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**SENSITIVE**

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RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
)  
Edward M. Bernstein )  
)  
A Lot of People Supporting Ed Bernstein and ) MUR 4999  
Michael W. Kern, as treasurer )  
)  
Edward M. Bernstein and Associates, Inc. )

**GENERAL COUNSEL'S REPORT #2**

**I. ACTIONS RECOMMENDED**

Authorize subpoenas for the depositions of Edward M. Bernstein, Nancy Bernstein, Edward Lazarus, Karl Struble, James D. "Rick" Welch, and Paul Worlie. Approve Subpoenas to Produce Documents and Orders to Submit Written Answers directed to Edward M. Bernstein, Edward M. Bernstein and Associates, Inc., Explosive Media, Nancy Bernstein, Edward Lazarus, James D. "Rick" Welch, and Paul Worlie.

**II. BACKGROUND**

The central issue in this matter is whether Edward M. Bernstein and Associates, Inc. ("Law Firm") coordinated its television and billboard advertisements with Edward M. Bernstein's Senatorial committee, A Lot of People Supporting Ed Bernstein ("Bernstein Committee"), for the purpose of promoting Bernstein's U.S. Senate campaign in the 2000 election in Nevada.<sup>1</sup> In finding reason to believe that the Law Firm, Edward M. Bernstein, as an officer, the Bernstein Committee and Michael W. Kern, as treasurer, violated 2 U.S.C. § 441b,

<sup>1</sup> The available information indicates that the advertisements at issue first aired on February 28, 2000. The respondents in this matter have entered into two thirty-day tolling agreements with the Commission. As such, the statute of limitations will expire on respondents' activities on April 29, 2005.

1 the Commission considered the following: (1) Mr. Bernstein's apparent high level of decision-  
2 making authority in the advertising campaigns of both the Law Firm (as the 100% stockholder of  
3 the incorporated Law Firm and president of Explosive Media, the media company responsible for  
4 the production, development, and marketing of the Law Firm's television and billboard  
5 advertisements) and his Senate campaign; (2) the substantial changes in the Law Firm television  
6 advertisements, which appear to allude to the candidate's qualifications for public office; (3) the  
7 changes in the Law Firm's billboard advertisements, which contained messages intimating that  
8 Mr. Bernstein cares for the people of Nevada; (4) the Law Firm's reported near 50% increase in  
9 television advertising buys at about the time that the candidate announced his candidacy; and (5)  
10 the timing of these changes, which appear to coincide with Mr. Bernstein's March 13, 2000  
11 announcement of candidacy.<sup>2</sup>

12 Subpoenas to Produce Documents and Orders to Provide Written Answers were issued to  
13 Edward M. Bernstein, the Law Firm, Explosive Media, the Bernstein Committee, Struble Oppel  
14 Communications (the political media firm responsible for the production and development of the  
15 Bernstein Committee's advertisements), and Media Strategies and Research ("MSR") (the  
16 company that purchased advertising time on behalf of the Bernstein Committee). The objective

<sup>2</sup> At the time the Commission found reason to believe in this matter, there was no indication the advertisements contained express advocacy. While the Act defines "independent expenditures" as those "expressly advocating the election or defeat of a clearly identified candidate," 2 U.S.C. § 431(17), neither the Act nor relevant case law requires that in order to constitute a coordinated expenditure a communication must contain express advocacy. *FEC v. The Christian Coalition*, 52 F. Supp.2d 45, 86-87 & fn. 50 (D.D.C. 1999) (finding the argument that the express advocacy limitation must apply to expressive coordinated expenditures "is untenable" in light of *Buckley*); see also *FEC v. Colorado Republican Federal Campaign Committee*, 59 F.3d 1015, 1021 (10th Cir. 1995) (reversing district court holding that coordinated expenditures subject to § 441a(d) limits must contain express advocacy) (*rev'd on other grounds*); *Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986) (express advocacy "not constitutionally required for those statutory provisions limiting contributions"); *McConnell v. FEC*, 251 F. Supp.2d 176, 249 (D.D.C. 2003) (following settled view of courts in the D.C. Circuit that the coordination concept is not limited to express advocacy), *prob. juris. noted*, 123 S. Ct. 2268 (U.S. 2003).

1 of these subpoenas was to obtain information to compare all of the Law Firm's advertisements  
2 that ran from 1994 to February 2000.<sup>3</sup> Additionally, the subpoenas sought details regarding the  
3 decision-making process for both the Law Firm and Bernstein Committee advertising campaigns.  
4 Respondents and the aforementioned witnesses provided limited information in the form of  
5 documents, videotapes, and written answers in response to the subpoenas suggesting that there  
6 may have been coordinated activity between the Law Firm and the Bernstein Committee.  
7 However, at this time, this Office seeks additional discovery in order to fully ascertain (1) how  
8 the Law Firm advertisements evolved contemporaneously with the candidate's campaign and the  
9 role of the various individuals involved, and (2) whether other areas of overlap between the  
10 entities at issue amount to additional components of coordination.

11 **III. DISCUSSION**

12 **A. Summary of the Information Obtained thus Far**

13 The available information appears to indicate that the Law Firm and the Bernstein  
14 Committee may have been involved in coordinated activity. What follows below are two  
15 significant components of that apparent coordination.

16 **1. "2000 Employee Testimonial" Advertisements**

17 Four "Employee Testimonial" advertisements paid for by the Law Firm, which were the  
18 only English-language television advertisements aired in the months of March, April, and May  
19 2000, represent the shift in the Law Firm's advertising strategy.<sup>4</sup> Unlike the previous Law Firm  
20 advertisements, these advertisements exclude Mr. Bernstein and feature Law Firm employees

<sup>3</sup> In response to the complaint, the Law Firm had asserted that the 2000 television advertisements at issue were similar to its advertising campaigns run in 1994 and 1999.

<sup>4</sup> The broadcast advertising buy information confirms that the "2000 Employee Testimonial" advertisements ("Maria," "Paul," "Patti," and "Christian") began airing February 28, 2000 and were last seen in August 2000.

1 focusing only on his positive personal qualities and conveying the message that he has skills  
2 applicable to situations other than the practice of law. By contrast, the pre-2000 advertisements  
3 featuring Law Firm employees did not mention Edward Bernstein at all; instead, the "1994  
4 Employee Testimonial" advertisements, for example, discussed ways in which the Law Firm  
5 collectively exercised sound customer service. The Law Firm's billboards also changed at this  
6 time; the Law Firm's marketing strategy focused on keeping a consistent look and feel to both  
7 the television and billboard advertising campaigns. Attachment 1, pg. 3.<sup>5</sup>

8 The Law Firm asserts that its television advertisements were altered for the sole purpose  
9 of avoiding "equal time" requirements under the Communications Act. Specifically, the Law  
10 Firm refers to a November 18, 1999 letter from counsel to Paul Worlie, the Bernstein  
11 Committee's campaign manager, explaining that the Bernstein Committee would not be subject  
12 to "equal time" requirements if the Law Firm advertisements did not display Mr. Bernstein's  
13 image, and did not refer to him as an individual or as a candidate. Attachment 2.

14 In fact, the content of the Law Firm's "2000 Employee Testimonial" advertisements  
15 appear to reflect advice from the Bernstein Committee's media strategists urging Mr. Bernstein  
16 to modify his public image. Memoranda from Edward Lazarus, the candidate's pollster and  
17 strategic advisor, and Karl Struble, of Struble Oppel Communications, the Bernstein  
18 Committee's media consultant, urged that by the spring of 2000, the Bernstein Committee  
19 broadcast advertisements that rehabilitate the negative public image of the candidate. The  
20 available information shows that the Bernstein Committee appears to have broadcast only one  
21 such advertisement, which did not begin to air until June 2000; the Law Firm, however, altered

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<sup>5</sup> A selection of the responses is attached. The complete responses are voluminous and are available in the Central Enforcement Docket.

1 its advertisements using "2000 Employee Testimonials" in an apparent attempt to rehabilitate  
2 Bernstein's public image and broadcast these advertisements during the spring of 2000.

3 In addition to changing the content of the advertisements, the Law Firm made substantial  
4 advertising buys contemporaneously with Mr. Bernstein's candidacy announcement, paying for  
5 advertisements at more expensive air times than it had prior to Mr. Bernstein running for Federal  
6 office. James D. "Rick" Welch, a Director of Marketing for Explosive Media, provides some  
7 insight about the Law Firm's advertising buys in his February 23, 2000 memorandum to "EMB,"  
8 which appears to refer to Mr. Bernstein. Attachment 3. Specifically, Mr. Welch noted that the  
9 new "Employee Testimonials" spots were completed, and that he was in the middle of increasing  
10 the advertising budget by 50% and changing the advertising schedule on Las Vegas and Reno  
11 television stations. *Id.* Mr. Welch also stated that he was negotiating new rates for access and  
12 prime times. *Id.*

13 **2. Individuals with a Nexus to both the Law Firm and the Bernstein**  
14 **Committee**  
15

16 The available information, albeit limited, reveals individuals involved in the  
17 advertising strategies of both the Law Firm and the Bernstein Committee. Two individuals  
18 involved in the creation of the Law Firm's television advertisements, the candidate and his wife,  
19 Nancy Bernstein, a Director of Marketing for Explosive Media, communicated with the  
20 Bernstein Committee and media consultant Struble Oppel Communications. *See* Attachment 1.  
21 Mr. Bernstein, as president of both Explosive Media and the Law Firm, had final approval over  
22 the Law Firm's television advertisements. *Id.* While the Law Firm concedes that both Mr. and  
23 Mrs. Bernstein were involved to varying degrees in communications with the Bernstein

1 Committee and Struble Oppel Communications during the campaign, they deny that such activity  
2 rose to the level of coordination. *Id.*

3 The available information also suggests that the Bernstein Committee's campaign  
4 manager was involved in changes to the Law Firm's advertisements. Mr. Worlie received the  
5 November 18, 1999 letter noted above regarding "equal time" requirements at the Law Firm's  
6 Las Vegas office, suggesting that he may have been influential in charting the new direction of  
7 the Law Firm's advertisements and/or that the facilities and resources of the Law Firm were used  
8 for campaign purposes. The available information also suggests that he played an important role  
9 in the Law Firm's billboard advertisement strategy. In an August 23, 2000 memorandum  
10 directed to "EMB," which, again, appears to refer to Mr. Bernstein, James D. "Rick" Welch  
11 stated that he was awaiting a response from Mr. Worlie regarding Mr. Bernstein's image  
12 remaining on the Law Firm's billboard displays. Attachment 4.

13 The information obtained thus far also suggests that the Law Firm may have employed  
14 Mr. Worlie before Mr. Bernstein's March 13, 2000 candidacy announcement. Additional  
15 information indicates that Mr. Worlie was involved in the Bernstein campaign by October 1999.  
16 However, the Bernstein Committee's disclosure reports do not report payroll disbursements to  
17 Mr. Worlie until January 24, 2000.<sup>6</sup> Given that Mr. Worlie was apparently working on Bernstein  
18 Committee matters at one of the Law Firm offices at least two months before he received  
19 payment from the Bernstein Committee, it appears that the Law Firm may have retained  
20 Mr. Worlie for purposes of advancing the Bernstein Committee's campaign. Such a

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<sup>6</sup> The Bernstein Committee's April 2000 Quarterly Report discloses this payroll disbursement to Mr. Worlie in the amount of \$4,508.27.

1 possibility not only suggests coordination between the Law Firm and the Bernstein Committee,  
2 but may also indicate a prohibited corporate in-kind contribution by the Law Firm.

3 **B. The Need for Additional Information**

4 The information provided by respondents and witnesses is not complete and requires  
5 further clarification. In response to letters from this Office seeking full compliance with the  
6 Commission's subpoena, the Law Firm asserted that they had no additional information to  
7 provide in response to the Commission's Subpoena and Order and that their prior document  
8 productions provided sufficient information. However, the available information reveals the  
9 following: (1) scripts for many of the advertisements shown on the videotape were not provided;  
10 (2) discrepancies exist between the content of certain scripts and the apparent videotape  
11 counterpart; and (3) some advertisements may not have been produced on the videotape or in  
12 script form. Through probing of the witnesses and respondents during deposition discovery, we  
13 hope to obtain further information about the scripts not provided and to clarify the discrepancies  
14 that exist between the scripts and the videotapes that have been provided. In addition, more  
15 detailed information regarding the Law Firm advertisements is necessary to compare the "2000  
16 Employee Testimonial" advertisements with all Law Firm advertisements broadcast between  
17 1994 and 2000, and to compare all 2000 Law Firm advertisements with the Bernstein  
18 Committee's advertisements. In particular, more detailed information regarding the Law Firm's  
19 "Working Families" advertisement, which aired after the "2000 Employee Testimonial"  
20 advertisements, could be significant in assessing whether there was coordination between the  
21 Law Firm and the Bernstein Committee given that both entities aired an advertisement entitled  
22 "Working Families" during the same timeframe (July 4, 2000 to July 23, 2000).

1           The available information also does not elaborate on the communications between Law  
2   Firm personnel and persons associated with the Bernstein Committee. For example, the  
3   available information indicates that both Mr. and Mrs. Bernstein were involved in the advertising  
4   strategies of both the Law Firm and the Bernstein Committee but does not provide specifics  
5   regarding their communications with the two entities; such communications can be explored via  
6   further discovery.

7           Additionally, Bernstein Committee campaign manager Paul Worlie's apparent nexus to  
8   the advertising strategy of the Law Firm requires further scrutiny. The available information  
9   indicates that Mr. Worlie was involved in the Law Firm changing its billboard and television  
10   advertisements, but we do not know the full extent of his involvement with the creation of the  
11   "2000 Employee Testimonial" campaign. Further, the Law Firm's possible employment of  
12   Mr. Worlie, who is not an attorney, prior to Mr. Bernstein's March 13, 2000 candidacy  
13   announcement needs to be confirmed and the full scope of his activities while at the Law Firm  
14   needs to be ascertained.

15           The available information is also incomplete regarding the development and creation of  
16   most of the Law Firm's television and billboard advertisements. Specifically, more information  
17   is needed regarding the Law Firm's "2000 Employee Testimonial" television and billboard  
18   advertising strategy at the time that Mr. Bernstein declared his candidacy on March 13, 2000.  
19   Although the Law Firm contends that the "1994 Employee Testimonial" advertisements served  
20   as the blueprint for the "2000 Employee Testimonial" advertisements, the two advertising  
21   campaigns appear to be distinguishable; no information explaining the decision-making process



1 as to the billboards has been provided. The lack of any information describing the creation and  
2 development of these advertisements calls for further information through discovery.

3 The information obtained thus far regarding the "2000 Employee Testimonial" television  
4 and billboard advertisements also appears inconsistent with the Law Firm's justification for the  
5 changes to its advertising campaign. As noted above, counsel advised the campaign manager  
6 that the Law Firm's advertisements would not carry "equal time" implications if Mr. Bernstein  
7 did not appear in them and if they did not refer to Mr. Bernstein's candidacy or to him as an  
8 individual. The Law Firm avers that, on advice of counsel, its advertisements were changed to  
9 avoid "equal time" requirements. However, the Law Firm's television and billboard  
10 advertisements still clearly referred to Mr. Bernstein.

11 The available information is also incomplete regarding the Law Firm's decision to  
12 purchase more expensive advertising time for the "2000 Employee Testimonial" television  
13 advertisements during the timeframe that Mr. Bernstein announced his candidacy. We know that  
14 shortly before Mr. Bernstein's announcement, the Law Firm planned to increase its advertising  
15 budget by 50%.

16 Additionally, the information obtained thus far reveals two additional instances of  
17 apparent overlap between the Law Firm and the Bernstein Committee that require further  
18 scrutiny. First, the Bernstein Committee's disclosure reports indicate that Marina McPherson,  
19 identified in the Law Firm's employee list as an Executive Assistant, was also a paid employee  
20 of the Bernstein Committee. Additional discovery is necessary to assess Ms. McPherson's role  
21 in both entities. Second, the Law Firm paid for one Bernstein Committee television spot  
22 (entitled "Rip-Off") from KTVN TV in Reno, NV that aired on July 12, 2000 at a cost of \$25.

1 This occurrence appears to be a concrete example of coordination and constitutes a prohibited  
2 corporate contribution. *See* 2 U.S.C. § 441b.

3 Finally, the information regarding the Bernstein Committee's advertising strategy is also  
4 incomplete. As noted above, the advertising strategy advanced by pollster Edward Lazarus and  
5 media consultant Karl Struble is not consistent with the Bernstein Committee's actual advertising  
6 buys. Although in March 2000 Mr. Lazarus urged the Bernstein Committee to engage in paid  
7 media immediately, the Bernstein Committee did not pay for media until June 2000. Although as  
8 early as November 1999 Mr. Struble cautioned Mr. Bernstein about his "credibility problem" and  
9 recommended that Mr. Bernstein improve his public image through "significant rating points on  
10 compelling positive ads," the Bernstein Committee appears to have aired only one such  
11 advertisement, which only ran for a little more than a week in June 2000. Between March and  
12 June 2000, however, the Law Firm broadcast television advertisements that appear to have  
13 attempted to modify Mr. Bernstein's image in a manner consistent with the Bernstein Committee  
14 campaign strategy. Given that these inconsistencies suggest that the Law Firm advertisements  
15 took the place of the public image advertisements advocated by the Bernstein Committee's own  
16 media consultant, more information is needed to fully explore the coordination that appears to  
17 have occurred.

18 **C. Proposed Discovery**

19 Further investigation is necessary to clear up inconsistencies and answer a number of  
20 questions, including those raised in the documents produced, and this Office proposes the  
21 additional discovery described below to gather the evidence needed to complete the record. In

1 particular, this Office recommends a deposition subpoena for Edward M. Bernstein, who was  
2 involved in the advertising strategies of the Law Firm and the Bernstein Committee.  
3 Attachment 5. Mr. Bernstein may also be able to provide specifics about all areas of overlap  
4 between the Law Firm and the Bernstein Committee. This Office also recommends deposition  
5 subpoenas for Edward Lazarus, the Bernstein Committee's pollster and strategic advisor, and  
6 Karl Struble, the Bernstein Committee's media consultant, about the nature and extent to which  
7 they may have influenced the Law Firm's advertisements. Attachments 6-7. In addition, this  
8 Office recommends a deposition subpoena for Nancy Bernstein, who as a Director of Marketing  
9 for Explosive Media and having communicated with the Bernstein Committee and media  
10 consultant Struble Oppel Communications, is connected to the advertising strategies of both the  
11 Law Firm and the Bernstein Committee. Attachment 8. This Office also recommends a  
12 deposition subpoena for James D. "Rick" Welch, who authored memoranda detailing Mr.  
13 Worlie's involvement in the Law Firm's billboard advertisements. Further, as a Director of  
14 Marketing for Explosive Media, Mr. Welch may be able to explain certain aspects of the Law  
15 Firm media strategy regarding the creation of the "2000 Employee Testimonial" advertisements  
16 and the substantial advertising buys contemporaneous to Mr. Bernstein's March 13, 2000  
17 candidacy announcement. Attachment 9. Finally, this Office recommends a deposition  
18 subpoena for Paul Worlie, the Bernstein Committee's campaign manager, who may have been  
19 involved in changes to the Law Firm's advertisements and may have been employed by the Law  
20 Firm prior to Mr. Bernstein's candidacy announcement. Attachment 10.

21 This Office further recommends that requests for documents and answers to written  
22 questions under subpoena be issued to Edward M. Bernstein, Nancy Bernstein, Edward Lazarus,

1 James D. "Rick" Welch, and Paul Worlie. We seek additional information from Mr. and Mrs.  
2 Bernstein and Mr. Welch about the media strategy of the Law Firm advertisements and any  
3 communications that they may have had with Mr. Worlie or other staff of the Bernstein  
4 Committee. Regarding Edward Lazarus, we seek additional information pertaining to the  
5 advertising strategy of the Bernstein Committee. We also seek further details from Paul Worlie  
6 about his employment history and any communications with persons involved in the creation of  
7 the Law Firm advertisements. Additionally, this Office recommends that a request for  
8 documents and answers to written questions be issued both to the Law Firm and Explosive  
9 Media regarding the employment history of Paul Worlie and any Law Firm scripts that were not  
10 produced in the first round of discovery.<sup>7</sup> Attachments 11-12.

11 **IV. RECOMMENDATIONS**

- 12 1. Approve the attached subpoena for deposition and production of documents and order  
13 to submit written answers to Edward M. Bernstein.
- 14 2. Approve the attached subpoena for deposition and production of documents and order  
15 to submit written answers to Nancy Bernstein.
- 16 3. Approve the attached subpoena for deposition and production of documents and order  
17 to submit written answers to Edward Lazarus.
- 18 4. Approve the attached subpoena for the deposition of Karl Struble.
- 19 5. Approve the attached subpoena for deposition and production of documents and order  
20 to submit written answers to James D. "Rick" Welch.
- 21 6. Approve the attached subpoena for deposition and production of documents and order  
22 to submit written answers to Paul Worlie.
- 23 7. Approve the attached subpoena for the production of documents and order to submit  
24 written answers to Edward M. Bernstein and Associates, Inc.

<sup>7</sup> In addition to the proposed formal discovery, this Office is conducting informal discovery regarding MSR, *see supra* pg. 2, and Brad Coker, managing director of Mason-Dixon Polling & Research, who was reported as commenting on Mr. Bernstein's unfavorable public image ratings.

8. Approve the attached subpoena for the production of documents and order to submit written answers to Explosive Media.

9. Approve the appropriate letters.

Lawrence H. Norton  
General Counsel

Rhonda J. Vosdinh  
Associate General Counsel  
for Enforcement

9/24/03

Date

BY: Cynthia E. Tompkins by MA  
Cynthia E. Tompkins  
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Attachments:

1. Respondents' October 31, 2001 Response to Supplemental Questions.
2. Bill Oldaker November 18, 1999 letter to Paul Worlie.
3. James D. "Rick" Welch February 23, 2000 memorandum.
4. James D. "Rick" Welch August 23, 2000 memorandum.
5. Subpoena and Order directed to Edward M. Bernstein.
6. Subpoena and Order directed to Edward Lazarus.
7. Subpoena for deposition directed to Karl Struble.
8. Subpoena and Order directed to Nancy Bernstein.
9. Subpoena and Order directed to James D. "Rick" Welch.
10. Subpoena and Order directed to Paul Worlie.
11. Subpoena and Order directed to Edward M. Bernstein and Associates, Inc.
12. Subpoena and Order directed to Explosive Media.