

JAMES BOPP, JR.<sup>1</sup>

*Senior Associates*

RICHARD E. COLESON<sup>1</sup>

BARRY A. BOSTROM<sup>1</sup>

*Associates*

RAEANNA S. MOORE<sup>1</sup>

JEFFREY P. GALLANT<sup>2</sup>

ANITA Y. WOUTENBERG<sup>1</sup>

JOSIAH S. NEELEY<sup>3</sup>

CLAYTON J. CALLEN<sup>4</sup>

JOSEPH E. LA RUE<sup>5</sup>

## BOPP, COLESON & BOSTROM

ATTORNEYS AT LAW

(not a partnership)

1 South Sixth Street

TERRE HAUTE, INDIANA 47807-3510

Telephone 812/232-2434 Facsimile 812/235-3685

THOMAS J. MARZEN

(1946-2007)

E-MAIL ADDRESSES

jboppjr@aol.com

rcoleson@bopplaw.com

bbostrom@bopplaw.com

rmoore@bopplaw.com

kgallant@bopplaw.com

awoutenberg@bopplaw.com

jneeley@bopplaw.com

ccallen@bopplaw.com

jlalrue@bopplaw.com

<sup>1</sup>admitted in Ind.

<sup>2</sup>admitted in Va.

<sup>3</sup>admitted in Tex.

<sup>4</sup>admitted in Mo.

<sup>5</sup>admitted in Oh.

November 19, 2007

Commissioners  
Mr. Ron B. Katwan  
Federal Election Commission  
Washington, DC 20463

Re: Draft Final Rule on Electioneering  
Communications

Dear Commissioners & Mr. Katwan:

We have reviewed the General Counsel's Draft Final Rule. The Commission should adopt Draft A (altering the "electioneering communication" definition), but it should make the changes indicated on the attached draft in order to fix some serious flaws in the proposed rule.

Specifically, we first note that *WRTL II*'s no-other-reasonable-interpretation ("NORI") test shows up in three places, i.e., twice at (d)(a) and once at (d)(a)(2)(iii). This is confusing and redundant. The NORI test should be stated once as *the* test. In our revised draft, we eliminate the repetition and put the NORI test in its rightful place as the sole governing test.

Second, *WRTL II*'s discussion of indicia of express advocacy and grassroots lobbying activity were part of the *WRTL II*'s application of the NORI test in the *unique context* of an as-applied challenge based on grassroots lobbying activity. Consequently, the indicia of express advocacy should be moved to the safe harbor section, as our draft does. This is logical because an ad could readily pass the NORI test (i.e., be protected issue advocacy) and yet mention an election and/or political parties. For example, an ad by a corporation could feature one or more federal candidates urging people "to do your civic duty and vote next week, regardless of whether you are a Republican, Democrat, or Independent." These multiple indicia of express advocacy would not cause the ad to fail the NORI test. By the use of the word "and" in (d)(a), the FEC's Draft Final Rule seems to agree that indicia of express could be present and the ad could still pass the NORI test. However, the indicia of express advocacy are not properly part of the NORI test itself and should not be included in the statement of the test.

Although we hesitate to put words in the mouth of others, we note the following online comments that seem to agree that the indicia of express advocacy should not be part of the statement of the NORI test. Paul Ryan at the Campaign Legal Center website ([www.clcblog.org](http://www.clcblog.org))


FEC Commissioners and Mr. Katwan  
November 19, 2007  
Page 2

says that the CLC “supported th[e] approach” of “[t]he FEC’s initial proposed rule,” which “largely mirrored the Court’s opinion by establishing an umbrella ‘no reasonable interpretation’ test and then establish[ed] a *de facto* safe harbor for ads possessing all of the characteristics listed above.” Bob Bauer’s November 17 blog ([www.moresoftmoneyhardlaw.com](http://www.moresoftmoneyhardlaw.com)) also notes that the Commission originally proposed a clean NORI rule, with a grassroots lobbying safe harbor from which an ad would be forced by indicia of express advocacy, and then comments negatively on the present Draft Final Rule’s divergence from that pattern.

Third, we have altered the FEC’s vague and redundant part (d)(2)(iii) by substituting a safe harbor for conveying information, which is consistent with *WRTL II*’s statement that “[i]ssue advocacy conveys information and educates.” 127 S. Ct. at 2667.

Sincerely,

BOPP, COLESON & BOSTROM

  
James Bopp, Jr.  
Richard E. Coleson

**§ 100.29 Electioneering Communication (2 U.S.C. 434(f)(3)).**

\* \* \* \* \*

- (d) Notwithstanding paragraph (a), a communication is not an electioneering communication unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate. ~~In making this determination, the Commission will consider whether the communication includes any indicia of express advocacy and whether the communication has a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.~~

(1) ~~A communication includes indicia of express advocacy if it:~~

- ~~(i) Mentions any election, candidacy, political party, opposing candidate, or voting by the general public; or~~
- ~~(ii) Takes a position on any candidate's or officeholder's character, qualifications, or fitness for office.~~

(21) Safe Harbors. (i) A communication has a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate if it does not include indicia of express advocacy and:

- (iA) Focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue; or
- (iiB) Proposes a commercial transaction, such as purchase of a book, video or other product or service, or attendance (for a fee) at a film exhibition or other event; or
- (iiiC) ~~Includes a call to action or other appeal reasonably interpreted in conjunction with the rest of the communication as urging action other than voting for or against or contributing to a clearly identified Federal candidate or political party.~~ Provides information regarding the position of a candidate on an issue or the actions of a public official in office.

(ii) A communication includes indicia of express advocacy if it:

- (A) Mentions any election, candidacy, political party, opposing candidate, or voting by the general public; or
- (B) Takes a position on any candidate's or officeholder's character, qualifications, or fitness for office.

(32) Rules of Interpretation. In interpreting a communication under ~~this~~ paragraph (d):

- (i) The Commission may only consider ~~external~~ relevant background facts ~~that would qualify for judicial notice~~, such as whether a named individual is a candidate for office or whether a communication describes a public policy issue.
- (ii) ~~Ambiguities are to~~ Any doubt as to the meaning of a communication shall be resolved in favor of the permissibility of an electioneering communication under this paragraph.