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AOR 2010-10

June 10, 2010

Federal Election Commission
Office of General Counsel
999 E Street, N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request

To Whom It May Concern:

We represent National Right to Life PAC (NRL PAC) in regard to this Advisory Opinion Request. A Statement of Designation of Counsel is enclosed. How shall disbursements for independent expenditures paid for by NRL PAC be allocated among candidates in the scenarios delineated below? These scenarios are illustrated by Exhibits 1-12, enclosed. These exhibits are merely exemplars to illustrate the questions being posed. We are not requesting approval of these exhibits. The central issue is whether independent expenditures must be allocated between all candidates discussed in the same communication, and therefore reported separately on FEC Form 5, schedule 5-E, or whether the expenditure may be allocated to only those candidates expressly supported or expressly opposed.

The Regulations

11 CFR § 104.3(b)(3)(vii)(B) states in pertinent part: "For each independent expenditure reported, the committee must also provide a statement which indicates whether such independent expenditure is in support of, or in opposition to a particular candidate, as well as the name of the candidate and office sought by such candidate"

11 CFR § 104.10(a) states in pertinent part: "*Expenses allocated among candidates. A*

OFFICE OF GENERAL
COUNSEL

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Federal Election Commission

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political committee that is a separate segregated fund . . . making an expenditure *on behalf of* more than one clearly identified candidate for Federal office shall allocate the expenditure among the candidates pursuant to 11 CFR part 106. . . . For allocated expenditures, the committee shall report the amount of each . . . independent expenditure . . . attributed to each Federal candidate.”

11 CFR § 106.1(a) states in pertinent part: “*General rule.* (1) Expenditures, including . . . independent expenditures, . . . made *on behalf of* more than one clearly identified Federal candidate shall be attributed to each such candidate *according to the benefit reasonably expected to be derived.* For example, in the case of a publication or broadcast communication, the attribution shall be determined by the proportion of space or time *devoted to each candidate* as compared to the total space or time devoted to all candidates. . . . These methods shall also be used to allocate payments involving both expenditures on behalf of one or more clearly identified Federal candidates and disbursements on behalf of one or more clearly identified candidates.”

The Facts

The scenarios upon which our questions are illustrated by Exhibits 1–12, enclosed. Exhibits 1 & 2 involve communications expressly advocating for one candidate; these communications do not mention any other candidates. Exhibits 3–6 involve communications expressly advocating for one candidate, highlighting the position of the opposing candidate in the same race on the relevant issue, and comparing the positions of those two candidates on that issue. Exhibits 7–10 are communications expressly advocating for two candidates in different races, highlighting the position of the opposing candidates in the respective races on the relevant issue, and comparing the positions of the supported candidates on that issue to those of the opponents. Exhibit 11 involves express advocacy against a candidate; it does not mention any other candidate. Exhibit 12 involves express advocacy in support of two candidates and express advocacy against those candidates’ opponent.

As you can see, NRL PAC’s planned communications involve “express advocacy” for one or more clearly identified candidates in one or more specific races while highlighting the positions of the opposing candidate(s) on important issues. Occasionally NRL PAC will distribute a communication with two or three races, where half of the candidates identified in the communication are supported, respectively, and the positions of the opposing candidates on important issues are highlighted, respectively. In such cases NRL PAC plans to report the entire amount as a disbursement in support of the supported candidate(s). In the instances where the communications support more than one candidate, NRL PAC plans to allocate the amount proportionately *among the candidates supported by and receiving benefit from the communication.*

Title 11 of the Code of Federal Regulations, Section 104.3(b)(1)(vii) requires that disbursements for independent expenditures be reported. The regulation further requires itemization of these independent expenditures, along with “a statement which indicates whether such independent expenditure is in support of, or in opposition to a particular candidate.” 11 CFR §

104.3(b)(3)(vii)(B). FEC Form 3X, Schedule E, Itemized Independent Expenditures and FEC Form 5, Schedule 5-E, Itemized Independent Expenditures contain space entitled "Name of Federal Candidate Supported or Opposed by Expenditure" along with a notation to "Check One" next to two boxes labeled "Support" and "Oppose." The forms appear to indicate that an expenditure will be reported as either for (support for) or against (opposed to) the listed candidate. There is no indication on the form or in the instructions that a single expenditure should be divided and reported both as in "support" of one candidate and opposed to his or her opponent in any particular election.

In addition, a "political committee . . . making an expenditure on behalf of more than one clearly identified candidate . . . shall allocate the expenditure among the candidates pursuant to 11 CFR part 106." 11 CFR § 104.10(a). That part specifies that "independent expenditures . . . made *on behalf of* more than one . . . candidate shall be attributed to each such candidate according to the *benefit reasonably expected to be derived.*" 11 CFR § 106.1(a) (emphasis added). It then provides three examples of situations where allocation among several candidates would be necessary.

One instance conspicuously missing from the regulations and examples is the circumstance necessitating allocation of disbursements for independent expenditures among the candidates who "benefit" *and* the opposing candidates who are discussed by the same communication. This makes perfect sense. If a communication by its terms expressly advocates for the election of Candidate A, then Candidate A benefits and Candidate B (who is Candidate A's opponent) is not benefitted by the communication.

Questions and Proposed Answers

Question One: How shall disbursements for independent expenditures be allocated among candidates when only one candidate is identified and that communication involves express advocacy for that candidate (see Exhibits 1 & 2)?

Proposed Answer One: Allocation is only necessary when more than one candidate benefits from the disbursement for an independent expenditure. See 11 CFR § 106.1(a). Therefore, no allocation is necessary for these communications.

Question Two: How shall disbursements for independent expenditures be allocated among candidates when two candidates are identified, but only one is supported by express advocacy and the position of the opposing candidate in the same race on the relevant issue is highlighted and compared to the position of the supported candidate (Exhibits 3–6)?

Proposed Answer Two: Allocation is only necessary when more than one candidate *benefits* from the disbursement for an independent expenditure. See 11 CFR § 106.1(a). Therefore, no allocation is necessary for these communications. Even though the communication contains two candidates, they are opponents. One is intended to be benefitted, and the other is not intended to be

benefitted. No allocation is necessary; the entire amount is reported as a disbursement for an independent expenditure in support of the supported or benefitting candidate.

Question Three: How shall disbursements for independent expenditures paid for by NRL PAC be allocated among candidates when several candidates and races are identified, half of whom are supported by express advocacy and the positions of the opposing candidates in the same races on the relevant issues are highlighted and compared to the positions of the supported candidates (see Exhibits 7–10)?

Proposed Answer Three: Allocation should be made proportionately among the candidates supported in the same communication, but no allocation should be made to the opposing candidates discussed in the same communication. Allocation should be “according to the benefit reasonably expected to be derived.” 11 CFR § 106.1(a). Exhibits 7–10 involve communications where the benefitting candidates have equal treatment. A reasonable allocation would be for an equal percentage of the amount of the disbursement to be allocated to each candidate. In short, so long as the allocation is proportionate to the benefit reasonably expected to be derived, the allocation is proper.

Question Four: How shall disbursements for independent expenditures be allocated among candidates when only one candidate is identified and that communication involves express advocacy *in opposition to* that candidate (see Exhibit 11)?

Proposed Answer Four: Allocation is only necessary when more than one candidate benefits from the disbursement for an independent expenditure. See 11 CFR § 106.1(a). Therefore, no allocation is necessary for these communications. This communication would be reported as a communication opposing the listed candidate.

Question Five: How shall disbursements for independent expenditures be allocated among candidates when the communication identifies three candidates (A, A1, & C), expressly advocating in support of two candidates (A & A1) and expressly advocating against candidate C, where A and A1 represent a presidential and vice presidential ticket, and C is a senatorial candidate (Exhibit 12)?

Proposed Answer Five: This communication should be reported as an expenditure in support of the benefitting candidates (A & A1) and allocated between them according to criteria as explained above in “Proposed Answer Three.” See 11 CFR §§ 104.10(a); 104.3(b)(3)(vii)(B); & 106.1(a).

Question Six: When a communication identifies two opposing candidates, and expressly advocates for the election of one, but does not expressly advocate the defeat of the other, is it a violation to file an independent expenditure report that identifies the entire expenditure as being made in “support” of the candidate expressly supported?

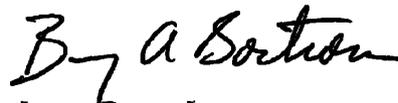
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Proposed Answer Six: No, so long as the entire amount is reported as a disbursement for an independent expenditure in support of the benefitting candidate, the reporting requirements have been met. There is no requirement to divide the expenditure between the two named candidates. See 11 CFR §§ 104.10(a); 104.3(b)(3)(vii)(B); & 106.1(a).

Please contact us with any questions that you may have.

Sincerely,

BOPP, COLESON & BOSTROM

A handwritten signature in black ink that reads "Barry A. Bostrom". The signature is written in a cursive style with a large initial "B".

James Bopp, Jr.
Barry A. Bostrom
Zachary S. Kester



FEDERAL ELECTION COMMISSION
 999 E Street, NW
 Washington, DC 20463

**Statement of Designation of Counsel
 (Respondent/Witness)**

MUR: _____

Name of Counsel: Barry Bostrom

Firm: Bopp, Coleson & Bostrom

1 South 6th St.

Terre Haute, IN 27807-3510

Telephone: (812) 232-2434

Fax: (812) 235-3685

The above named individual is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

May 20 2010
 Date

Carol Tobias Carol Tobias
 Signature

Name (Print): Carol Tobias

Address: 34 Melcor de Canoncito

Cedar Crest, NM 87008

Telephone: Home (505) 286-5778

Business ()

Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.

**Candidate A
Sample State GOTV Script**

Hello.

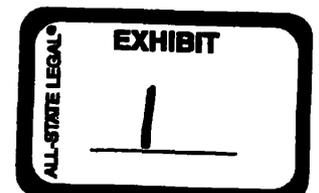
This is National Right to Life PAC asking you to vote for Candidate A for Congress in the Republican primary election.

Candidate A supports legal protection for unborn children. Candidate A opposes using tax dollars to pay for abortion.

Please vote pro-life. Vote for Candidate A for Congress.

Thank you.

This message not authorized by any candidate or candidate's committee. NRL PAC, at nrlpac.org (202-626-8805), is responsible for the content of this advertising and paid for this call.



Use before your life and death. Choose Life then, that you and your descendants will live.

Compare the Candidates and Vote for Life on Tuesday, November

Candidate A

- ✔ Candidate A supports legal protection for unborn children, and opposes abortion on demand.
- ✔ Candidate A voted against using your tax dollars to promote or pay for abortion.
- ✔ Candidate A opposes partial-birth abortion, and voted for the Partial-Birth Abortion Ban Act.
- ✔ Candidate A co-sponsored and voted for a bill to require an abortionist to notify at least one parent before performing an abortion on a minor girl from another state.
- ✔ Candidate A is endorsed by the National Right to Life Political Action Committee.

Vote like life depends on it . . . it does.

Vote for

CANDIDATE A

for U.S. House

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**Candidate A
Sample State GOTV Script**

Hello.

This is National Right to Life PAC asking you to vote for Candidate A for Senate.

Candidate A supports legal protection for unborn children. Candidate A opposes using tax dollars to pay for abortion. And Candidate A voted to end partial-birth abortion.

Candidate B supports abortion on demand, *even* for birth control, *even* into the sixth month of pregnancy.

Please vote for Candidate A for Senate.

This message not authorized by any candidate or candidate's committee. NRL PAC, at nrlpac.org (202-626-8805), is responsible for the content of this advertising and paid for this call.

Thank you.



Use before your life and health... Choose Life then, then you and your descendents may live.

Compare the Candidates and Vote for Life on Tuesday, November

Candidate A

- ☛ Candidate A supports legal protection for unborn children, and opposes abortion on demand.
- ☛ Candidate A opposes partial-birth abortion, and voted for the Partial-Birth Abortion Ban Act.
- ☛ Candidate A voted against using your tax dollars to promote or pay for abortion.
- ☛ Candidate A cosponsored and voted for a bill to require an abortionist to notify at least one parent before performing an abortion on a minor girl from another state.
- ☛ Candidate A is endorsed by the National Right to Life Political Action Committee.

Candidate B

- ☛ Candidate B supports a policy of abortion on demand, which allows abortion for any reason.
- ☛ Candidate B is endorsed by the pro-abortion National Women's Political Caucus, which supports candidates who favor unrestricted abortion on demand and partial-birth abortion.
- ☛ Candidate B is endorsed by the pro-abortion group DAPAC, which supports candidates who support unrestricted abortion on demand and tax funding of abortion.

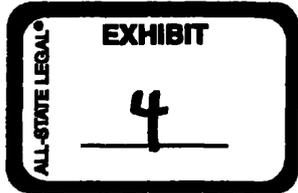
Vote like life depends on it . . . it does.

Vote for

CANDIDATE A

for U.S. House

CO4



**National Right to Life PAC
General Election**

Tag: ST1-NT1
Candidate: Candidate A

More than 3,500 (three thousand-five hundred) abortions are performed every day in this country, and each abortion takes the life of a living unborn baby. You can speak up for unborn children by voting for Candidate A for Congress.

Candidate A supports legal protection for unborn children. Candidate A opposes using your tax dollars to pay for abortion. Candidate A supports requiring parental notice or consent before an abortion is performed on a minor girl. And Candidate A opposes partial-birth abortion.

Candidate B supports the current policy of abortion on demand for any reason, *even* for birth control, *even* into the sixth month of pregnancy.

Unborn babies can't vote, but you can. On Tuesday, November please vote for Life. Vote for Candidate A for Congress.

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**National Right to Life PAC
General Election**

Tag: STROS-NT2D

Candidate: Candidate A

Woman: That settles it! I'm *not* voting for Candidate C!

Man: Why not?

Woman: Candidate C voted to keep the brutal partial-birth abortion procedure legal.

Man: That's terrible! Isn't partial-birth abortion when a living unborn baby is pulled feet first from the womb all but the head and then killed?

Woman: Yes. And Candidate C even voted against a bill to require that a parent be notified before an abortion is performed on their minor daughter in another state.

Man: What about Candidate A?

Woman: Candidate A supports legal protection for unborn children. Candidate A supports requiring parental notice or consent before an abortion is performed on a minor girl. And, Candidate A opposes partial-birth abortion.

Man: Then, I'm voting for Candidate A for Senate.

Woman: Me, too.

Announcer: On November vote to keep America's children safe. Vote for Candidate A for U.S. Senate.

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**Candidate A and Candidate B
Sample State GOTV Script**

Hello.

This is National Right to Life PAC asking you to vote for Candidate A for Senate and Candidate B for Congress.

Candidate A and Candidate B support legal protection for unborn children, and Candidate A and Candidate B oppose partial-birth abortion.

Candidate C and Candidate D support abortion on demand, *even* for birth control, *even* into the sixth month of pregnancy.

Please vote for Candidate A for Senate and Candidate B for Congress.

This message not authorized by any candidate or candidate's committee. NRL PAC, at nrlpac.org (202-626-8805), is responsible for the content of this advertising and paid for this call.

Thank you.



Compare the Candidates and Vote for Life on Tuesday, November

Candidate A

- ☛ Candidate A supports legal protection for unborn children, and opposes abortion on demand.
- ☛ Candidate A opposes partial-birth abortion, and voted for the Partial-Birth Abortion Ban Act.
- ☛ Candidate A opposes using your tax dollars to promote or pay for abortion.
- ☛ Candidate A is endorsed by the National Right to Life Political Action Committee.

Candidate B

- ☛ Candidate B supports a policy of abortion on demand, which allows abortion for any reason.
- ☛ Candidate B voted against a bill to ban partial-birth abortions. This would allow partial-birth abortions to continue with no restrictions.
- ☛ Candidate B voted to use your tax dollars to promote abortion.
- ☛ Candidate B accepted \$10,000 in campaign contributions from Washington Women for Choice, a pro-abortion political action committee organized to impact federal judicial appointments.

Candidate C

- ☛ Candidate C supports legal protection for unborn children, and opposes abortion on demand.
- ☛ Candidate C opposes partial-birth abortion, and voted for the Florida ban on partial-birth abortion.
- ☛ Candidate C opposes using your tax dollars to promote or pay for abortion.
- ☛ Candidate C is endorsed by the National Right to Life Political Action Committee.

Candidate D

- ☛ Candidate D supports a policy of abortion on demand, which allows abortion for any reason.
- ☛ Candidate D accepted \$5,000 in campaign contributions from the radical pro-abortion group, EMILY's List, which supports only candidates who support abortion on demand, partial-birth abortion, and using your tax dollars to pay for abortion.
- ☛ Candidate D is endorsed by the pro-abortion National Women's Political Caucus, which supports candidates who support unrestricted abortion on demand and partial-birth abortion.

CANDIDATE A
for U.S. Senate

CANDIDATE C
for U.S. House

FL59



**National Right to Life PAC
General Election**

Tag: STS1-NT1
Candidate: Candidate A & Candidate B

More than 3,500 abortions are performed every day in this country, and each abortion takes the life of a living unborn baby. You can speak up for unborn children by voting for Candidate A for U.S. Senate and Candidate B for U.S. House.

Candidate A and Candidate B support legal protection for unborn children. Candidate A and Candidate B oppose using your tax dollars to pay for abortion. Candidate A and Candidate B support requiring parental notice or consent before an abortion is performed on a minor girl. And Candidate A and Candidate B voted to end partial-birth abortion.

Candidate C and Candidate D support the current policy of abortion on demand for any reason, *even* for birth control, *even* into the sixth month of pregnancy.

Unborn babies can't vote but you can. On Tuesday, November please vote for Life. Vote for Candidate A for U.S. Senate and Candidate B for U.S. House.

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**National Right to Life PAC
General Election**

Tag: ST1-NT2D
Candidate: Candidate A & Candidate B

Nephew: My vote just isn't going to matter this year.

Aunt: Actually, for unborn children, your vote couldn't be more important. More than 3,000 unborn babies are aborted every day in this country.

Candidate A and Candidate B oppose abortion and support protection of unborn children.

But, Candidate C and Candidate D support a policy of abortion on demand for any reason.

Candidate C even voted four times in the State Senate against bills to provide care and protection for babies who are born alive after abortions. And, Candidate C voted to keep partial-birth abortion legal.

Nephew: That's awful. Isn't partial-birth abortion when a living unborn baby is delivered, all but the head, before being killed?

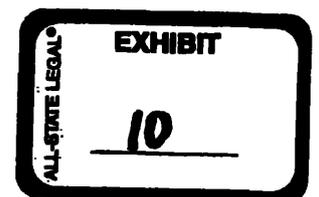
Woman: Yes, it is. But, the good news is, Candidate A voted to end partial-birth abortion. Candidate A and Candidate B won't use our tax dollars to pay for abortion.

Nephew: You're right. My vote does matter.

Aunt: Yes it does.

On November vote for Life. Vote for the State's pro-life team:
Candidate A and Candidate A1 for President and Vice President and
Candidate B for Congress.

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Candidate A - OPPOSE
Sample State – US Senate

Hello.

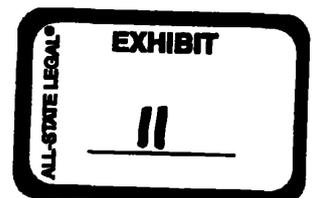
This is National Right to Life PAC asking you to vote **against** Candidate A for Senate on Tuesday.

Candidate A supports a policy of abortion on demand. And, Candidate A has been endorsed by the pro-abortion group NARAL, which supports candidates who support partial-birth abortion, **and** who support taxpayer funding of abortion!

Vote **against** Candidate A and keep him and his pro-abortion policies out of the United States Senate.

Thank you.

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**National Right to Life PAC
General Election**

Tag: STS-NT2D
Candidate: Anti-Candidate C

Woman: Did you know National Right to Life is asking pro-lifers to vote against Candidate C for Senate?

Man: Really? Why?

Woman: Candidate C supports a policy of abortion on demand, which allows abortion for any reason. And, Candidate C has been endorsed by the pro-abortion group NARAL!

Man: Is that bad?

Woman: **Yes!** That's terrible! NARAL supports candidates who support abortion for any reason; who support partial-birth abortion, *and* who support using our tax dollars to pay for abortion.

Man: That's awful. Isn't partial-birth abortion when a living unborn baby is delivered, all but the head, before being killed?

Woman: Yes, it is. That's why Congress and more than half the states have passed laws banning partial-birth birth abortion. But if the [prominent pro-abortion leader] and his allies like Candidate C have their way, partial-birth abortion could become legal again.

On Tuesday, November , voters can provide a strong voice for unborn children in the voting booth. While you're voting *for* America's pro-life team, Candidate A and Candidate A1 and vote *against* Candidate C and keep him and his pro-abortion policies out of the United States Senate.

Man: Paid for by National Right to Life PAC at nrlpac.org. Not authorized by any candidate or candidate's committee. NRLPAC is responsible for the content of this advertising.

