

ARKANSAS ETHICS COMMISSION

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ADVISORY OPINION NO. 2006-EC-004 Issued April 21, 2006

The Ethics Commission has received a written request for an advisory opinion from James Bopp, Jr. and Raeanna S. Moore, attorneys seeking an opinion on behalf of one of their clients, Arkansas Right to Life ("ARTL"). In the advisory opinion request, counsel asks whether Arkansas' campaign finance statutes apply to issue ads such as the ones described in the following samples:

1. **Television – Voice Over:** Arkansas Values. They must be protected! But some want to take them away. Children need their parents love and direction when making difficult life choices! Some people say that Arkansas laws are adequate to protect children who find themselves facing an unplanned pregnancy. Who are these people? Arrogant politicians like John Smith, ignoring the need to protect Arkansas values by giving in to special interests. Call John Smith at xxx-xxx-xxxx, and tell him to protect your children!
2. **Radio – Voice Over:** Here in Arkansas we have a proven leader in Jane Doe, who is fighting to protect the unborn, the elderly and the disable. Some are trying to stop progress here in Arkansas by giving in to liberal special interest groups. Jane Doe has spent 12 years fighting those special interests and their liberal anti-family agenda. Call Jane Doe at xxx-xxx-xxxx and thank her for fighting for Arkansas' future.

The request states that these ads would be paid for from the general funds of ARTL and may or may not involve consultation with a candidate. Additionally, the request includes a legal analysis in which counsel submits that Arkansas' definitions of "contribution" and "expenditure" contain "the same vague language, i.e. 'for the purpose of influencing the nomination or election' of a candidate, that the Supreme Court found unconstitutional in *Buckley*."

The statutory definitions of the terms at issue are defined by Ark. Code Ann. § 7-6-201. These terms are defined as follows:

(4)(A) "Contribution" means, whether direct or indirect, advances...or anything of value...to a candidate, [or] committee...made for the purpose of influencing the nomination or election of any candidate."

* * *

(8) "Expenditure" means a purchase...or anything of value...made for the purpose of influencing the nomination or election of any candidate."

* * *

(11) "Independent expenditure" means any expenditure which is not a contribution: and (A) Expressly advocates the election or defeat of a clearly identified candidate for office; (B) Is made without arrangement, cooperation, or consultation between any candidate ... and the person making the expenditure...; and (C) Is not made in concert with or at the request or suggestion of any candidate..."

* * *

(12) "Independent expenditure committee" means any person who receives contributions from one (1) or more persons in order to make an independent expenditure and is registered pursuant to § 7-6-215 prior to making expenditures."

In analyzing this request, the Commission is keenly aware that the subject of this request touches on a much debated issue in the campaign finance arena. Since the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed 2d 659 (1976), the regulatory community has been challenged to make certain that its campaign finance laws balance the right of association (which is connected to the right of speech protected by the First Amendment) and the "legitimate governmental interests in informing the public of the source of financial support for political discourse, deterring corruption and maintaining records necessary to detect violation of contributions limits." *Buckley*, 424 at 67-68, 96 S.Ct. 612.

Quoting from *Buckley*, the opinion request correctly states that "political" speech enjoys the highest constitutional protection: "Discussion of public issues and debate on the qualification of candidates are integral to...our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the

unfettered interchange of ideas...[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs...of course includ(ing) discussions of candidates..." citing *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (internal citations omitted).

Accordingly, it is necessary to answer the question presented in light of applicable court decisions addressing the constitutionality of the phrase "for the purpose of influencing" under the First Amendment. Precedent has clearly established that this phrase must be construed to require language of "express advocacy" before reporting requirements may be imposed. See, e.g., *Buckley*, (1976); *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) ("MCFL"); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); and *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999). "To avoid uncertainty, and therefore invalidation of a regulation of political speech, the Supreme Court in *Buckley*, established a bright-line test. The Supreme Court's focus was on whether the communication contains "express" or "explicit" words of advocacy for the election or defeat of a candidate." *Iowa Right to Life Committee, Inc. v. Williams*, 187 F. 3d 963 (8th Cir. 1999) (internal citations omitted).

"Communications that discuss the record and philosophy of specific candidates, like the one before us, do not constitute express advocacy under *Buckley* and MCFL unless they also contain words that exhort viewers to take specific electoral action for or against the candidates." *California Pro-Life Council, Inc. v. Getman*, 328 F. 3d 1088 (9th Cir. 2003), (internal quotation marks and citation omitted).

As a helpful mechanism to grasp the possible types of communication and the applicable laws regulating certain political speech, the Commission has prepared a table or graph to illustrate its determination that issue advocacy, without explicit words urging action to "vote for" or "vote against" a clearly identified candidate, is unregulated political speech and not subject to Arkansas' campaign finance laws.

	Express Advocacy	No Express Advocacy
Cooperation With Candidate	Contribution to candidate (\$2,000 limit)	Unregulated, issue advocacy
No Cooperation With Candidate	Independent Expenditure (registration and reporting required; amount unlimited)	Unregulated, issue advocacy

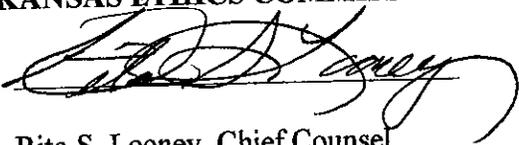
Based on the facts presented and the applicable law, it is the Commission's opinion that the content of the ads as described in the opinion request do not expressly advocate the election or defeat of a clearly identified candidate and therefore the ARTL would not be required to register and file reports as an independent expenditure committee. These proposed ads constitute issue advocacy protected from regulation by the State under the First and Fourteenth Amendments to the Constitution.

It is noted that this opinion is being issued based on the provisions set forth above as applied specifically to the issue ads as described in the request. Paid advertisements which expressly advocate the election or defeat of a clearly identified candidate are regulated through the law as applied to independent expenditures or as political contributions reported by the candidate benefited.

Finally, because payment of the proposed ads would come from the general funds of ARTL, as opposed to funds solicited for the purpose of making contributions to candidates, the ARTL would not trigger the political action committee (PAC) registration and reporting requirements in connection with the running of these ads.¹

This opinion is issued by the Arkansas Ethics Commission pursuant to Ark. Code Ann. § 7-6-217(g)(2).

ARKANSAS ETHICS COMMISSION

By: 

Rita S. Looney, Chief Counsel

¹ As defined in Ark. Code Ann. § 7-6-201(1)(A), an approved PAC means any person who:

- (i) Receives contributions from one (1) or more persons in order to make contributions to candidates, ballot question committees, legislative question committees, political parties, county political party committees, or other political action committees;
- (ii) Does not accept any contribution or cumulative contributions in excess of five thousand dollars (\$5,000) from any person in any calendar year; and
- (iii) Registers pursuant to § 7-6-215 prior to making contributions.

To qualify as an approved PAC, the committee is required to register with the Secretary of State within fifteen (15) days after accepting contributions during a calendar year which, in the aggregate, exceed five hundred dollars (\$500). The registration is to be annually renewed by January 15, unless the committee has ceased to exist. The committee is required to maintain for a period of four (4) years records evidencing the name, address, and place of employment of each person who contributed to the committee, along with the amount contributed, and the name and address of each candidate who received a contribution from the committee, along with the amount contributed. Ark. Code Ann. § 7-6-215(a)(1) and (2).