Office will also seek information pertaining to the advertising practices of Edward M. Bernstein and Associates, and information concerning the personnel, development process, and costs of the Bernstein and Associates television advertisements in Nevada. In order to obtain sufficient information and to assist this Office in its investigation of this matter, we recommend that the Commission approve the attached Subpoenas to Produce Documents and Orders to Provide Written Answers to all respondents.

#### **IV. RECOMMENDATIONS**

1. Find reason to believe that A Lot of People Supporting Ed Bernstein, and Michael W. Kern, as treasurer, violated 2 U.S.C. § 441b.
2. Find reason to believe that Edward M. Bernstein and Associates, and Edward M. Bernstein, as an officer, violated 2 U.S.C. § 441b.
3. Approve the appropriate Factual and Legal Analyses and the appropriate letters.
4. Find no reason to believe that KVBC-TV, KNRV-TV, or Sunbelt Communications violated any provision of the Act in connection with this matter.
5. Approve the attached Factual and Legal Analyses.
6. Approve the attached discovery directed to Edward M. Bernstein, Explosive Media, Edward M. Bernstein and Associates, Inc., A Lot of People Supporting Ed Bernstein, Media Strategies and Research, and StrubleOppel Communications.

7. Approve the appropriate letters.

5/22/01  
Date

  
Lois G. Lerner  
Acting General Counsel

Attachments:

1. June 20, 2000 response from counsel of the Bernstein for Senate campaign.
2. June 20, 2000 response from counsel of Edward M. Bernstein and Associates.
3. Transcript of advertisement produced March 1, 1994 featuring Robert Galloway.
4. Transcript of advertisement produced March 1, 1994 featuring Gary Segal.
5. Transcript of advertisement produced January 22, 1999 featuring paralegal Maria Fernandez-Atkinson and Nancy Bernstein.
6. Transcript of advertisement produced January 22, 1999 featuring paralegal Maria Fernandez-Atkinson.
7. Transcript of a 2000 Bernstein and Associates Commercial featuring Maria Fernandez-Atkinson.
8. Transcript of a 2000 60 second Bernstein and Associates Commercial featuring Paul Haire.
9. Transcript of a 30 second 2000 Bernstein and Associates Commercial featuring Paul Haire.
10. Transcript of a 2000 Bernstein and Associates Commercial featuring Patti Donoghue.
11. Transcript of a 2000 Bernstein and Associates Commercial featuring Cristian Falcon.
12. June 19, 2000 letter from Chuck Gardner to the State Bar of Nevada.
13. Transcript of a June 5, 2000 Bernstein Senatorial Campaign advertisement titled "Sandy."
14. Factual and Legal Analysis for A Lot of People Supporting Ed Bernstein.
15. Factual and Legal Analysis for Edward M. Bernstein and Associates.
16. Subpoena and Order: Edward M. Bernstein.
17. Subpoena and Order: Edward M. Bernstein and Associates.
18. Subpoena and Order: Explosive Media.
19. Subpoena and Order: A Lot of People Supporting Ed Bernstein.
20. Subpoena and Order: Media Strategies and Research.
21. Subpoena and Order: StrubleOppel Communications.