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WRF Obtains Ruling Limiting Louisiana Statute to Express Advocacy

By Thomas W. Kirby and Caleb P. Burns

WRF election lawyers have persuaded the U.S. Court of Appeals for the Fifth Circuit in New Orleans to hold that vague state campaign finance definitions of "expenditure" must be narrowly construed to apply to spending for speech only if such speech uses explicit words to expressly advocate the election or defeat of a clearly identified candidate. *Center for Individual Freedom v. Carmouche*, No. 04-30877 (5th Cir. May 11, 2006).

This holding is an important limitation on the state's ability to impose reporting and disclosure requirements on all persons making "independent expenditures."

The U.S. Supreme Court's 1976 *Buckley* decision held that restrictions on spending for independent speech had to be precise, objective and narrow. Where federal campaign finance law used vague language such as "in connection with an election" to identify regulated spending, *Buckley* limited the restrictions to "express advocacy," sometimes called the "magic words" test.

The Supreme Court's 2003 *McConnell* decision allowed Congress to regulate a new category of speech because the statute's detailed definition of "electioneering communications" drew a bright line that was at least as precise and objective as the "express advocacy" standard. *McConnell* commented that Congress had good reason to adopt a new test since the "express advocacy" test was easily circumvented.

Many states, including Louisiana, read *McConnell* to relax the "express advocacy" standard in favor of a broader and more subjective construction of their campaign finance laws. In *Carmouche*, however, a three-judge panel of the U.S. Court of Appeals agreed with WRF's arguments that (1) *Buckley* remains the law, (2) a narrow and objective bright line is necessary and (3) until and unless Louisiana legislates an adequate alternative standard, the state's definition of "expenditure" must be limited to "express advocacy."

On July 11, 2006, the Fifth Circuit denied rehearing *en banc*. ■

IN THIS ISSUE

Six Easy Steps to Firewall Protection against Coordination

The Federal Election Commission (FEC) limits the ability of organizations to engage in federal campaign activity through its coordination rules. Organizations are prohibited from, or severely restricted in, making "coordinated communications," as these communications are considered to be in-kind contributions made to a candidate, authorized committee or political party committee. Corporations are flatly prohibited from making these contributions, while political action committees (PACs) are prevented from making contributions in excess of $5,000 per election cycle. In other words, a coordinated communication can be an illegal contribution.

Nevertheless, in recent revisions to its coordination rules, the FEC created a safe harbor for those political committees that construct and implement a "firewall" between coordinating and non-coordinating units operating within the same organization. *See* Coordinated Communications, 71 Fed. Reg. 33,190, 33,206 (June 8, 2006) (to be codified at 11 C.F.R. § 109.21(h)), available at www.fec.gov/law/cfr/ej_compilation/2006/notice_2006-10.pdf. A "firewall," in this context, is a system that prevents

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Six Easy Steps

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coordinating and non-coordinating units in the same organization from sharing information on a candidate, authorized committee or political party committee. Organizations that design and implement an appropriate system will fall under the firewall safe harbor and will have established a rebuttable presumption that their independent campaign-related activities are not "coordinated communications" if performed by non-coordinating persons. Below are six steps an organization should follow to take advantage of the firewall safe harbor.

Step 1: Refrain from Coordination Activity until a Firewall Is Designed and Implemented

A firewall policy should be designed and implemented before any coordinating activity takes place. Without a firewall in operation first, an exchange of information is more likely to occur between coordinating and non-coordinating persons. Communications made before a firewall is implemented are likely to fall outside the safe harbor.

Step 2: Design a Firewall

Generally, a firewall should be designed to prohibit the flow of information between coordinating and non-coordinating persons. Recognizing that the effectiveness of a firewall depends upon an organization's structure, clients and personnel, the FEC did not dictate the "specific procedures required to prevent the flow of information." Thus, what is required to design a proper firewall policy is somewhat nebulous. The FEC, however, provides insight regarding proper firewall policy design through its explanation and justification and through an enforcement matter decision.

Prevent Exchange of Material Information: The safe harbor is destroyed if information about a candidate, authorized committee or political party committee's plans, projects, activities or needs are used by the non-coordinating persons for an independent expenditure or if the coordinating persons convey this information to a person paying for the independent communication (like the PAC of a trade association). The information, however, must be material to the creation, production or distribution of the communication. Any firewall policy should be designed to prevent this exchange of information.

The EMILY's List Factors: The FEC provided insight into what constitutes a sufficient firewall through its decision in Matter Under Review 5506 (EMILY's List). There, a committee's firewall policy prohibited its employees, volunteers and consultants engaged in advertising work from interacting with the candidate, authorized committee or political party committee. These employees, volunteers and consultants also were prohibited from communicating with others in the committee who had direct contact with the candidate, authorized committee or political party committee. Lastly, the committee's firewall policy prohibited employees, volunteers and consultants who had direct contact with candidates or committees from discussing and conveying material information to those employees, volunteers and consultants who did not have direct contact with the candidates

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UPCOMING DATES TO REMEMBER

July 15, 2006

- Second quarter FEC report due for federal candidates
- Second quarter FEC report due for federal PACs filing quarterly
- Second quarter IRS Form 8872 due for nonfederal PACs filing quarterly*

July 20, 2006

- July monthly FEC report due for federal PACs filing monthly
- July monthly IRS Form 8872 due for nonfederal PACs filing monthly*

August 14, 2006

- Lobbying Disclosure Act (LDA) filing due

August 20, 2006

- August monthly FEC report due for federal PACs filling monthly
- August monthly IRS Form 8872 due for nonfederal PACs filing monthly*

Deadlines are not extended if they fall on a weekend.

* Note: Qualified state and local political organizations are not required to file Form 8872 with the IRS.

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or committees who were engaged in non-coordinated advertising efforts. The combination of these measures led the FEC to conclude that the committee's firewall was sufficiently designed to prevent the untoward flow of information between coordinating and non-coordinating entities.

Step 3: Reduce Firewall Policy to Writing

The policy embodying the firewall must be put into written form in order to take advantage of the new firewall safe harbor.

Step 4: Distribute Written Firewall Policy

The firewall policy then must be distributed to all "relevant" employees, consultants and clients affected by the firewall. The term "relevant" includes employees and consultants actually working for the organization that is paying for an independent communication and those engaged in activities with the candidate.

Step 5: Implement Firewall Policy

The firewall policy should be implemented by the organization. Whatever requirements or prohibitions provided in the firewall policy should be followed by the organization's employees, volunteers and consultants.

Step 6: Be Prepared to Provide Information on Your Firewall Policy

An organization that seeks to use the firewall safe harbor should be prepared to provide information about its firewall policy. Information regarding how the firewall operates, when the firewall was implemented and when the firewall policy was distributed to the relevant parties is likely to be required in any challenge to the safe harbor. There is no record keeping requirement in the safe harbor rule, but maintaining the above information will be useful.

In sum, an organization is not required to adopt a firewall policy. In fact, the FEC stated that it will not draw a negative inference from an organization's failure to adopt such a policy. Without a firewall policy, however, an organization runs a greater risk that its independent activities will be deemed "coordinated communications" if persons in other parts of the organization interact with a candidate and his or her campaign. The existence of a firewall goes a long way toward mitigating this risk. ■

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Idaho

Idaho Begins Regulation of Executive Branch Lobbyists

Joining other states such as New Hampshire and Pennsylvania that have begun regulating the activities of executive branch lobbyists, Idaho Governor Dirk Kempthorne earlier this year signed into law former House Bill 707, which extends the state's lobbying laws to cover the lobbying of executive branch officials and employees. The new law became effective on July 1, 2006.

The new law expands the definition of lobbying to cover attempts to influence various members of the executive branch regarding rulemakings, procurements, contracts, bids, bid processes, financial service agreements and bonds. The new law is applicable to influencing the following persons:

- Governor
- Lieutenant governor
- Secretary of state
- State controller
- State treasurer
- Attorney general
- Department heads, agency directors, deputy directors, division administrators and bureau chiefs
- Members of state boards and commissions

Unlike legislative lobbyists in Idaho, who currently file monthly lobbying reports when the legislature is in session, those lobbyists who solely lobby the executive branch only need to file two lobbying reports per year. Such reports are due on January 31 and July 31.

Visit the website of Idaho's Secretary of State at www.idsos.state.id.us/elect/lobbyist/lobinfo.htm for updated forms and other information relevant to the new law. For more information on similar changes in Pennsylvania, see the article in the May 2006 edition of *Election Law News* at www.wrf.com/PA_Lobbying_Rules. ■

New Hampshire

New Hampshire Tackles Executive Branch Lobbying

On June 2, 2006, New Hampshire began regulating the actions of executive branch lobbyists in the state. Another new law effective on the same date established a detailed set of gift rules for public officials. Finally, a third law expanded the reporting requirements of registered legislative and executive branch lobbyists. (On June 19, 2006, New Hampshire's legislature passed a law clarifying the lobbyist reporting requirements.)

Executive Branch Lobbyists Now Regulated. For the first time, persons who undertake the following activities are required to register and report in New Hampshire as lobbyists:

> promote or oppose, directly or indirectly, any action by the governor, governor and council, or any state agency, . . . where such action concerns legislation or contracts pending or proposed before the [state legislature], any pending or proposed administrative rule, or the procurement of goods or services that are being or may be purchased by the state.

Such lobbyists must wear name tags before the governor, council or state agency. There is an exception to the procurement lobbying portion of the new executive branch lobbying rules for certain sales activities conducted by individuals who own their own business or work as in-house employees.

New Gift and Honoraria Rules. New Hampshire now has statewide gift rules for public officials applicable to gifts from everyone—not just from lobbyists. These rules, and their many exceptions, are in addition to the preexisting provisions found in the state's criminal code.

Under the state's new gift rules, no person may give any gift to any elected official, public official, public employee, constitutional officer or legislative employee. Also, no person may give a gift to a family member of any of these covered persons "with a purpose of influencing or affecting the official conduct of such official or employee."

Furthermore, public officials and public employees may not accept an honorarium from "a person who is subject to or likely to become subject to or interested in any matter or action pending before, or contemplated by, the public official, public employee, or the government body to which that person is affiliated."

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Among other things, the following items are exceptions to the new gift rule:

- Any item with a value less than $10.
- A ceremonial object or award, the value of which is $50 or less and is primarily personal to the recipient.
- Objects which primarily serve an informational purpose provided in the ordinary course of business such as reports, books, maps or charts.
- Meals, beverages, lodging or transportation associated with a celebratory or ceremonial event open to the public or to which more than 50 people are expected to attend.

Expanded Reporting Requirements. New executive branch lobbyists as well as long-standing legislative lobbyists are now subject to expanded lobbyist reporting requirements. Lobbying reports are now due on the second Friday of every month. Moreover, the reports ask for additional and more detailed information, including all fees provided by the lobbyist's clients. ■

Virginia

Virginia Eliminates Federal PAC Reporting Requirements

Effective July 1, 2006, federal political action committees (PACs) are no longer required to file separate reports with the Virginia State Board of Elections (SBE). Under a recent amendment to the campaign finance laws, a federal PAC must complete a new "Statement of Organization: Federal Political Action Committee" form that will be available online at www.sbe.virginia.gov. This new form requires the federal PAC to include the name and address of the committee, the committee's Federal Election Committee (FEC) identification number and the name and address of the committee's treasurer.

Once this form is complete, the SBE will provide a link on its website to the federal PAC's FEC reports. No Virginia-specific reporting is required. Please note, however, that federal PACs currently registered in Virginia are still required to file Virginia-specific reports under the old reporting system for campaign activity through June 30, 2006. ■

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FEC Fines Arkansas Law Firm for Contributions in the Name of Another and Other Bad Acts

On April 22, 2006, the Federal Election Commission (FEC) announced that it had reached a conciliation agreement with an Arkansas lawyer and his law firm for violations of the Federal Election Campaign Act. Together, the lawyer and his firm agreed to pay $50,000 in civil penalties. Edwards for President, the 2004 presidential campaign committee of John Edwards, agreed to pay $9,500 in civil penalties related to the matter.

The agreement in Matter Under Review (MUR) 5366 stemmed from allegations that Tab Turner of North Little Rock, AK, among other things, reimbursed four firm employees for contributions to the Edwards campaign. Moreover, according to the conciliation agreement, the staff at the law firm Turner & Associates worked on the Edwards fundraisers from the office during normal working hours as part of their job duties. Since the law firm was incorporated, the agreement alleges that the firm made illegal in-kind corporate contributions to the Edwards campaign for the activities of the staff and illegally facilitated contributions. In addition, the lawyer charged to his personal account at the firm the rental car and hotel expenses associated with firm staff assisting at the Edwards fundraisers, causing excessive contributions on the part of Turner.

According to the conciliation agreement, the FEC explicitly did not make a "knowing and willful" finding against Turner or his firm.

Documents related to MUR 5366 can be found through the Enforcement Query System on the FEC's website at http://eqs.nictusa.com/eqs/searcheqs. ■

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Progress on Federal Lobbying Reform Legislation Stalled

Despite earlier predictions that a compromise lobbying reform bill could be negotiated by House and Senate conferees prior to the July recess, lawmakers remain unable to reach an agreement on several key issues, including restrictions on 527 political organizations, and the fate of the bill is uncertain. In fact, Speaker Hastert has yet to appoint a set of House conferees, opting to wait until an informal agreement can be reached on some of the bill's more controversial provisions such as 527 reform.

In response to a provision initially included in the House version of the bill, the House Ethics Committee held a June 7, 2006 hearing on possible changes to House rules governing acceptance of privately funded travel. The hearing featured testimony from representatives of five different organizations as members sought input on the various proposals for reform. Although originally scheduled to release a list of its final recommendations by June 15, the committee has not put forward any proposals at this time. ■

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UPCOMING SPEECHES

Judicial Election vs. Judicial Nomination

Jan Witold Baran, Moderator

The State of the American Judiciary
Institute for Legal Reform at the U.S. Chamber of Commerce
July 18, 2006 | Washington, DC

Gearing up for the November Elections: Campaign Support Dos and Don'ts

Carol A. Laham, Speaker

A National Constitution Center Live Audio Conference
August 1, 2006 | 1 PM - 2 PM

For more information, please visit www.wrf.com/events.

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