



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

JUN 27 2001

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Edward M. Bernstein, Esq  
Edward M. Bernstein and Associates, Inc  
500 South 4<sup>th</sup> Street  
Las Vegas, NV 89101

RE: MUR 4999

Dear Mr. Bernstein:

On April 20, 2000, the Federal Election Commission notified you of a complaint alleging violations of 2 U.S.C. § 441b, a provision of the Federal Election Campaign Act of 1971, as amended ("the Act").

Upon further review of the allegations contained in the complaint, and additional information, the Commission, on June 21, 2001, found that there is reason to believe that Edward M. Bernstein, as an officer of Edward M. Bernstein and Associates, Inc., violated 2 U.S.C. § 441b, a provision of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath. All responses to the enclosed Order to Answer Questions and Subpoena to Produce Documents must be submitted to the General Counsel's Office within 30 days of your receipt of this letter. Any additional materials or statements you wish to submit should accompany the response to the order and subpoena. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

You may consult with an attorney and have an attorney assist you in the preparation of your responses to this order and subpoena. If you intend to be represented by counsel, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notification or other communications from the Commission.

Edward M. Bernstein  
MUR 4999  
Page 2

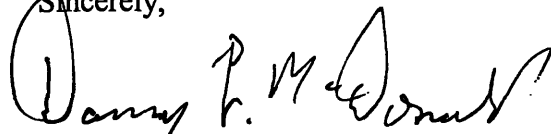
If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Roy Q. Lockett, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Danny L. McDonald  
Chairman

Enclosures  
Order and Subpoena  
Designation of Counsel Form  
Factual and Legal Analysis

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of

)  
) MUR 4999  
)

**SUBPOENA TO PRODUCE DOCUMENTS**  
**ORDER TO SUBMIT WRITTEN ANSWERS**

TO: Edward M. Bernstein, Esq.  
Edward M. Bernstein and Associates  
500 South 4<sup>th</sup> Street  
Las Vegas, NV 89101

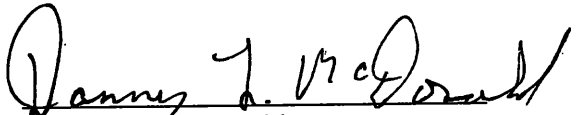
Pursuant to 2 U.S.C. § 437d(a)(1) and (3), and in furtherance of its investigation in the above-captioned matter, the Federal Election Commission hereby orders you to submit written answers to the questions attached to this Order and subpoenas you to produce the documents requested on the attachment to this Subpoena. Legible copies which, where applicable, show both sides of the documents may be substituted for originals.

Such answers must be submitted under oath and must be forwarded to the Office of the General Counsel, Federal Election Commission, 999 E Street, N.W., Washington, D.C. 20463, along with the requested documents within 30 days of receipt of this Order and Subpoena.

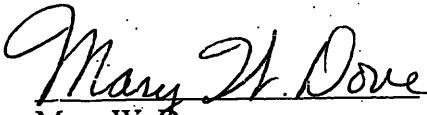
Edward M. Bernstein  
MUR 4999  
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WHEREFORE, the Chairman of the Federal Election Commission has hereunto set his  
hand in Washington, D.C. on this *26th* day of *June*, 2001.

For the Commission,

  
Danny L. McDonald  
Chairman

ATTEST:

  
Mary W. Dove  
Commission Secretary

Attachments

Instructions and Definitions (3 pages)

Questions and Document Requests (2 pages)

### INSTRUCTIONS

In answering this Subpoena to Produce Documents and Order to Submit Written Answers, furnish all documents and other information, however obtained, including hearsay, that is in possession of, known by or otherwise available to you, including documents and information appearing in your records.

Each answer is to be given separately and independently, and unless specifically stated in the particular discovery request, no answer shall be given solely by reference either to another answer or to an exhibit attached to your response.

The response to each interrogatory propounded herein shall set forth separately the identification of each person capable of furnishing testimony concerning the response given, denoting separately those individuals who provided informational, documentary or other input, and those who assisted in drafting the interrogatory response.

If you cannot answer the following interrogatories in full after exercising due diligence to secure the full information to do so, answer to the extent possible and indicate your inability to answer the remainder, stating whatever information or knowledge you have concerning the unanswered portion and detailing what you did in attempting to secure the unknown information.

Should you claim a privilege with respect to any documents, communications, or other items about which information is requested by any of the following interrogatories and requests for production of documents, describe such items in sufficient detail to provide justification for the claim. Each claim of privilege must specify in detail all the grounds on which it rests.

Unless otherwise indicated, the discovery request shall refer to the time period from January 1, 1994 to December 1, 2000.

The following interrogatories and requests for production of documents are continuing in nature so as to require you to file supplementary responses or amendments during the course of this investigation if you obtain further or different information prior to or during the pendency of this matter. Include in any supplemental answers the date upon which and the manner in which such further or different information came to your attention.

### DEFINITIONS

For the purpose of these discovery requests, including the instructions thereto, the terms listed below are defined as follows:

"You" shall mean the named person to whom these discovery requests are addressed, including all employees, whether paid or unpaid; agents; co-workers; volunteers; subordinates; staff or attorneys thereof. References to persons "working for or voluntarily assisting you" refer

to any person performing any services on your behalf or at your direction, whether paid or unpaid.

"A Lot of People Supporting Ed Bernstein" shall mean the political committee registered with the Federal Election Commission under ID Number C00349787 as well as any personnel or organization of any kind whatsoever that are or were common to A Lot of People Supporting Ed Bernstein.

"Persons" shall be deemed to include both singular and plural, and shall mean any natural person, partnership, committee, association, corporation, or any other type of organization or entity.

"Document" shall mean the original and all non-identical copies, including drafts, of all papers and records of every type in your possession, custody, or control, or known by you to exist. The term document includes, but is not limited to books, letters, contracts, notes, diaries, log sheets, records of telephone communications, transcripts, vouchers, accounting statements, ledgers, checks, money orders or other commercial paper, telegrams, telexes, pamphlets, circulars, leaflets, reports, memoranda, correspondence, surveys, tabulations, audio and video recordings, drawings, photographs, graphs, charts, diagrams, lists, computer print-outs, and all other writings and other data compilations from which information can be obtained. If a document is maintained on or in a magnetic or electronic medium (for example, but not limited to, computer tape, diskette, or CD-ROM), provide both "hard" (i.e., paper) and "soft" (i.e., in the magnetic or electronic medium) copies, including drafts, and identify the name (e.g., WordPerfect, Microsoft Word for Windows, Pro Write, etc.) and version numbers by which the documents will be most easily retrieved.

"Identify" with respect to a document shall mean state the nature or type of document (e.g., letter, memorandum), the date, if any, appearing thereon, the date on which the document was prepared, the title of the document, the general subject matter of the document, the location of the document, the number of pages comprising the document, the author of the document, and all recipients of the document (including all persons, other than the primary recipient of the document, who received copies).

"Identify" with respect to a person shall mean state the full name, the most recent business and residence addresses and the telephone numbers, the present occupation or position of such person, and the nature of the connection or association that person has to any party in this proceeding.

If the person to be identified is not a natural person, provide the legal and trade names, the address and telephone number, and the full names of both the chief executive officer and the agent designated to receive service of process for such person.

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"And" as well as "or" shall be construed disjunctively or conjunctively as necessary to bring within the scope of these interrogatories and request for the production of documents any documents and materials which may otherwise be construed to be out of their scope.

24-04-407-4063

### QUESTIONS AND DOCUMENT REQUESTS

1. a. Produce all documents, as defined herein, that evidence a contractual agreement between you and StrubleOppel Communications.
- b. Produce all documents that evidence a contractual agreement between you and Explosive Media.
2. Produce all documents that in any way refer to, are about, or contain information regarding any television or billboard advertisements for Edward M. Bernstein and Associates that were broadcast or displayed between January 1, 1994 and December 1, 2000.
3. Produce all documents that in any way refer to, are about, or contain information regarding the media campaign strategy of Edward M. Bernstein Associates from January 1, 1994 to December 1, 2000.
4. Produce all documents, that in any way refer to, are about, or contain information regarding television and billboard advertisements for the Edward M. Bernstein for Senate campaign.
5. Produce all documents that in any way refer to, are about, or contain information regarding the media campaign strategy of the Edward M. Bernstein for Senate campaign.
6. a. Identify all personnel of Edward M. Bernstein and Associates with whom you communicated regarding Edward M. Bernstein and Associates advertisements. Produce all documents that refer to, are about, or contain information regarding those communications.
- b. Identify all personnel of StrubleOppel Communications with whom you communicated regarding Edward M. Bernstein and Associates advertisements. Produce all documents that refer to, are about, or contain information regarding those communications.
- c. Identify all personnel of Explosive Media with whom you communicated regarding Edward M. Bernstein and Associates advertisements. Produce all documents that refer to, are about, or contain information regarding those communications.
- d. Identify all personnel of the Edward M. Bernstein for Senate campaign with whom you communicated regarding Edward M. Bernstein and Associates law firm advertisements. Produce all documents that refer to, are about, or contain information regarding those communications.
7. a. Identify all personnel of the Edward M. Bernstein for Senate campaign with whom you communicated regarding the Edward M. Bernstein for Senate campaign advertisements. Produce all documents that refer to, are about, or contain information regarding those communications.



b. Identify all personnel of StrubleOppel Communications with whom you communicated regarding the Edward M. Bernstein for Senate campaign advertisements. Produce all documents that refer to, are about, or contain information regarding those communications.

c. Identify all personnel of Explosive Media with whom you communicated regarding the Edward M. Bernstein for Senate campaign advertisements. Produce all documents that refer to, are about, or contain information regarding those communications.

d. Identify all personnel of Edward M. Bernstein and Associates with whom you communicated regarding the Edward M. Bernstein for Senate campaign advertisements. Produce all documents that refer to, are about, or contain information regarding those communications.

8. Produce all documents including but not limited to notes, minutes, agendas, memos, and briefing statements that in any way refer to, are about, or contain information regarding your announcement of candidacy on or about March 13, 2000. Such documents should include, but not be limited to, information regarding the use of slogans and banners, and the text of all remarks made at the March 13, 2000 press conference.

**FEDERAL ELECTION COMMISSION**  
**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Edward M. Bernstein and Associates, and  
Edward M. Bernstein, as an officer

MUR: 4999

**I. GENERATION OF MATTER**

This matter was generated by a complaint filed with the Federal Election Commission by John Mason. See 2 U.S.C. § 437g(a)(1).

**II. FACTUAL AND LEGAL ANALYSIS**

**A. Complaint**

The complaint alleges that Edward M. Bernstein and Associates, Inc. television and billboard advertisements since February 2000, while ostensibly advertisements for the law firm, actually represent prohibited corporate contributions by the Bernstein law firm for Edward M. Bernstein's senatorial campaign. Specifically, Mr. Mason asserts that in February 2000, the candidate dramatically changed his law firm's advertising message to reflect the themes of Bernstein's senate advertising campaign. According to the complaint, the new advertisements and billboards, instead of featuring only Mr. Bernstein speaking directly to the camera, on the radio, or with his picture on a billboard, now constituted testimonials by others about how much "Ed Bernstein Cares." This new message, which the complainant avers was still airing and posted on billboards in the Las Vegas area (as of April 4, 2000), "outlines how much Candidate cares for the people of Nevada."

Mr. Mason asserts that the theme "Ed Bernstein Cares" was also used in

Mr. Bernstein's formal announcement of his candidacy. On March 13, 2000, at a press conference held at the home of David Emerick, a former client of Mr. Bernstein who was severely injured on his job as a maintenance worker, the candidate announced his candidacy for United States Senate. Mr. Mason contends that "[j]ust like the law firm's new ads, the theme of his press conference, announcement speech and the platform upon which he based his candidacy was 'Ed Bernstein cares.' "

Mr. Mason also notes "[i]n the time since his formal announcement, the law firm has more than doubled its past television buys with the new advertising message echoing the issues highlighted by the Candidate and his campaign." Likewise, Mr. Mason avers that the new Bernstein and Associates billboards echo the themes of the Bernstein senatorial campaign.

On May 10, 2000, Mr. Mason submitted an Addendum to the complaint, which included a videotape containing a number of Bernstein - and -Associates television advertisements.

#### **B. Response**

On June 20, 2000 Counsel for the law firm of Edward M. Bernstein and Associates submitted a response to the allegations in the complaint. The response categorizes the complaint as "frivolous," noting that even if the ads for the law firm were testimonials to Mr. Bernstein's good character, no violation of the Federal Election Campaign Act has occurred, since the ads were for the promotion of the firm's business and not for the purpose of influencing the election of candidate Bernstein. The response avers that there is a sharp contrast between the ads in question in the Hyatt MUR and the ads being run by Edward M. Bernstein and Associates. In particular, the Hyatt ads

focused on public policy themes of health care and crime, two issues which Hyatt consultants knew would likely be raised in the campaign. In contrast, counsel of the respondent asserts that the Bernstein ads contain no issues at all, noting that:

an objective look at the transcripts for two previous ad campaigns run in 1994 and 1999 and the transcripts of ads being run in 2000 reveals a remarkable similarity. In fact, it reveals that the current advertisements are in essence unchanged from advertisements the firm has typically produced. No new themes are introduced. No new issues are raised.

The response also notes that the Bernstein campaign is distinguishable from the Hyatt MUR in its use of media consultants. The response asserts that "[i]n the Hyatt MUR, the Commission objected to, among other things, the use of the same media consultant by both the Hyatt campaign and the Hyatt law firm." The response adds that Mr. Bernstein has taken great care to establish his Senate campaign as a separate and distinct entity from his law firm by hiring campaign media consultants StrubleOppel Communications, who have never worked for the law firm. The law firm retains its own media consultants, Explosive Media.

The response also disputes the complaint's implication that Mr. Bernstein's failure to appear in the law firm's ads in some way violates the Federal Election Campaign Act. The response states that "[i]n the past, Mr. Bernstein has, from time to time, not appeared in the firm's ads." Rather, the response adds that the Commission did not object to Hyatt not appearing in his firm's ads; the Commission's objection was due to the Hyatt ads' introduction of issues of health care and crime, given that they were crafted by a consultant who worked both for the campaign and law firm.

Finally, the response avers that policy implications arising from Mr. Mason's complaint warrant its immediate dismissal. The response asserts that if the Commission were to

proceed on the theory that references to Mr. Bernstein's character in the firm's ads violate the Act, "any candidate for federal office would be required to take any mention of themselves out of their business' advertisements. Such a decision would have an extremely deleterious impact on personal service businesses such as law firms."

Furthermore, "if the Commission decided a candidate could neither appear in ads for his/her business nor be mentioned in the ads, it would seriously limit the ability of certain individuals to become candidates for federal office."

### **C. Edward M. Bernstein and Associates Television Advertisements**

The complainant and respondent have each submitted information concerning Edward M. Bernstein and Associates' law firm advertisements. The information has come in the form of a videotape of Bernstein television advertisements with accompanying transcripts, and six additional transcripts of Bernstein and Associates television commercials. The advertisements cover the years 1994, 1999, and 2000. The two 1994 advertisements submitted to this Office by the respondents focus on the perspectives of Edward M. Bernstein and Associates attorneys Robert Galloway and Gary Segal. In the transcript of one of the advertisements, attorney Robert Galloway stresses the importance of establishing a feeling of trust between the client and the attorney. Mr. Galloway also notes that it is important for the client to feel that the attorney cares about them. The word "cares" is underlined. Underneath Mr. Galloway's statement is the tagline, "Edward M. Bernstein & Associates, Attorneys at Law." At the bottom of the transcript is Ed Bernstein's statement, which says, "I'm

Ed Bernstein. My attorneys work hard to earn your trust.” The other 1994 advertisement, featuring Mr. Gary Segal, comments on how the law firm strives to protect the client’s rights and empathize with their frustrations. The same tagline is employed.

Ed Bernstein’s quote in this advertisement: “I’m Ed Bernstein. Gary knows how often an accident causes anger and stress. We’ll make sure you receive the compensation you deserve.”

In the two 1999 advertisements submitted by respondents, the law firm continues to use the same tagline used in its 1994 advertisements, namely, “Edward M. Bernstein & Associates, Attorneys at Law.” One advertisement features Maria Fernandez-Atkinson, a legal assistant employed at the Firm (also featured in a 2000 advertisement), and Nancy Bernstein, Mr. Bernstein’s wife. The gist of this advertisement is a testimonial to Ed Bernstein’s legal service to the Latino community in the Las Vegas area. No other members of the firm are mentioned. Nancy Bernstein stresses that “Ed is a person that doesn’t give up and he believes in what is right and that is why he continues helping injured people.” The second advertisement is another testimonial to Ed Bernstein’s commitment to the legal needs of the Latino Community. The advertisement, which features only Maria Fernandez-Atkinson, touts that “no one else has made a greater effort to help injured people in our community than Ed Bernstein.” Ed Bernstein apparently makes the statement, “Take the first step” at the end of the advertisement.

The majority of the transcripts submitted by the respondent to this Office focus on advertisements produced in 2000.<sup>1</sup> All five of the advertisements are employee testimonials that discuss attributes of Ed Bernstein's character. The complainant's videotape displays the actual commercials of three of the transcripts.

One of the three videotaped advertisements, entitled "Maria," apparently first aired on February 28, 2000, features Maria Fernandez-Atkinson, a legal assistant employed at the firm. The advertisement begins with a close-up head shot of Ms. Fernandez-Atkinson recounting an instance where Mr. Bernstein went to a client's mobile home in 116 degree weather to discuss his case when the client was unable to come to the office. She concludes that Mr. Bernstein's actions are indicative of the "kind of care that he takes with his clients and with everyone that he meets." At one point during the commercial, the screen goes black, with a message in white lettering superimposed. At this juncture, the message "Ed Bernstein is Different" is displayed.

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<sup>1</sup> There are three other video clips present in the complainant's videotape. First, there is a commercial that the complainant describes as "previously used" and is entirely in Spanish. The commercial consists of a gathering of people, each with a small flag representing the country of their respective nationality. The camera focuses on approximately ten of the people gathered, and one by one these individuals raise their flag and enthusiastically state the name of the country that the flag represents. The Spanish speaking countries represented include, but are not limited to, Chile, Mexico, Cuba, Argentina, Panama, Dominican Republic, Guatemala, and Venezuela. Edward Bernstein appears at the end of the commercial holding a set of the miniature flags and states in Spanish, "Take the first step." The gist of Mrs. Nancy Bernstein's statement, who also appears in the advertisement, is that no matter where you come from, if you are involved in an accident, Bernstein and Associates speaks your language. Although the advertisement does not appear to be recently produced, the commercial was apparently still airing as of March 23, 2000.

Second, the videotape contains a segment of the Ed Bernstein show with guest Congresswoman Shelley Berkley, which aired on March 13, 2000, shortly after the announcement of his candidacy.

Finally, there is a television news story that appears to be incomplete. Apparently, the complainant intended to present a television news story of Bernstein's announcement and how the old Bernstein commercials and new version contrast. However, the news story only depicts an image of Mr. Bernstein in an older advertisement for a few seconds before it abruptly ends.

The final image in this advertisement is a woman identified as Mrs. Nancy Bernstein seated in a leather office chair behind a desk with the Bernstein and Associates logo superimposed at the bottom right side of the screen. Mrs. Bernstein states the new tagline "Edward M. Bernstein and Associates, the first step in getting the care you need."

A second advertisement displayed on the videotape, entitled "Paul," apparently first aired on February 29, 2000 and features Paul Haire, an attorney with the law firm. Mr. Haire is seen on camera in an office, and discusses a situation where Mr. Bernstein assigned an employee to watch over the children of one of his clients. From that experience, Mr. Haire states that he learned from Mr. Bernstein that "our firm was more about helping the family every bit as much as helping the individual client." He also states that Mr. Bernstein "instilled in me that day the desire to treat the client's family as I would my own." There are three other visual images seen throughout this advertisement. First, there are two instances where the screen goes black, with a message in white lettering superimposed. The first instance occurs when Mr. Haire's voice can be heard recounting the client's inability to appear at a court hearing because there was no babysitter. At this juncture, the message "Ed Bernstein is Different" is displayed. The second message, "Ed Bernstein cares," is shown when Mr. Haire notes that Ed Bernstein directed that the client bring the children to the firm's office for supervision. The final image is the same image projected in the "Maria" advertisement: A woman identified as Nancy Bernstein seated in a leather office chair behind a desk with the Bernstein and Associates logo superimposed at the bottom right side of the screen stating the tagline "Edward M. Bernstein and Associates, the first step in getting the care you need."



24-04-40-433

The third and final advertisement shown on the videotape apparently began airing on May 4, 2000 and once again features Paul Haire. This advertisement is similar to the "Paul" ad that aired on February 29, 2000 in that Mr. Haire is seen on camera in an office. Paul Haire notes that "Ed has a number of qualities that serve him well in no matter what he does." Among the qualities mentioned: sensitivity to the needs of the client; an ability to hear the opinions of others before voicing his own opinion, and the capacity to take "what seems to be the very best of those [opinions] and combine them into an opinion that seems to be the right answer every single time there is a problem." In addition, like the "Paul" advertisement, messages are superimposed over a black screen with Mr. Haire's voice in the background. Where the previous "Paul" ads employ the messages "Ed Bernstein is Different," and "Ed Bernstein Cares," the new commercials use the messages "Ed Bernstein Cares" and "Ed Bernstein Listens." This advertisement is distinguishable from all of the 2000 advertisements, however, in its omission of Mrs. Bernstein reciting the tagline "Edward M. Bernstein and Associates, the first step in getting the care you need." Instead, only the logo is shown.

The fourth 2000 transcript is from a thirty second television advertisement featuring Patti Donoghue, an attorney with the Firm. In this advertisement, Patti Donoghue notes that Ed Bernstein's philosophy of the law firm is to create a sense of family distinct from what people would experience when they enter other law firms. Ms. Donoghue adds that "the firm pretty much is Ed's philosophy, so how we do business here is how Ed does business everywhere."

The testimonial of a non-attorney employee represents the final 2000 transcript. Cristian Falcon states in a 30 second television commercial that “[w]hat Ed has taught me is to care about people.” She also notes that “[w]e listen, we care and that is what Ed has taught me.”

#### **D. Applicable Law**

The Commission has considered potential coordination that took place prior to the effective date of 11 C.F.R. § 100.23 under the standards set forth in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). In addressing the issue of what constitutes “coordination” with a candidate, the *Christian Coalition* court discussed two general ways in which coordination could occur: first, that “expressive coordinated expenditures made at the request or the suggestion of the candidate or an authorized agent” would be considered coordinated; and second, “absent a request or suggestion, an expressive expenditure becomes ‘coordinated’ where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication’s: (1) contents; (2) timing; (3) location, mode or intended audience (e.g., choice between newspaper or radio advertisement); or (4) ‘volume’ (e.g., number of copies of printed materials or frequency of media spots.” *Id.* at 92. The court also found that coordination might be established if an individual had a certain level of decision-making authority for both the spender and the campaign and the spender made the expressive expenditures to assist the campaign. *Id.* at 96-97.

### E. Analysis

The information currently available indicates that there is reason to believe that Edward M. Bernstein & Associates, Inc. may have coordinated its communications with the Bernstein for Senate campaign and that those communications may have been at least in part influencing a Federal election. We advance this view given that:

- Mr. Bernstein may have had a high level of decision-making authority regarding the advertising campaigns of both the Bernstein law firm (as the 100% stockholder of the incorporated law firm that made the advertisements, as well as the president of the media consulting firm responsible for the creative marketing of the ads) and the campaign (as the candidate);
- the heightened frequency of the law firm's advertisements, as demonstrated by a reported near 50% increase in advertising buys from February 2000 to March 2000, coincided with Mr. Bernstein's announcement of candidacy for U.S. Senate on March 13, 2000;
- the law firm ads airing during late February 2000 and thereafter were substantially distinguishable from earlier Bernstein and Associates commercials to the extent that they appear to make indirect reference to the candidate's qualifications for public office for the purpose of influencing the election;
- the timing of the changes to the Bernstein and Associates' billboards appear to coincide with Mr. Bernstein's announcement of candidacy, and the content of the new billboards may have been made for the purpose of influencing the election; and
- the themes introduced by the law firm advertisements appear to coincide and conform with the Bernstein campaign's messages.

### 1. Potential Coordination

The information available at this time appears to indicate that Mr. Bernstein may have had a high level of decision-making authority regarding the advertising campaigns of both the Bernstein law firm and the campaign. It appears that Mr. Bernstein, as both candidate and 100 percent shareholder of the spender, may satisfy the coordination standard enunciated in both *Christian Coalition* and 11 C.F.R § 100.23(c), which recognizes coordination where the candidate has exercised control or decision-making authority over the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of the communication in question. The candidate owns 100% of the capital stock in his incorporated law firm. In addition, he is the president of Explosive Media, the company responsible for the law firm's television advertisements. The fact that StrubleOppel Communications handles the campaign advertisements does not detract from the possibility that the candidate exerts influence over both the law firm's advertising decisions and the campaign advertisements. If StrubleOppel advances a particular campaign theme or strategy, it seems likely that the candidate would play a substantial role in the approval or rejection of such strategies. In addition, since the law firm used the candidate's own advertising agency, Bernstein could readily change the content, timing, or frequency of his law firm's advertisements.

In fact, some evidence suggests that Bernstein may have exercised his authority over the law firm's advertising by doubling the firm's television ad buys during the month he announced his candidacy. According to a *Las Vegas Review-Journal* article dated April 6, 2000, in February 2000, Mr. Bernstein reportedly spent \$30,880 on television advertisements in the three Las Vegas network stations. In March,

Mr. Bernstein reportedly spent \$57,280 for the same three stations. These numbers represent a nearly 50% increase between February 2000, when Mr. Bernstein did not announce his candidacy, and March 2000, the month he became a candidate. Thus, the information presently available suggests that coordination may have occurred between Mr. Bernstein's law firm and his Senate campaign.

**2. Communications for the Purpose of Influencing the Federal Election**

**a. Distinctions among the 1994, 1999, and 2000 Television Advertisements**

The advertisements displayed during this period also appear to make indirect reference to the candidate's qualifications for public office. Contrary to the assertions of the respondents, the advertisements submitted from 1994, 1999, and 2000 respectively, appear to be somewhat distinguishable. The 1994 advertisements focus on the qualities of the law firm as a whole, not Edward M. Bernstein individually. The common theme for these ads is how the firm functions as a collective, working for the client's rights. Even Ed Bernstein tailors his statements to evoke the collective in each ad: "My attorneys work hard to earn your trust;" and "We'll make sure you receive the compensation you deserve."

While the 1999 and 2000 advertisements may represent a shift in the law firm's marketing strategy from Edward M. Bernstein and Associates the collective to Edward Bernstein the individual, the distinctions between these advertisements are also substantial. The respondent apparently submitted the two 1999 advertisements in an attempt to demonstrate that these pre-candidacy announcement advertisements were substantially similar to the 2000 advertisements. Like the 2000 advertisements,

employees offer testimonials relating to Ed Bernstein's character: "Ed is a person that doesn't give up and he believes in what is right and that is why he continues helping injured people." And like the 2000 advertisements, Ed Bernstein the individual is the primary focus: "I'm proud to say that no one else has made a greater effort to help injured people in our community than Ed Bernstein." What sets the 2000 series of advertisements apart from the 1999 advertisements, and the 1994 advertisements for that matter, however, is the scope of the communication.

Unlike the 1999 advertisements, the 2000 advertisements have expanded the scope of Ed Bernstein's qualifications outside his legal practice. These advertisements convey the message that Ed Bernstein has qualities that can be applied to circumstances other than the law. The 1999 advertisements provided to the Commission do not address this characteristic; the crux of those ads is Ed Bernstein's abilities in helping injured people, clearly within the confines of his practice. The new advertisements provided make statements like "the firm pretty much is Ed's philosophy, so how we do business here is how Ed does business everywhere," and "that's the kind of care that he takes with his clients and with everyone that he meets." Or, "Ed has a number of qualities that serve him well in no matter what he does." If the advertisement solely was for the purpose of advancing Mr. Bernstein's law firm interests, it is not clear why there would be a need to mention his ability to adapt his firm's philosophy to other ventures. The statement intimating that Ed Bernstein provides a high level of care to his clients and everyone he meets also seems to be geared toward prospective voters.

Likewise, the advertisement exclaiming that "Ed has a number of qualities that serve him well in no matter what he does" can also be construed as an attempt to

influence prospective voters. This advertisement, which aired in May 2000, might be used to convey the message to potential voters that the skills used in his everyday legal practice, namely, his sensitivity to the needs of others, the ability to hear the opinions of others before voicing his own, and the capability to combine the best opinions presented into an opinion that seems to be the right answer, could be applied to other activities, including political life. The use of the superimposed messages "Ed Bernstein Cares" and "Ed Bernstein Listens" further accentuate the advertisement's purpose to influence the voter.

**b. Changes in the Bernstein and Associates Billboards**

It also appears that the billboards used by the law firm may have been made for the purpose of influencing the election. The complaint states that the earlier Bernstein and Associates pre-candidacy announcement billboards featured only a picture of Ed Bernstein with the slogan "Take the First Step." Neither the complainant nor the respondent offer additional information concerning the content of the Firm's ads contemporaneous to Mr. Bernstein's announcement of his candidacy. The only information that this Office has discovered pertinent to the content of the billboards in question comes in the form of a letter distributed over the Internet. On June 19, 2000, attorney Chuck Gardner sent a letter to Mr. Rob Bare, Bar Counsel for the State Bar of Nevada. In this letter, Mr. Gardner describes the appearance of a recent Bernstein billboard contemporaneous with his announcement of candidacy:

On the left is a photo of what appears to be a family – mom, dad, and small child. In the middle above the firm logo is the statement in large letters, "Ed Bernstein cares." There is smaller print that cannot be safely read from the roadway. To read it you must make a U-turn, park along the side of the road,

get out of the car, and walk around to the front of the billboard. From this vantage one can read the words "Maria Fernandez-Atkinson Legal Assistant." The object is to make the billboard appear to the public to be a client testimonial, unlawful under our rules, which it unquestionably does, while reserving the strained argument for the bar that the testimony comes not from a client, but from the attorney's paralegal, in print so small that no one can read it.

While this Office has yet to see this particular billboard, such a description raises the question whether the law firm made this business communication for the purpose of influencing an election. The picture of a family and the large message "Ed Bernstein Cares" can be construed as a campaign message intimating that Mr. Bernstein cares for the people of Nevada. Obviously, more information is needed. Namely, a determination on the size of the logo in relation to the message "Ed Bernstein Cares" would be important; a small logo in proportion to message could indicate an intention to conceal the law firm's involvement in the advertisement. It would also be helpful to ascertain the timing of this billboard (when it was first displayed), the number of billboards that have used this new billboard, and obtain a comparison between this new billboard and billboards displayed before the timing of this new billboard.

### **c. Common Use of Themes**

The themes introduced by the law firm advertisements appear to coincide with the Bernstein campaign's messages. The complaint argues that Mr. Bernstein based his candidacy on the platform "Ed Bernstein Cares" in his March 13, 2000 candidacy announcement. Respondents did not address or elaborate about this issue in their response to the complaint. If it is discovered that the Bernstein campaign used such a message as a slogan or an integral part of its campaign at the outset, it would appear likely that the subsequent law firm advertisements and billboards that contained the message



"Ed Bernstein Cares" would be a communication made for the purpose of influencing an election.

Even the Bernstein campaign's early television advertisements appear to suggest a link to the themes expressed in the law firm advertisements. For instance, a Bernstein campaign television advertisement that began running the week of June 5, 2000 highlighted respondent's character through a testimonial featuring Sandy Heverly, an anti-drunk driving activist. Ms. Heverly recalls Mr. Bernstein's work on the issue, noting that he helped organize a holiday taxi service. Ms. Heverly adds, "Four hundred people that were potential killers removed from the roadways because of Ed Bernstein caring enough to make a difference." This advertisement is similar to the 2000 law firm advertisements through its use of testimonials about Ed Bernstein's character. It is also similar in advancing the message that "Ed Bernstein cares." The timing of the June 5, 2000 advertisement is significant considering that it aired so close to the May 4, 2000 Paul Haire advertisement, which used the superimposed message "Ed Bernstein Cares." Such proximity could clearly have an impact on the minds of a potential voter in making a decision on a candidate for Federal Office.

### III. CONCLUSION

Accordingly, there is reason to believe that Edward M. Bernstein and Associates, and Edward M. Bernstein, as an officer, violated 2 U.S.C. § 441b.