TEXAS ETHICS COMMISSION

RECOMMENDATIONS FOR STATUTORY CHANGES

TEXAS ETHICS COMMISSION TASK FORCE
ROSS FISCHER, CHAIR

JANUARY 2007

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RECOMMENDATIONS FOR STATUTORY CHANGES TO THE 80TH TEXAS LEGISLATURE

TEXAS ETHICS COMMISSION TASK FORCE

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TASK FORCE RECOMMENDATIONS

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Title 15 of the Election Code

Attached for your reference are the relevant statutes. (**Exhibit A**).

Recommendation No. 1: E-mails (Political Advertising)

Clarification of section 251.001(16) of the Election Code, which defines "political advertising" in pertinent part as a communication supporting or opposing a candidate for nomination or election to a public office, that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication or on an Internet website.

The commission wrestled with the issue of whether the definition of political advertising includes communications made by e-mail. **Exhibit B** outlines the legislative history of e-mails in political advertising. Based on that history, at the May 2006 meeting the commission proposed a rule stating that the definition of political advertising does not include a communication made by e-mail. At the July 2006 meeting the commission adopted the rule, which became effective on August 6, 2006.

POSSIBLE OPTIONS

1. Amend the definition of "political advertising" to include communications made by e-mail. If the legislature wants to include e-mails in the definition of political advertising, the legislature may want to consider the Federal Election Commission (FEC) standard for addressing the issue. Under the FEC standard, most e-mails are not regulated.

2. Do not amend the statute, which would validate the commission's determination that the legislature did not intend e-mails to be included in the definition of "political advertising."

Recommendation No. 2: E-mails (Campaign Communication)

Clarification of section 251.001(17) of the Election Code, which defines "campaign communication" as a written or oral communication relating to a campaign for nomination or election to public office or office of a political party or to a campaign on a measure. The definition encompasses communications that also fall within the definition of political advertising. Therefore, the issue of whether the definition of "campaign communication" includes a communication made by e-mail is similarly likely to arise.

At the May 2006 meeting the commission proposed a rule stating that the definition of campaign communication does not include a communication made by e-mail. At the July 2006 meeting the commission voted to adopt that rule, which became effective August 6, 2006.

POSSIBLE OPTIONS

1. Amend the definition of "campaign communication" to include communications made by e-mail. If the legislature wants to include e-mails in the definition of "campaign communication," the legislature may want to consider the Federal Election Commission (FEC) standard for addressing the issue. Under the FEC standard, most e-mails are not regulated.

2. Do not amend the statute, which would validate the commission's determination that the legislature did not intend the definition of political advertising to include e-mails.

Recommendation No. 3: Payment Made to Purchase Real Property

Clarification of section 253.038 of the Election Code, which prohibits a candidate or officeholder or a specific-purpose committee for supporting, opposing, or assisting the candidate or officeholder from making or authorizing a payment from a political contribution to purchase real property or to pay the interest on or principal of a note for the purchase of real property.

In Ethics Advisory Opinion No. 319 (1996) (**Exhibit C**) the commission concluded:

> A legislator's use of political contributions to make a rental payment to his spouse for the use of her separate property does not constitute a payment to purchase real property and does not violate section 253.038 of the Election Code. Nor is such a payment a conversion to personal use as long as the payment does not exceed the fair market value of the use of the property.

The issue is whether the legislature intended to prohibit the use of political contributions to rent property from certain family members and certain businesses in which the candidate or officeholder has an interest.

POSSIBLE OPTIONS

1. Amend the law to prohibit the use of political contributions to rent property from anyone related within the second degree of consanguinity or the third degree by affinity. *See* Chapter 573 of the Government Code (intended to prohibit acts of nepotism by all elected officials) and a Chart of Relationships by Consanguinity and Affinity (**Exhibit D**).

   Also amend the law to prohibit the use of political contributions to rent property from: (1) a business in which the candidate or officeholder has any ownership interest, holds a position on the governing body of the business, or serves as an officer of the business, and (2) a business in which anyone related within the second degree of consanguinity or the third degree of affinity has any ownership interest. *See* Section 253.041 of the Election

Code (restricts the use of political funds to make payments to certain relatives and certain businesses).

2. Prohibit the use of political contributions for rental of a residence while serving in the legislature.

Recommendation No. 4: (Update to List of Corporations Covered by Corporate Restriction)

Update section 253.091 of the Election Code to add certain types of corporations organized under the "Texas Business Organizations Code" (BOC) to the list of corporations subject to the section 253.091 restriction.

Currently under section 253.091, the corporate restriction applies to corporations organized under the Texas Business Corporation Act, the Texas Non-Profit Corporation Act, federal law, or law of another state or nation.[1] However, beginning on January 1, 2006, businesses no longer organize under the Texas Business Corporation Act or the Texas Non-Profit Corporation Act. Instead, these same type businesses organize under the new BOC.

Background: In 2003, the BOC was enacted to be effective on January 1, 2006. Essentially this resulted in a rearrangement of the statutes relating to how businesses organize in Texas. *See* Section 1.001, Texas Organizations Code. The BOC codifies the following statutes and applies to all new Texas Corporations, partnerships, limited liability companies and other domestic filing entities formed on and after that date:

- Texas Business Corporation Act
- Texas Non-Profit Corporation Act
- Texas Professional Corporation Act
- Texas Professional Association Act
- Texas Miscellaneous Corporation Laws Act
- Texas Revised Partnership Act
- Texas Revised Limited Partnership Act
- Texas Limited Liability Company Act
- Texas Real Estate Investment Trust Act
- Texas Cooperative Association Act
- Texas Uniform Unincorporated Nonprofit Association Act.

Clearly, the BOC includes entities that are not specifically referenced in section 253.091. It appears that entities currently covered by section 253.091 restrictions are found in Title 2 (Corporations) of the BOC.

[1] For purposes of the corporate restrictions, the following associations, whether incorporated or not, are considered to be corporations covered by this subchapter: banks, trust companies, savings and loan associations or companies, insurance companies, reciprocal or interinsurance exchanges, railroad companies, cemetery companies, government-regulated cooperatives, stock companies, and abstract and title insurance companies. Section 253.093, Election Code.

OPTION

Amend section 253.091 of the Election Code to update references to entities subject to the corporate restriction in light of the newly enacted BOC.

Recommendation No. 5: Definition of Measure

Clarification of section 251.001(19) of the Election Code, which defines "measure" as a question or proposal submitted in an election for an expression of the voters' will and includes the circulation *and* submission of a petition to determine whether a question or proposal is required to be submitted in an election for an expression of the voters' will.

The question that often arises here is whether the definition of measure includes a petition that is circulated but not submitted. Staff's cautious view is that such a petition falls within the definition. However, the law could be read to include only a petition that is both circulated and submitted. Below is an example of the practical implication of the different interpretations.

> A group made expenditures totaling $2,000 to circulate a petition in connection with a recall election. The group had every intention to submit the petition. However, for a reason unforeseen to the group, the group did not submit the petition. Was the group required to register as a political committee? Based on staff's cautious view, the answer is YES because the group exceeded $500 in political expenditures. *See* Sections 251.001(12) and (7), and 253.031(b), Election Code. However, the answer would be NO, if for a petition to fall within the definition of "measure" it must have been both circulated *and* submitted.

POSSIBLE OPTIONS

1. Amend the definition of "measure" by changing the "and" to "or."

2. Amend the definition of "measure" by stating that it does not include a petition that is circulated but not submitted.

Recommendation No. 6: Corporate Administrative Expenses

Clarification of section 253.100(a) of the Election Code, which authorizes a corporation to make expenditures to finance the establishment or administration of a general-purpose committee.

As you are aware, a corporation is prohibited from making a political contribution or a political expenditure that is not specifically authorized. A violation of the law is a felony of the third degree.

The question that often arises here is whether a corporate expenditure constitutes an administrative expenditure that is permissible under section 253.100(a) of the Election Code. The legislature, the courts, and the commission have struggled with questions in this area. The commission has issued

several advisory opinions providing a standard and guidance regarding specific fact situations. However, as soon as a specific fact situation is addressed, another arises.

During the 79th regular session, the legislature considered nine bills that addressed "administrative expense" for purposes of title 15 of the Election Code. One of the bills became law but not before deleting from the bill the definition of administrative expenses.

Recommendation No. 7: Press Exception

Clarification of section 253.091 of the Election Code, which lists the corporations covered by the corporate activity prohibitions. The legislature may want to consider whether an incorporated newspaper is subject to such prohibitions. Unlike federal law, Texas law does not have a press exception to the corporate activity prohibitions. In its deliberation of the issue, the legislature may want to look at the federal press exception.

Under federal law, an expenditure does not include costs for "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 431(9)(b)(1). Based on this statute, the FEC passed a rule that excludes from the definition of a contribution (or expenditure) "[a]ny cost incurred in covering or carrying a "news story, commentary, or editorial by any broadcasting station . . . newspaper, magazine or other periodical publication." 11 CFR 100.73. There are three elements to the press exemption: (1) the costs must be incurred by a press entity; (2) the facilities to distribute the material must not be owned or controlled by a political party, committee, or candidate; and (3) the press entity must be acting in its legitimate press function.

POSSIBLE OPTIONS

1. Enact a "press exception" based on the federal standard.

2. Enact a "press exception" based on a different standard taking into consideration communications that appear on an Internet website and communications made by e-mail.

Recommendation No. 8: Availability of Electronic Reports on the Internet

Reconsideration of section 254.0401(b) of the Election Code, which creates a waiting period before certain reports may be posted on the commission website. Basically, before certain reports may be posted, each candidate (and related committee) for the particular office must have filed a report.[2]

[2] Applies only to reports filed by major party candidates (nominated by or seeking nomination of a political party required to nominate candidates by primary election). Also, regardless of whether each candidate files a report, the commission may make semiannual reports and 30-day before the election reports Internet visible on the 21st day after the deadline, and 8-day before the election reports Internet visible on the 4th day after the deadline.

Repealing or reducing the waiting period would give the public earlier access to information. Candidates often release a report to some members of the press. This results in calls from members of the press who did not receive a copy of the report from the candidate. Also, this results in calls from the public wanting to view a report that is mentioned in a news story but that is not yet posted on the commission website.

POSSIBLE OPTIONS

1. Repeal section 254.0401(b) of the Election Code to allow the commission to make reports Internet visible as soon as possible.

2. Amend section 254.0401(b) of the Election Code to reduce the number of days that the commission must wait before posting reports in instances in which a report is not filed by each candidate.

Recommendation No. 9: Electronic Filing Exemption For Legislative Caucus

Clarification of section 254.036(c) of the Election Code, which provides the exemption from the requirement to file reports electronically. Included in the list of filers that may qualify for the exemption are candidates, officeholders, and political committees. Legislative caucuses are not included in the list. It is possible the omission was an oversight. Historically, the commission has allowed a caucus to claim the exemption from the electronic filing requirement. In January 2006, 14 caucuses filed a caucus report. Twelve of those reports were filed electronically.

POSSIBLE OPTION

Amend section 254.036(c) of the Election Code by adding caucuses to the list of filers that may qualify to file on paper.

Recommendation No. 10: Legislative Caucus Report

Clarification of section 254.0311 of the Election Code requires a legislative caucus to file a report of contributions and expenditures. Historically the notice to file the report is sent to the caucus chair. However, the law does not make any individual personally liable for failure to file the report. The membership of the caucus is not required to be disclosed to the commission. Therefore, if a report is not filed, staff is unsure as to who would be liable for failure to file a report. (The law makes an individual personally liable for failure to file other types of campaign finance reports including a political committee report and a candidate/officeholder report.)

POSSIBLE OPTIONS

1. Require a caucus to file an “appointment of caucus chair” notice.

2. Make the caucus chair the person responsible for filing caucus reports.

Recommendation No. 11: Civil Penalty for Late Special Report Near Election (Telegram Report)

Clarification of section 254.042 of the Election Code, which gives the commission the authority to impose a civil penalty if a report is filed late. Staff reads subsection (a) to exclude a "special report near election" from such fines.

The "special report near election" reporting period includes the 10 days immediately before the election and therefore arguably more time sensitive than an 8-day pre-election report. The reports are required to be filed by candidates for certain offices who accept contributions from a person that total more than $1,000 during the telegram reporting period. Information reported on a "special report near election" is re-reported on the next required report. The following is a practical effect of the law.

> A candidate for the state senate was opposed in the primary and was therefore required to file pre-election reports, including the 30-day and 8-day pre-election reports, and special reports near election. The candidate filed his 30-day and 8-day reports after the deadline. The commission imposed a late fine for each of those reports. After the election, the candidate filed a late special report near election disclosing a $10,000 contribution from one contributor. A fine was not imposed in connection with the special report near election.

Repealing subsection (a) would make special reports near election subject to late fines.

Additionally, the term "telegram" used in this section needs to be changed to "special report near election" to reflect the legislative changes made to rename that type of report. *See* Sections 254.038 and 254.039, Election Code.

POSSIBLE OPTIONS

1. Repeal section 254.042(a) of the Election Code, to make special reports near election subject to the higher fines.

2. Change the term "telegram" to "special report near election" to reflect legislative change made to rename that type of report.

Recommendation No. 12: Deadline for Filing Pre-Election Reports

Reconsideration of section 251.007 of the Election Code, which basically states that a report is timely filed if it is "mailed" by the due date unless otherwise provided by law. With the exception of "special reports near election," reports due before an election are considered timely filed if they are mailed by the due date. Consequently, some 8-day pre-election reports that are mailed arrive at the commission AFTER the election.

If the intent of the law is to make information available to the public BEFORE the election, the legislature may want to consider requiring pre-election reports to be RECEIVED by the commission on or before the due date.

Note: Section 251.007 of the Election Code does not apply to "special reports near election" discussed in Recommendation No. 11. A more specific provision (section 254.039 of the Election Code) requires those reports to be **received** by the due date.

POSSIBLE OPTIONS

1. Amend the relevant sections in chapter 254 of the Election Code to require all pre-election reports to be received by the commission on or before the due date.

2. Amend the relevant sections in chapter 254 of the Election Code to require all pre-election reports, *except the 30-day pre-election reports,* to be received by the commission on or before the due date.

Recommendation No. 13: Use of Public Funds for Political Advertising

Clarification of section 255.003 of the Election Code, which prohibits an officer or employee of a political subdivision from spending or authorizing the spending of public funds on political advertising.

"Political advertising" is defined in pertinent part as a communication supporting or opposing a candidate for nomination or election to a public office, that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication or on an Internet website. Section 251.001(16), Election Code.

Commission Opinions: The commission has said that a school district may not allow candidates for election to the school district's board of trustees to have campaign flyers placed in an area of the school that is not accessible to the public. Ethics Advisory Opinion No. 443 (2002) (**Exhibit E**). The commission concluded that spending of public funds includes the use of employees' work time, the use of facilities maintained by the political subdivision, and the use of a political subdivision's resources. *Id.* The commission has also concluded that t-shirts that support or oppose a candidate are considered to be political advertising. *See* Ethics Advisory Opinion No. 457 (2004) (**Exhibit F**).

Pending Attorney General Opinion: In September 2006, the Office of the Attorney General was asked, "Whether an elected office holder may display or distribute campaign material at his public office (Request No. 0532-GA). (**Exhibit G**). The Attorney General has until March 17, 2007, to respond.

The question that often arises is whether the use of *public resources* for political advertising is the equivalent of using *public funds* for political advertising and therefore a violation of section 255.003

of the Election Code. Another question is whether certain actions constitute the use of public resources.

Example: May an officer or employee of a political subdivision wear or authorize another officer or employee to wear clothing that constitutes political advertising. In other words, would allowing this constitute using or authorizing the use of public funds for political advertising?

- May city employees be authorized to wear during work hours t-shirts that say "Re-elect Our Mayor"?
- May school employees be authorized to wear during work hours t-shirts that say "Vote Yes for New Schools"?
- May an elected county official place on his or her county office a sign that says, "Re-Elect Me"?

Recommendation No. 14: Use of Internal Mail System for Political Advertising

Clarification of section 255.0031 of the Election Code, which prohibits an officer or employee of a state agency or political subdivision from using or authorizing the use of an internal mail system for the distribution of political advertising.

"Political advertising" is defined in pertinent part as a communication supporting or opposing a candidate for nomination or election to a public office, that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication or on an Internet website. Section 251.001(16), Election Code. The definition does not expressly include a communication made by e-mail.

Commission Rule: In July 2006, the commission adopted a rule stating that the definition of political advertising does not include a communication made by e-mail. *See* Recommendation No. 1 for detailed information regarding the rule.

The question that often arises is whether computers owned by a state agency or a political subdivision may be used to distribute a communication made by e-mail that supports or opposes a candidate or that supports or opposes a measure.

Example: Joe works for a school district. His good friend, Jane, is running for the school board. During his lunch break Joe sits at his desk and uses a school computer to write the following e-mail. "Please remember to VOTE FOR JANE." Would Joe be violating section 255.0031 of the Election Code by using the school computer to send the e-email to school district employees?

> Answer: No. Section 255.0031 of the Election Code applies to the distribution of a communication that meets the definition of "political advertising." Because e-mails are not currently within that definition the proposed activity would not violate section 255.0031 of the Election Code.

POSSIBLE OPTION

Amend the law to also prohibit the use of computers owned by a state agency or a political subdivision to be used to distribute e-mails that support or oppose a candidate or that support or oppose a measure.

Chapter 572 of the Government Code

Attached for your reference are the relevant statutes. (**Exhibit H**).

Recommendation No. 15: Information About Referrals

Clarification of section 572.0252 of the Government Code, which requires a state officer who is an attorney to report on the personal financial statement (PFS) the following: *Making or receiving any referral for compensation for legal services; and the category of amount of any fee accepted for making a referral for legal services.* In November 2005, the commission determined that section 572.0252 was so vague as to be unenforceable and said that the commission would recommend to the legislature that it clarify the statute. Ethics Advisory Opinion No. 466 (2005). (**Exhibit I**).

As background information, section 572.0252 was added to the law by H.B. 1606 of the 78th Legislature, Regular Session. That section was added to the bill towards the end of the legislative session. The legislative intent for H.B. 1606 did not include information regarding section 572.0252. The change first applied to personal financial statements filed in 2005.

In January and March 2005, the commission considered but did not adopt a rule that attempted to clarify the statute. In March 2005, a subcommittee of two commissioners was created to draft rules to clarify the statute. However, the subcommittee members agreed that the statute was so vague as to be unenforceable. Attempts to reasonably interpret and clarify the statute raised many important questions, which could not be answered to determine what the statute requires without relying upon an arbitrary or unreasonable interpretation of its scope and purpose. In clarifying the statute, the legislature may want to consider the following factors: date of the referral, name of the referring party, description of the case, percentage of fee paid or received, and date fee is paid or received.

During the 2005 Special Legislative Sessions, staff worked with a senator's staff to seek clarification of section 572.0252. However, due to more pressing matters being considered during the Special Sessions, the legislature did not get an opportunity to consider this matter.

POSSIBLE OPTIONS

1. Re-write section 572.0252 taking into consideration disclosure of the following: date the referral is accepted, name of referring party, description of the case, percentage of fee paid or received, and date fee is paid or received.

2. Clarify existing language by addressing questions such as the following: (1) Is reporting triggered when the compensation is received or when the agreement is entered into? It is possible that compensation is received after the agreement is entered into. (2) Currently the law requires the fee to be reported in a dollar amount. How is the fee reported if the amount is based on a *percentage* of an unknown dollar amount? (3) Is reporting required if the filer makes a referral to a member of the filer's law firm? (4) If a filer is a partner of a law firm, is reporting required when an associate makes a referral for which the law firm is compensated? (5) Is reporting required when the filer compensates the person making the referral, when the filer is compensated for making a referral, or when the filer receives a referral for which the filer receives compensation for providing legal services? Is reporting required in each of those three instances?

Recommendation No. 16: Preparation and Mailing of Forms

Reconsideration of section 572.030(b) of the Government Code, which requires the commission to mail two copies of the personal financial statement (PFS) form to each individual subject to the reporting requirements. Because of budgetary constraints, approximately five years ago the commission discontinued including copies of the PFS form with the notice to file. Instead, filers are referred to the commission website for a copy of the PFS form and instructions. The commission, however, continues to mail the form and instructions upon request.

Approximately 3,500 individuals file a PFS with the commission. The PFS form consists of 24 pages. The instructions to the form consist of 19 pages. The cost for copying and mailing copies is approximately $7,000, not including staff time.

POSSIBLE OPTIONS

1. Amend the law to allow the commission to provide the forms on the commission's Internet website instead of mailing the forms.

2. Appropriate additional funds to the commission to cover the mailing costs at issue.

Recommendation No. 17: Description of Gift

Reconsideration of section 572.023(b)(7) of the Government Code, which requires a personal financial statement (PFS) filer to identify a person from whom the filer or his or her spouse or dependent child received a gift of anything of value in excess of $250 and a description of the gift. This provision relates to how a gift is required to be reported. It does not address the permissibility of the acceptance of the gift. Other areas of the law, for example, the Penal Code, the lobby law, or the campaign finance law, address whether or not acceptance of the gift is legal.

The law contains language specifically requiring the majority of the financial activity disclosed on the PFS to include a specific value, a dollar category, or a number category. Section 572.023, Government Code. However, the law does not specifically require the description of a gift to include a value.

In 1999, the commission stated that the description of a gift was not required to include the specific value of a gift. Ethics Advisory Opinion No. 415 (1999). (**Exhibit J**). Staff has relied on the law and this advisory opinion to advise filers that the law does not require the description of a gift to include the specific value of the gift.

Unlike Texas, fifteen other states specifically require that the value of a gift be reported. For example, California's personal financial disclosure law states in relevant part as follows: "gifts shall be valued at fair market value as of the date of receipt or promise." Section 18946, (California) Government Code. Additionally, federal officials such as Supreme Court Justices are required to provide a description and the value of a gift.

A state representative submitted a petition for rulemaking regarding the description of a gift that is required to be reported under section 572.023(b)(7). As you are aware, the representative sued the commission because the commission did not vote to propose the rule. These events transpired during a special session in which a senator and a representative each filed a bill addressing the disclosure of a gift.[3] The bills did not become law.

After the lawsuit discussed above was dismissed, the commission received a request for an advisory opinion on the issue. The question asked in the request is whether the description of a cash or cash equivalent gift of over $250 that is reportable under section 572.023(7) of the Government Code is required to include the value of the gift or merely report the method of conveyance of the gift.

The commission staff researched the legislative history on this issue by listening to countless hours of audio tapes from legislative hearings at which this area of the law was discussed. Staff did not find a discussion relating to the description of a gift. Staff did, however, find discussions relating to whether or not other items reported on the personal financial statement should include a value.

POSSIBLE OPTIONS

1. Amend the law to expressly require a gift to include the value of the gift. Address whether the value of a gift is determined by the greater of the actual value or the fair market value of the gift at the time the gift is accepted.

2. Amend the law to expressly require only a gift of cash or cash equivalent to include the value.

3. (Depending on how the commission addresses the request for the opinion, we may add another option here.)

[3] Representative Elliott Naishtat filed H.B. 93 requiring the description of a gift to include the fair market value of a gift. Senator Gonzalo Barrientos filed S.B. 20 requiring the description of gift of cash or cash equivalent to include the value of the gift.

Recommendation No. 18: Nature of Occupation

Reconsideration of section 572.023(b)(1) of the Government Code, which requires a personal financial statement (PFS) filer to list all sources of occupational income, "identified by employer, or if self-employed, by *nature of the occupation*." The question that often arises is whether a filer who is self-employed is required to list each person from whom they receive occupational income. The commission staff's longstanding interpretation of this provision is that a filer is NOT required to identify each client from whom occupational income is received. The PFS instructions regarding a self-employed filer are as follows: "**Self-Employed.** If the individual is self-employed, report the nature of the occupation, e.g. attorney, carpenter, etc. . . . "

Unlike Texas, other states specifically require a self-employed officer to disclose client names and information about the economic activity provided. For example, some states require a filer to identify each client from whom the filer receives income exceeding a certain threshold. The state of Maine has such a requirement and gives a filer the option to complete a form disclosing certain information or to submit federal income tax information, such as a 1099 Form. Maine law requires disclosure if not otherwise prohibited by other Maine law, rule, or established code of professional ethics. If disclosure is prohibited, a filer is nonetheless required to identify the principal type of economic activity relating to that client.

POSSIBLE OPTIONS

1. Amend the law to require a self-employed filer to identify each client, unless other law prohibits disclosure.

2. Consider the Maine standard in which the identity of a client is required only if the filer receives from that client compensation exceeding a certain threshold, unless other law prohibits disclosure. Under this standard a filer is given the option to complete a form disclosing certain client information or submit federal income tax information, such as a 1099 Form.

3. Do not amend the law, which would result in the continuation of the commission's longstanding interpretation that the law does not require a filer to identify each client.

Recommendation No. 19: Revolving Door Provision

Update section 572.054(c)(2) of the Government Code, which sets the state employee position classification to which the revolving door provision applies. Although the legislature has changed the manner in which state employment positions are classified, section 572.054(c)(2) has not been amended to reflect the changes.

Recommendation No. 20: Contracts by State Officers with Governmental Entities

Clarification of section 572.056 of the Government Code, which relates to contracts entered into by state officers with governmental entities. Basically it prohibits a state officer from accepting or soliciting from a governmental entity a "commission, fee, bonus, retainer, or rebate" that is compensation for the officer's personal solicitation of the award of a contract for services to the governmental entity.

In 1992, the commission concluded that it was difficult to determine what this section prohibits and that the commission would recommend that the legislature clarify the statute. Ethics Advisory Opinion No. 72 (1992). (**Exhibit K**).

Recommendation No. 21: Personal Financial Statement Filing Deadline

Reconsideration of section 572.026(b) of the Government Code, which requires an individual who is appointed to serve as a salaried appointed officer or an appointed officer of a major state agency to file a personal financial statement within the 14th day of appointment.

In 2003 the legislature substituted "14th day" for "30th day." The change in the law caused many non-salaried appointed officers a hardship to timely complete the personal financial statement.

POSSIBLE OPTION

Consider amending the law to give *all* non-salaried appointed officers of major state agencies more than 14 days to file the personal financial statement.

Chapter 305 of the Government Code

Attached for your reference are the relevant statutes and rules. (**Exhibit L**).

Some of the recommendations in this section involve lobby rules adopted by the Ethics Commission. Therefore, a brief review of the commission's past actions in regard to those rules may be helpful. In early 1992 the Ethics Commission adopted a set of lobby rules to resolve some of the confusion about the application of the lobby law, which the legislature had substantially amended in 1991. During 1992 the commission issued many opinions about the lobby law, not all of which were well received by the regulated community. In 1993 the commission appointed a task force to work on, among other things, a proposal for new lobby rules. The members of the task force included a registered lobbyist, members of "government watchdog groups" such as Common Cause, legislative staff, members of the press, and Ethics Commission members and staff. The task force made suggestions about the substance of the new lobby rules. In response to the work of the task force, the Ethics Commission adopted the lobby rules discussed below.

Recommendation No. 22: Exceptions From the Requirement to Register as a Lobbyist

Lobby registration is required if a person[4] meets either one of two thresholds: "the compensation and reimbursement threshold" or the "expenditure threshold.[5]" Section 305.003, Government Code. Sections 305.003(b) through (c) and section 305.004 of the Government Code provide a list of persons exempt from registration. Other exceptions from lobby registration are found in the Ethics Commission Rules.

Exceptions Created By Ethics Commission Rules: Under Ethics Commission Rule § 34.5, "compensation or reimbursement" received for 12 types of communications do not count towards the "compensation and reimbursement" threshold even though the communications may be intended to influence legislation or administrative action.

Ethics Commission Rule § 34.43(b) contains an "incidental lobbying" exception under the "compensation and reimbursement" threshold. Under the rule a person is exempt from the requirement to register, no matter how much compensation and reimbursement the person receives to lobby, if lobbying constitutes no more than five percent of the person's compensated time during a calendar quarter.

Under Ethics Commission Rule § 34.45, an entity that is required to register may nonetheless avoid registration if one or more registered lobbyists report all activity otherwise reportable by the entity.

Under Ethics Commission Rule § 34.41(b), an expenditure made by a member of the judicial, legislative, or executive branch of state government or an officer or employee of a political subdivision of the state acting in his or her official capacity is not included for purposes of determining whether a person is required to register under the expenditure threshold. (Under the statute, these individuals are similarly exempt under the "compensation and reimbursement" threshold. Section 305.003(b-1), Government Code.

The legislature may want to consider whether to codify the rules. Doing so would result in the statute providing a comprehensive list of the exceptions from lobby registration.

[4] Under the lobby law, "person" is defined as an individual, corporation, association, firm, partnership, committee, club, organization, or group of persons who are voluntarily acting in concert. Section 305.002(8), Government Code.

[5] Under current Ethics Commission rules, a person who receives more than $1,000 in a calendar quarter as compensation or reimbursement to lobby must register as a lobbyist. (Compensation and reimbursement must be added together to determine whether registration is required. Ethics Advisory Opinion No. 103 (1993) and Ethics Commission Rule § 34.43(a). Under current commission rules, a person who expends more than $500 in a calendar quarter for certain purposes must register as a lobbyist.

POSSIBLE OPTIONS

1. Codify the exceptions from lobby registration created by commission rules without making modification to the rules.

2. Modify the exceptions from lobby registration created by commission rules.

Recommendation No. 23: Reporting and Attribution of Lobby Expenditures

Clarification regarding the reporting and attribution of lobby expenditures for benefits given jointly by more than one lobbyist.

Attribution of Expenditures: As background information, the lobby law contains a number of restrictions on expenditures by lobbyists.[6] The restrictions both apply when the lobbyist makes an expenditure and when someone other than the lobbyist makes an expenditure on the lobbyist's behalf with the lobbyist's consent or ratification. Section 305.024, Government Code; Ethics Advisory Opinion No. 30 (1992). (**Exhibit M**).

The lobby law contains a number of exceptions to restrictions on expenditures by a lobbyist and, in some instances, sets annual dollar limits on those expenditures. Sections 305.024 and 305.025, Government Code. For example, a lobbyist may provide one or more gifts to a state officer up to a maximum aggregate expenditure total of $500 per officer during a calendar year.

The issue that often arises is whether an expenditure may be split between multiple lobbyists for purposes of the expenditure limits. The commission staff's longstanding interpretation has been that the entire amount of an expenditure is attributed to each lobbyist and that therefore, an expenditure cannot be split for purposes of the expenditure limits.

Reporting of Expenditures: The lobby law also requires a lobbyist to report certain lobby expenditures. *See* Section 305.006, Government Code. A lobby expenditure made on a person's behalf and with the person's consent or ratification is an expenditure by that person for purposes of the registration and reporting under the lobby law. Ethics Commission Rules § 34.11(a).

The issue that often arises here is whether an expenditure may be split between multiple lobbyists for reporting purposes. Commission staff's longstanding interpretation of the rule is that splitting is not allowed for reporting purposes. Additionally, because double reporting should be avoided, only one lobbyist reports the expenditure and that lobbyist reports the entire amount.[7]

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[6] Similarly, the law sets limits on what a member of the legislative or executive branch of state government may solicit, accept, or agree to accept from a lobbyist.

[7] Double reporting of the same expenditure would occur if more than one lobbyist reports the entire amount. The commission has said that the lobby statute should be construed to avoid "double reporting" of expenditures. Ethics Advisory Opinion 48 (1992).

A violation of either section 305.024 or 305.006 constitutes a Class A misdemeanor, which is punishable by a fine not to exceed $4,000, confinement in jail for a term not to exceed one year, or both such fine and confinement. Section 12.21, Penal Code. (Exhibit N). Additionally, the commission has the authority to impose a civil penalty of not more than $5,000 or triple the amount at issue.

Example: Three lobbyists go in together and purchase a $1,500 hunting rifle for a member of the legislature. They each pay $500.

> For reporting purposes, does each lobbyist report only $500, does each lobbyist report $1,500 or does one lobbyist report the entire $1,500?
>
> For purposes of the $500 annual gift limit set by law, what portion of the $1,500 is attributed to each lobbyist? Is the $500 that each paid or the entire $1,500? (If the entire amount were attributed to each lobbyist, each lobbyist would have exceeded the annual limit.)

Based on the statute and rule discussed above, commission staff has consistently said that splitting is not allowed for either reporting purposes or for attribution purposes. In other words, the commission staff's interpretation of the law has been that the entire $1,500 is attributed to each lobbyist and, that for reporting purposes, only one lobbyist reports the entire amount. Similarly, for purposes of the expenditure limits, the commission staff's interpretation of the law has been that the entire amount is attributed to each lobbyist and thus, in the example, each lobbyist would have exceeded the $500 expenditure limit.

POSSIBLE OPTIONS

Reporting

1. Codify Ethics Commission Rule § 34.11(b), which provides that splitting is not allowed for reporting purposes and registration purposes.

2. Prohibit double reporting of lobby expenditures. Ethics Advisory Opinion No. 48 (1992). (**Exhibit O**).

3. Require an expenditure made by multiple lobbyists to be reported by one lobbyist and require that lobbyist: (1) to report the entire amount (2) to identify all lobbyists who made the expenditure, and (3) identify specific amount attributed to other lobbyists.

4. Alternatively, enact provisions allowing lobbyists to split an expenditure for reporting purposes and allowing each lobbyist to report only the amount of an expenditure attributed only to them.

Attribution

5. Enact a provision providing that splitting is not allowed for purposes of the lobby expenditure limits.

6. Alternatively, enact a provision providing that splitting is allowed for purposes of the lobby expenditure limits.

Recommendation No. 24: Update to Lobby Reporting Provision

Update of section 305.0062(d) of the Government Code, which requires an expenditure for an event to which all legislators are invited to be reported under subsection **(a)(7**) and not under any other subdivision. The proper subdivision to report this type of expenditure is **(a)(8)**. This section was recently amended and due to an oversight the reference to (a)(7) was not changed to (a)(8).

POSSIBLE OPTION

Update section 305.0062(d) of the Government Code by replacing (a)(7) with (a)(8).

Recommendation No. 25: E-mails and Internet Website (Legislative Advertising)

Clarification of section 305.027 of the Government Code, which is a provision that requires a disclosure statement on legislative advertising. In Ethics Advisory Opinion No. 464 (September 2005), the commission concluded that the disclosure statement is not required on a communication that appears on a website and a communication made by e-mail. (**Exhibit P**). This conclusion was reached after a subcommittee of three commissioners deliberated the issue. The commission's decision in EAO No. 464 was based in part that in 2003, the legislature amended section 251.001(16) of the Election Code to include in the definition of political advertising a communication that appears on a website. Acts 2003, 78th Leg., R.S., ch. 249, § 2.01, at p. 1135; Elec. Code § 251.001(1). The legislature, however, did not add that type of communication to the definition of legislative advertising. Therefore, the commission reasoned that the legislature did not intend the definition of legislative advertising to include a communication that appears on a website or a communication made by e-mail. The commission also stated that it would ask the legislature to clarify whether it intended to include in the definition of legislative advertising a communication that appears on a website and a communication made by e-mail.

POSSIBLE OPTIONS

1. Amend the definition of "legislative advertising" to include a communication made by e-mail and a communication that appears on an website.

2. Do not amend the definition of "legislative advertising," which would validate the commission's determination that the legislature did not intend to

include in that definition communications that appear on a website and communications made by e-mail.

Recommendation No. 26: Contingent Fees

Clarification of section 305.022 of the Government Code, which provides that it is illegal for a person to retain or employ another to influence legislation or administrative action, when compensation for that employment or service is totally or partially contingent on the passage or defeat of any legislation, the governor's approval or veto of any legislation, or the outcome of any administrative action.

Subsection (c) of section 305.022 provides that the *prohibition does not apply to contingent fees payable to an employee of a vendor of a product. (Emphasis added.)* [8] This subsection has been interpreted to allow contingent fees for efforts to influence a state agency's purchasing decisions. This subsection has also been interpreted to allow contingent fees in efforts to influence a state agency's selection of a service provider. The question is whether the legislature intended this provision to be interpreted in this manner.

The law would benefit from clarification on what is meant by "a vendor of a product." The legislature may want to consider: whether this exception applies to efforts to influence purchasing decisions; **whether it applies to purchasing decisions in response to a request for a proposal (RFP);** whether purchasing decisions apply simply to the purchase of goods, or also to the purchase of services; and, whether the selection of a service provider constitutes a purchasing decision.

POSSIBLE OPTIONS

1. Define the terms "vendor" and "product" for purposes of section 305.022 of the Government Code.

2. Consider whether the prohibition applies to a response to a state agency's RFP and other methods of procurement.

[8] Additionally, subsection (d) provides that the contingent fee prohibition does not prohibit payment or acceptance of compensation that is expressly authorized by some other law or compensation for legal representation before a state administrative agency in a contested hearing or similar adversarial proceeding prescribed by law.

Chapter 571 of the Government Code

Attached for your reference are the relevant statutes. (**Exhibit Q**).

Recommendation No. 27: Sworn Complaints - Appeal of Final Decision

Clarification of section 571.133(a) of the Government Code, which relates to sworn complaints and which states as follows: "[t]o appeal a final decision of the commission, a **person** may file a petition in district court in Travis County or in the county in which the respondent resides."

The issue is whether the right to appeal a commission decision may be exercised only by a respondent in the complaint in question or whether a complainant and others not named in the complaint may also exercise that right.

POSSIBLE OPTIONS

1. Amend section 571.133(a) of the Government Code, by replacing the word "person" with "the respondent of a sworn complaint."

2. Amend section 571.133(a) of the Government Code, by replacing the word "person" with "the respondent or the complainant of a sworn complaint."

3. Amend section 571.133(a) of the Government Code, by replacing the term "person" with "any person."

Recommendation No. 28: Sworn Complaints - Waiver of Confidentiality

Clarification of section 571.140 of the Government Code, which prohibits the commission and commission staff from disclosing certain sworn complaint information. The issue is whether the respondent and the complainant in a complaint may waive such confidentiality for the limited purpose of permitting commission staff to disclose the names of the respondent and complainant and the allegations at issue before the commission.

POSSIBLE OPTION

Amend section 571.140 of the Government Code, by allowing a respondent and complainant to waive confidentiality for the limited purpose of permitting commission staff to disclose the names of the respondent and complainant and the allegations at issue before the commission.

EXHIBITS

EXHIBIT A

TITLE 15. REGULATING POLITICAL FUNDS AND CAMPAIGNS

CHAPTER 251. GENERAL PROVISIONS

SUBCHAPTER A. GENERAL PROVISIONS

§ 251.001. Definitions

In this title:

(1) “Candidate” means a person who knowingly and willingly takes affirmative action for the purpose of gaining nomination or election to public office or for the purpose of satisfying financial obligations incurred by the person in connection with the campaign for nomination or election. Examples of affirmative action include:

(A) the filing of a campaign treasurer appointment, except that the filing does not constitute candidacy or an announcement of candidacy for purposes of the automatic resignation provisions of Article XVI, Section 65, or Article XI, Section 11, of the Texas Constitution;

(B) the filing of an application for a place on the ballot;

(C) the filing of an application for nomination by convention;

(D) the filing of a declaration of intent to become an independent candidate or a declaration of write-in candidacy;

(E) the making of a public announcement of a definite intent to run for public office in a particular election, regardless of whether the specific office is mentioned in the announcement;

(F) before a public announcement of intent, the making of a statement of definite intent to run for public office and the soliciting of support by letter or other mode of communication;

(G) the soliciting or accepting of a campaign contribution or the making of a campaign expenditure; and

(H) the seeking of the nomination of an executive committee of a political party to fill a vacancy.

(7) “Campaign expenditure” means an expenditure made by any person in connection with a campaign for an elective office or on a measure. Whether an expenditure is made before, during, or after an election does not affect its status as a campaign expenditure.

(12) “Political committee” means a group of persons that has as a principal purpose accepting political contributions or making political expenditures.

(16) “Political advertising” means a communication supporting or opposing a candidate for nomination or election to a public office or office of a political party, a political party, a public officer, or a measure that:

(A) in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast by radio or television; or

(B) appears:

(i) in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication; or

(ii) on an Internet website.

(17) “Campaign communication” means a written or oral communication relating to a campaign for nomination or election to public office or office of a political party or to a campaign on a measure.

(19) “Measure” means a question or proposal submitted in an election for an expression of the voters’ will and includes the circulation and submission of a petition to determine whether a question or proposal is required to be submitted in an election for an expression of the voters’ will.

§ 251.007. Timeliness of Action by Mail

When this title requires a notice, report, or other document or paper to be delivered, submitted, or filed within a specified period or before a specified deadline, a delivery, submission, or filing by first-class United States mail or common or contract carrier is timely, except as otherwise provided by this title, if:

(1) it is properly addressed with postage or handling charges prepaid; and

(2) it bears a post office cancellation mark or a receipt mark of a common or contract carrier indicating a time within the period or before the deadline, or if the person required to take the action furnishes satisfactory proof that it was deposited in the mail or with a common or contract carrier within the period or before the deadline.

CHAPTER 253. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES

SUBCHAPTER B. CANDIDATES, OFFICEHOLDERS, AND POLITICAL COMMITTEES

§ 253.031. Contribution and Expenditure Without Campaign Treasurer Prohibited

(b) A political committee may not knowingly accept political contributions totaling more than $500 or make or authorize political expenditures totaling more than $500 at a time when a campaign treasurer appointment for the committee is not in effect.

SUBCHAPTER D. CORPORATIONS AND LABOR ORGANIZATIONS

§ 253.091. Corporations Covered

This subchapter applies only to corporations that are organized under the Texas Business Corporation Act, the Texas Non-Profit Corporation Act, federal law, or law of another state or nation.

§ 253.100. Expenditures for General-Purpose Committee

(a) A corporation, acting alone or with one or more other corporations, may make one or more political expenditures to finance the establishment or administration of a general-purpose committee.

CHAPTER 254. POLITICAL REPORTING

SUBCHAPTER B. POLITICAL REPORTING GENERALLY

§ 254.0311. Report by Legislative Caucus

(a) A legislative caucus shall file a report of contributions and expenditures as required by this section.

(b) A report filed under this section must include:

(1) the amount of contributions from each person, other than a caucus member, that in the aggregate exceed $50 and that are accepted during the reporting period by the legislative caucus, the full name and address of the person making the contributions, and the dates of the contributions;

(2) the amount of loans that are made during the reporting period to the legislative caucus and that in the aggregate exceed $50, the dates the loans are made, the interest rate, the maturity date, the type of collateral for the loans, if any, the full name and address of the person or financial institution making the loans, the full name and address, principal occupation, and name of the employer of each guarantor of the loans, the amount of the loans guaranteed by each guarantor, and the aggregate principal amount of all outstanding loans as of the last day of the reporting period;

(3) the amount of expenditures that in the aggregate exceed $50 and that are made during the reporting period, the full name and address of the persons to whom the expenditures are made, and the dates and purposes of the expenditures;

(4) the total amount or a specific listing of contributions of $50 or less accepted from persons other than caucus members and the total amount or a specific listing of expenditures of $50 or less made during the reporting period; and

(5) the total amount of all contributions accepted, including total contributions from caucus members, and the total amount of all expenditures made during the reporting period.

(c) If no reportable activity occurs during a reporting period, the legislative caucus shall indicate that fact in the report.

(d) A legislative caucus shall file with the commission two reports for each year.

(e) The first report shall be filed not later than July 15. The report covers the period beginning January 1 or the day the legislative caucus is organized, as applicable, and continuing through June 30.

(f) The second report shall be filed not later than January 15. The report covers the period beginning July 1 or the day the legislative caucus is organized, as applicable, and continuing through December 31.

(g) A legislative caucus shall maintain a record of all reportable activity under this section and shall preserve the record for at least two years beginning on the filing deadline for the report containing the information in the record.

(h) In this section, "legislative caucus" has the meaning assigned by Section 253.0341.

§ 254.036. Form of Report; Affidavit; Mailing of Forms

(c) A candidate, officeholder, or political committee that is required to file reports with the commission may file reports that comply with Subsection (a) if:

(1) the candidate, officeholder, or campaign treasurer of the committee files with the commission an affidavit stating that the candidate, officeholder, or committee, an agent of the candidate, officeholder, or committee, or a person with whom the candidate, officeholder, or committee contracts does not use computer equipment to keep the current records of political contributions, political expenditures, or persons making political contributions to the candidate, officeholder, or committee; and

(2) the candidate, officeholder, or committee does not, in a calendar year, accept political contributions that in the aggregate exceed $20,000 or make political expenditures that in the aggregate exceed $20,000.

§ 254.038. Special Report Near Election by Certain Candidates and Political Committees

(a) In addition to other reports required by this chapter, the following persons shall file additional reports during the period beginning the ninth day before election day and ending at 12 noon on the day before election day:

(1) a candidate for an office specified by Section 252.005(1) who accepts political contributions from a person that in the aggregate exceed $1,000 during that reporting period; and

(2) a specific-purpose committee for supporting or opposing a candidate described by Subdivision (1) and that accepts political contributions from a person that in the aggregate exceed $1,000 during that reporting period.

(b) Each report required by this section must include the amount of the contributions specified by Subsection (a), the full name and address of the person making the contributions, and the dates of the contributions.

(c) A report under this section shall be filed electronically, by telegram or telephonic facsimile machine, or by hand, in the form required by Section 254.036. The commission must receive the report not later than 5 p.m. of the first business day after the date the contribution is accepted. A report under this section is not required to be accompanied by the affidavit required under Section 254.036(h) or to be submitted on a form prescribed by the commission. A report under this section that complies with Section 254.036(a) must be accompanied by an affidavit under Section 254.036(c)(1) unless the candidate or committee has submitted an affidavit under Section 254.036(c)(1) with another report filed in connection with the election for which a report is required under this section.

(d) To the extent of a conflict between this section and Section 254.036, this section controls.

§ 254.039. Special Report Near Election by Certain General-Purpose Committees

(a) In addition to other reports required by this chapter, a general-purpose committee that makes direct campaign expenditures supporting or opposing either a single candidate that in the aggregate exceed $1,000 or a group of candidates that in the aggregate exceed $15,000 during the period beginning the ninth day before election day and ending at 12 noon on the second day before election day shall file a report electronically, by telegram or telephonic facsimile machine, or by hand, in the form required by Section 254.036. The commission must receive the report not later than 48 hours after the expenditure is made. A report under this section is not required to be accompanied by the affidavit required under Section 254.036(h) or to be submitted on a form prescribed by the commission. A report under this section that complies with Section 254.036(a) must be accompanied by an affidavit under Section 254.036(c)(1) unless the committee has submitted an affidavit under Section 254.036(c)(1) with another report filed in connection with the election for which a report is required under this section.

(b) Each report required by this section must include the amount of the expenditures, the full name and address of the persons to whom the expenditures are made, and the dates and purposes of the expenditures.

(c) To the extent of a conflict between this section and Section 254.036, this section controls.

§ 254.042. Civil Penalty for Late Report

(a) The commission shall determine from any available evidence whether a report, other than a telegram report under Section 254.038 or 254.039, required to be filed with the commission under this chapter is late. On making that determination, the commission shall immediately mail a notice of the determination to the person required to file the report.

(b) If a report other than a report under Section 254.064(c), 254.124(c), or 254.154(c) or the first report under Section 254.063 or 254.123 that is required to be filed following the primary or general election is determined to be late, the person required to file the report is liable to the state for a civil penalty of $500. If a report under Section 254.064(c), 254.124(c), or 254.154(c) or the

first report under Section 254.063 or 254.153 that is required to be filed following the primary or general election is determined to be late, the person required to file the report is liable to the state for a civil penalty of $500 for the first day the report is late and $100 for each day thereafter that the report is late. If a report is more than 30 days late, the commission shall issue a warning of liability by registered mail to the person required to file the report. If the penalty is not paid before the 10th day after the date on which the warning is received, the person is liable for a civil penalty in an amount determined by commission rule, but not to exceed $10,000.

(c) A penalty paid voluntarily under this section shall be deposited in the State Treasury to the credit of the General Revenue Fund.

Return to Recommendation No. 1

EXHIBIT B

LEGISLATIVE HISTORY OF E-MAILS IN POLITICAL ADVERTISING

An issue that often arises is whether the definition of political advertising includes communications made by e-mail. The relevant provision at issue is section 251.001(16) of the Election Code, which defines political advertising in pertinent part as a communication supporting or opposing a candidate for nomination or election to a public office, that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication or on an Internet website.

The current version of section 251.001(16) of the Election Code defining political advertising was added by H.B. 1606 during the 78th regular legislative session, and became effective on September 1, 2003. The legislature considered several versions of this provision.

The original introduced version of H.B. 1606 amended the definition of political advertising to specifically include both communications that appear on an Internet website and communications made by e-mail. After that version went to the House Select Committee on Ethics, the committee substituted a version of the bill that removed the reference to e-mail, but kept the "on an Internet website" language. This substitute version was passed by the House and sent to the Senate.

After review by the Senate Government Organization Committee, a version was substituted which removed "on an Internet website" language and added language to include advertising broadcast, "by other means of electronic transmission." The Senate passed this version, but the House refused to concur with the Senate's amendments. After a conference committee filed its report, the version that was signed by the House and the Senate removed the "other means of electronic transmission" and reinserted the "on an Internet website" language. That is the version that became law.

In conclusion, the legislature clearly considered whether to include in the definition of political advertising communications made by e-mail. The evidence suggests that the legislature did not intend to include those types of communications in the current definition of political advertising.

In Ethics Advisory Opinion No. 464 (2005), which related to legislative advertising the commission determined that the definition of *legislative advertising* does not include a communication made by e-mail because that type of communication is not specifically included in the definition of legislative advertising.

Return to Recommendation No. 1

EXHIBIT C

TEXAS ETHICS COMMISSION

P. O. Box 12070, Capitol Station
Austin, Texas 78711-2070

ETHICS ADVISORY OPINION NO. 319

April 19, 1996

Whether a legislator may use political contributions to pay rent and maintenance fees for a condominium in Travis County that the legislator's wife owns as separate property. (AOR-350)

The Texas Ethics Commission has been asked whether a legislator may use political contributions to pay rent and maintenance fees for a condominium in Travis County that the legislator's wife owns as separate property. There are two issues presented by that question: whether such payments constitute a conversion of political contributions to personal use in violation of section 253.035 of the Election Code and whether such payments constitute a use of political contributions to purchase real estate in violation of section 253.038 of the Election Code.

Although a legislator may not convert political contributions to personal use, a legislator who does not ordinarily reside in Travis County may use political contributions to pay "reasonable housing or household expenses incurred in maintaining a residence in Travis County." Elec. Code § 253.035(a), (d)(1). Such payments are reportable officeholder expenditures. *See id.* §§ 251.001(9), 254.031(3), (6). The question here is whether such payments are permissible even if made to a legislator's spouse.

The Ethics Commission has stated that a candidate or officeholder may use political contributions to reimburse himself for the use of personal assets for campaign or officeholder purposes. Ethics Advisory Opinions Nos. 129, 116 (1993). Similarly, it is permissible for a candidate or officeholder to use political contributions to pay a family member for the use of the family member's assets for campaign or officeholder purposes. Any such reimbursement should be based on the fair market value of the use of an asset. A conversion of political contributions to

personal use would occur if a legislator paid his spouse more than fair market value for the use of her real property for officeholder purposes.

Although the personal-use restriction in section 253.035 of the Election Code does not prohibit a legislator from using political contributions to pay his spouse fair market value for the use of the spouse's assets for officeholder purposes, it has been suggested that the payments at issue here are prohibited under section 253.038 of the Election Code, which prohibits the use of political contributions to *purchase* real property or to pay the interest on or principal of a note for the *purchase* of real estate.[1]

The real property in question here is the separate property of the legislator's spouse. In Texas a married person has the sole management, disposition, and control over his or her separate property. Tex. Const. art. XVI, § 15; Fam. Code § 5.21. A man who pays rent to his spouse for the use of real property does not thereby acquire or "purchase" an interest in that property. Consequently, a legislator's use of political contributions to make a rental payment to his spouse for the use of her separate rental property does not constitute a payment to purchase real property and does not violate section 253.038 of the Election Code.[2]

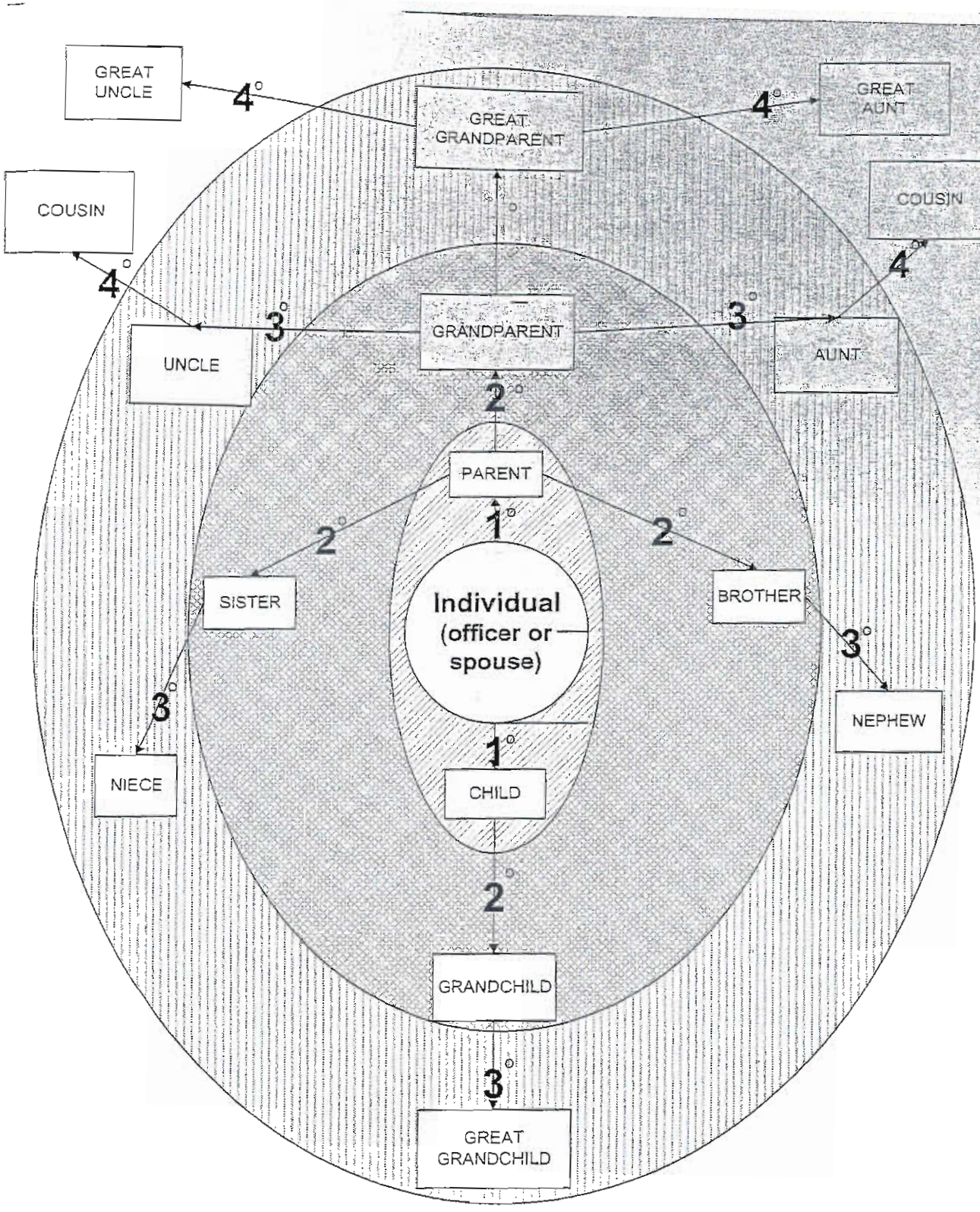
SUMMARY

A legislator's use of political contributions to make a rental payment to his spouse for the use of her separate property does not constitute a payment to purchase real property and does not violate section 253.038 of the Election Code. Nor is such a payment a conversion to personal use as long as the payment does not exceed the fair market value of the use of the property.

Return to Recommendation No. 3

[1]The prohibition on the use of political contributions to purchase real property or to make payments on a note for the purchase of real property does not apply to a payment made in connection with real property purchased before January 1, 1992.

[2] In the absence of an agreement to the contrary, income from separate property is community property. Tex. Const. Art. XVI, § 15. Although in this case the legislator may have a community interest in the rent payments, the legislator does not acquire an interest in the real property by virtue of those payments.



Degrees of Relationship Chart

When determining the degree of relationship by consanguinity, the individual in the center is the officer. For relationships by affinity, the officer's spouse is the individual in the center.

Return to Recommendation No. 3

EXHIBIT E

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 443

May 10, 2002

Whether a school district may allow candidates for election to the school district's board of trustees to have campaign flyers placed in an area of a school that is not accessible to the public. (AOR-495)

The Texas Ethics Commission has been asked about the application of section 255.003 of the Election Code to a situation in which a school district allows any candidate for election to the school district's board of trustees to have campaign flyers placed in a teachers' lounge that is not accessible to the public.

Section 255.003 of the Election Code prohibits an officer or employee of a political subdivision such as a school district from spending or authorizing the spending of public funds for political advertising. The question presented raises two separate issues: whether the situation described involves the "spending" of public funds and, if so, whether the public funds would be spent "for" political advertising.

In a 1992 advisory opinion, we concluded that the "spending" of public funds included the use of school district employees' work time as well as the use of existing school district equipment. Ethics Advisory Opinion No. 45 (1992). Because the situation described in the request letter involves the placement of campaign flyers in an area of a school restricted to school employees, the placement presumably requires school district employees to transport the flyers to the restricted area on work time. Furthermore, in our opinion, for purposes of section 255.003, the "spending" of public funds includes the use of facilities maintained by a political subdivision. Therefore, the placement of campaign flyers in a teachers' lounge would involve the "spending" of public funds for purposes of section 255.003 of the Election Code.

The remaining question is whether, in the situation described in the request letter, public funds would be spent "for" political advertising. Individual campaign flyers are, in most circumstances, political advertising. *See* Elec. Code § 251.001(16) (defining "political advertising"). The use of school district resources to disseminate political advertising is a use "for" political advertising. The requestor argues, however, that the restriction in section 255.003 should not apply in a case in which any candidate has the same opportunity to make use of

school district resources for the dissemination of political advertising.[1] That interpretation assumes that the only purpose of section 255.003 is to prevent a political subdivision from favoring one candidate or one political point of view over another. It is likely that prevention of such favoritism was at least one purpose of section 255.003. The broad language of section 255.003, however, applies to any use of a political subdivision's resources for political advertising, and there is no language to suggest that a political subdivision may use public resources for political advertising if the political subdivision itself does not show a preference for political advertising from a particular source.

We note that this opinion is not intended to address the use of the facilities of a political subdivision in a situation in which the facilities function as a "public form." *See generally International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (cases discussing permissible restrictions on use of public forum). Whether a particular area of a school or other public facility is a public form is a fact question, but in this case it is clear from the request letter that the teachers' lounge in question is not a public forum.

SUMMARY

For purposes of section 255.003, the "spending" of public funds includes the use of facilities maintained by a political subdivision.

The prohibition in section 255.003 of the Election Code applies to any use of a political subdivision's resources for political advertising.

This opinion does not apply to the use of the facilities of a political subdivision in a situation in which the facilities function as a public forum.

Return to Recommendation No. 13

[1] In a 1996 opinion, we concluded that a broadcast on a city television station was not itself "political advertising" because all candidates in the relevant election were invited to participate. Ethics Advisory Opinion No. 343 (1996). In that case, the fact that the opportunity to participate in the broadcast was available to all candidates led to the conclusion that the broadcast itself was not political advertising. In contrast, in this case, there is no question that the flyers are political advertising. Rather, the issue here is whether school resources may be used for political advertising if all candidates have the same opportunity to make use of school resources for political advertising.

EXHIBIT F

TEXAS ETHICS COMMISSION

P.O. Box 12070, Capitol Station
Austin, Texas 78711-2070

ETHICS ADVISORY OPINION NO. 457

July 16, 2004

Whether section 255.001 of the Election Code requires that a political advertising disclosure statement be included on shirts that bear a candidate's political logo. (AOR-512)

The Texas Ethics Commission has been asked whether section 255.001 of the Election Code requires that a political advertising disclosure statement be included on shirts that bear a candidate's political logo.[1] A person may not knowingly cause to be published, distributed, or broadcast political advertising containing express advocacy that does not indicate that it is political advertising and that does not disclose the name of an individual or group responsible for the political advertising. Elec. Code § 255.001(a). There is an exception to the disclosure requirement in section 255.001(a) for political advertising in the form of "campaign buttons, pins, hats, or similar campaign materials."[2] In our opinion, a shirt is similar to a campaign button or hat because it is intended to be worn. Therefore, a shirt that bears a candidate's political logo is not required to include a political advertising disclosure statement.

SUMMARY

A shirt that bears a candidate's political logo is not required to include a political advertising disclosure statement.

Return to Recommendation No. 13

[1] We use the phrase "political advertising disclosure statement" to refer to the information section 255.001(a) requires to be included in political advertising.

[2] The term "political advertising" includes a communication supporting a candidate for nomination or election to a public office that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication. *Id.* § 251.001(16). We interpret the term "political advertising" to include items such as hats, pins, buttons, and other items intended to be worn. Otherwise, it would not have been necessary to include a provision that excepts hats, pins, and buttons from the requirements of section 255.001(a).

EXHIBIT G

JEFF DAVIS COUNTY
BART E. MEDLEY
COUNTY ATTORNEY

Office: 432-426-4434
Fax: 432-426-3228

P.O. Box 201
Fort Davis, TX 79734

FILE # ML-44995-06
I.D. # 44995

September 12, 2006

VIA CERTIFIED MAIL
The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0532-GA

RE: Request for Opinion

Dear General Abbott:

I am requesting an opinion on the following question: Does Section 255.003, Texas Election Code, which prohibits the use of public funds for political advertising, prohibit an officeholder from displaying or distributing campaign material in his or her official office?

FACTS:

The position of Justice of the Peace is on the ballot in the 2006 General Election. Jeff Davis County has a single Justice of the Peace, with county-wide jurisdiction. The incumbent is running for re-election and has drawn an opponent. The opponent is employed by Jeff Davis County on its maintenance staff, under the direct supervision of the Commissioners Court..

The incumbent has, in his courthouse office, a number of giveaway campaign items, such as drink holders, magnetic football schedules, and similar items. There is no allegation that these items have been designed, printed, or purchased using public funds. Office employees do not distribute the items.

These items sit on a shelf in the office, and may be picked up by persons coming into the office. Frequently, voters do pick up this material. The opponent, who is prohibited from conducting campaign activities while on duty, has objected to these items being present in the incumbent's official office.

Both the incumbent and the opponent have contacted the Texas Ethics Commission in regard to this issue, and have received conflicting answers. The incumbent was told there was not a problem with this practice. The opponent was told this practice is unacceptable under Texas Election Code §255.003. Neither obtained a written opinion.

The undersigned personally contacted the Texas Ethics Commission on September 8, 2006, for guidance. The verbal opinion was that this practice was "not a good idea" in light of Advisory Opinion 443. A subsequent phone call to an attorney for the Texas Association of Counties yielded the opinion that there was "no problem."

LEGAL ANALYSIS

Section 255.003 specifically prohibits an officer or employee of a political subdivision from expending public funds for political advertising. Political advertising includes any communication which "appears in a pamphlet, circular, flier, billboard, or other sign, bumper sticker, or similar form of written communication." Texas Election Code §251.001(16)(B).

Drink holders, magnets, and similar items which are imprinted with "Re-Elect . . . Justice of the Peace" would seem to constitute political advertising under this definition. If such items had been purchased with public funds, there would be a clear violation of §255.003.

The Texas Ethics Commission has opined that the distribution of campaign material by a public employee on duty would constitute a violation of §255.003. *See* Texas Ethics Commission Advisory Opinion 443, May 10, 2002. This conclusion is entirely logical. A public employee on duty is paid with public funds. To utilize an employee's official work time for the distribution of campaign material would divert those public funds to that purpose. (For this very reason, the opponent is prohibited from campaigning while on duty.)

There is, however, no allegation that the incumbent purchased the campaign items with public funds, nor is there any allegation that he has used public employees to distribute them. The entire issue rests on the fact that the items are located in the incumbent's official office.

Advisory Opinion 443 seems to extend the prohibition of §255.003 to this situation. It states that, "the 'spending' of public funds includes the use of facilities maintained by a political subdivision." *Id.* This would seem to be a bit of a stretch. Had the Legislature intended this prohibition to apply to the mere use of an office, it could easily have specified such. Indeed, it has done so in other areas. *See* Texas Election Code §253.039 (Prohibiting political contributions in the Capitol).

The text of §255.003 itself seems to indicate that it was not intended to be construed in this manner. The section "does not apply to a communication that factually described the purposes of a measure, if the communication dies bit advocate passage or defeat of the measure." §255.003(b). This would seem to indicate that §255.003 was intended to prevent, for example, a commissioners court from using public funds to fight off a rollback election, rather than to cover the circumstances presented here.

The extension of §255.003 to this degree would require that all elected officials remove campaign items from their official offices - including members of the Legislature itself. This seems unlikely.

In any event, the Advisory Opinion is distinguishable from the present situation. Advisory Opinion 443 involves a bulletin board located in the teachers' lounge of a school. *Id.* A school board candidate's flyer was posted on that bulletin board. *Id.* The area was restricted to school employees. The opinion presumes that the only way the flyer could have been posted in the restricted area was by a school employee on duty. *Id.*

None of the above circumstances are present here. The campaign materials are present in the office, but were carried there by the elected official himself, relying upon the verbal opinion of the Texas Ethics Commission. There is no question as to whether the elected official was on duty when the items were carried in, as elected officials set their own duty hours. The incumbent's only employee does not distribute the materials and had no role in placing them in the office.

CONCLUSION

The sole basis of the complaint is the mere location of the material in the official office of an elected official. There is no allegation that public funds were spent on creating the materials, nor is there any allegation that public employees are distributing the materials.

It seems highly unlikely that the Legislature intended to require the removal of every campaign button, bumper sticker, hat, pencil, drink holder, or magnet from the office of every elected official in the state - including their own offices - simply because the offices themselves are maintained with public funds.

Research by the undersigned has produced no court decision, Attorney General opinion or Secretary of State opinion which covers these circumstances. From the Texas Ethics Commission, we have Advisory Opinion 443, two conflicting verbal opinions to the candidates, and a verbal opinion to the undersigned that this practice is "not a good idea." There are any number of things which are "not a good idea" but are perfectly lawful.

I have attached a copy of Advisory Opinion 443 to this request for your convenience. Due to the short period of time between today and the November election, I ask that this matter be given expedited consideration. Everyone concerned has expressed their desire to conform to the law; however, it is unclear what the law requires in this situation.

I appreciate your assistance in resolving this matter. Should you need more information regarding this matter, I will be happy to assist in any way. I can be reached at (432)426-4434 or by fax at (432)426-4431. Please note that this fax number differs from that printed above.

Respectfully submitted,

Bart E. Medley
Jeff Davis County Attorney

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 443

May 10, 2002

Whether a school district may allow candidates for election to the school district's board of trustees to have campaign flyers placed in an area of a school that is not accessible to the public. (AOR-495)

The Texas Ethics Commission has been asked about the application of section 255.003 of the Election Code to a situation in which a school district allows any candidate for election to the school district's board of trustees to have campaign flyers placed in a teachers' lounge that is not accessible to the public.

Section 255.003 of the Election Code prohibits an officer or employee of a political subdivision such as a school district from spending or authorizing the spending of public funds for political advertising. The question presented raises two separate issues: whether the situation described involves the "spending" of public funds and, if so, whether the public funds would be spent "for" political advertising.

In a 1992 advisory opinion, we concluded that the "spending" of public funds included the use of school district employees' work time as well as the use of existing school district equipment. Ethics Advisory Opinion No. 45 (1992). Because the situation described in the request letter involves the placement of campaign flyers in an area of a school restricted to school employees, the placement presumably requires school district employees to transport the flyers to the restricted area on work time. Furthermore, in our opinion, for purposes of section 255.003, the "spending" of public funds includes the use of facilities maintained by a political subdivision. Therefore, the placement of campaign flyers in a teachers' lounge would involve the "spending" of public funds for purposes of section 255.003 of the Election Code.

The remaining question is whether, in the situation described in the request letter, public funds would be spent "for" political advertising. Individual campaign flyers are, in most circumstances, political advertising. *See* Elec. Code § 251.001(16) (defining "political advertising"). The use of school district resources to disseminate political advertising is a use "for" political advertising. The requestor argues, however, that the restriction in section 255.003 should not apply in a case in which any candidate has the same opportunity to make use of school district resources for the dissemination of political advertising.[1] That interpretation assumes that the only purpose of section 255.003 is to prevent a political subdivision from favoring one candidate or one political point of view over another. It is likely that prevention of such favoritism was at least one purpose of section 255.003. The broad language of section 255.003, however, applies to any use of a political subdivision's resources for political advertising, and there is no language to suggest that a political subdivision may use public resources for political advertising if the political subdivision itself does not show a preference for political advertising from a particular source.

We note that this opinion is not intended to address the use of the facilities of a political subdivision in a situation in which the facilities function as a "public form." *See generally International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (cases discussing permissible restrictions on use of public forum). Whether a particular area of a school or other public facility is a public form is a fact question, but in this case

it is clear from the request letter that the teachers' lounge in question is not a public forum.

SUMMARY

For purposes of section 255.003, the "spending" of public funds includes the use of facilities maintained by a political subdivision.

The prohibition in section 255.003 of the Election Code applies to any use of a political subdivision's resources for political advertising.

This opinion does not apply to the use of the facilities of a political subdivision in a situation in which the facilities function as a public forum.

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[1] In a 1996 opinion, we concluded that a broadcast on a city television station was not itself "political advertising" because all candidates in the relevant election were invited to participate. Ethics Advisory Opinion No. 343 (1996). In that case, the fact that the opportunity to participate in the broadcast was available to all candidates led to the conclusion that the broadcast itself was not political advertising. In contrast, in this case, there is no question that the flyers are political advertising. Rather, the issue here is whether school resources may be used for political advertising if all candidates have the same opportunity to make use of school resources for political advertising.

Return to Recommendation No. 13

EXHIBIT H

CHAPTER 572. GOVERNMENT CODE
PERSONAL FINANCIAL DISCLOSURE, STANDARDS OF CONDUCT, AND CONFLICT OF INTEREST

SUBCHAPTER B. PERSONAL FINANCIAL STATEMENT

§ 572.023. Contents of Financial Statement in General

(b) The account of financial activity consists of:

(7) identification of a person or other organization from which the individual or the individual's spouse or dependent children received a gift of anything of value in excess of $250 and a description of each gift, except:

(A) a gift received from an individual related to the individual at any time within the second degree by consanguinity or affinity, as determined under Subchapter B, Chapter 573;

(B) a political contribution that was reported as required by Chapter 254, Election Code; and

(C) an expenditure required to be reported by a person required to be registered under Chapter 305;

§ 572.0252. Information About Referrals

A state officer who is an attorney shall report on the financial statement:

(1) making or receiving any referral for compensation for legal services; and

(2) the category of the amount of any fee accepted for making a referral for legal services.

§ 572.026. Filing Dates for State Officers and State Party Chairs

(b) An individual who is appointed to serve as a salaried appointed officer or an appointed officer of a major state agency or who is appointed to fill a vacancy in an elective office shall file a financial statement not later than the 14th day after the date of appointment or the date of qualification for the office, or if confirmation by the senate is required, before the first committee hearing on the confirmation, whichever date is earlier.

§ 572.030. Preparation and Mailing of Forms

(b) The commission shall mail two copies of the financial statement form to each individual required to file under this subchapter.

SUBCHAPTER C. STANDARDS OF CONDUCT AND CONFLICT OF INTEREST PROVISIONS

§ 572.054. Representation by Former Officer or Employee of Regulatory Agency Restricted; Criminal Offense

(c) Subsection (b) applies only to:

(2) a state employee of a regulatory agency who is compensated, as of the last date of state employment, at or above the amount prescribed by the General Appropriations Act for step 1, salary group 17, of the position classification salary schedule, including an employee who is exempt from the state's position classification plan.

§ 572.056. Contracts by State Officers With Governmental Entities; Criminal Offense

(a) A state officer may not solicit or accept from a governmental entity a commission, fee, bonus, retainer, or rebate that is compensation for the officer's personal solicitation for the award of a contract for services or sale of goods to a governmental entity.

(b) This section does not apply to:

(1) a contract that is awarded by competitive bid as provided by law and that is not otherwise prohibited by law; or

(2) a court appointment.

(c) In this section, "governmental entity" means the state, a political subdivision of the state, or a governmental entity created under the Texas Constitution or a statute of this state.

(d) A state officer who violates this section commits an offense. An offense under this subsection is a Class A misdemeanor.

Return to Recommendation No. 15

EXHIBIT I

TEXAS ETHICS COMMISSION

P.O. Box 12070, Capitol Station
Austin, Texas 78711-2070

ETHICS ADVISORY OPINION NO. 466

November 2, 2005

Personal financial disclosure statement reporting requirements in regard to making or receiving a referral for compensation for legal services. (SP-9)

This advisory opinion addresses the requirement that a state officer who is an attorney include in a personal financial statement certain information regarding referrals for compensation for legal services.

Section 572.0252 of the Government Code states:

> A state officer who is an attorney shall report on the financial statement:
> (1) making or receiving any referral for compensation for legal services; and
> (2) the category of the amount of any fee accepted for making a referral for legal services.

Gov't Code § 572.0252.

The due process clause under the United States Constitution requires that a penal statute define a criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *United States v. Daniel*, 813 F.2d 661, 663 (5th Cir. 1987); *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex.1998).

We do not think that section 572.0252 of the Government Code is defined sufficiently so that ordinary people can understand what information this statute requires to be included in a personal financial statement. This commission will recommend to the legislature that it clarify this statute.

SUMMARY

The Ethics Commission will recommend that the legislature clarify section 572.0252 of the Government Code because this statute is so vague as to be unenforceable.

Return to Recommendation No. 15

EXHIBIT J

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 415

May 14, 1999

Whether an officeholder is required to report a reception in the officeholder's honor as a gift on his personal financial disclosure statement. (AOR-458)

A judicial officeholder has asked whether he must report a reception given in his honor as a "gift" on his personal financial disclosure statement. A state officer is required to file a personal financial disclosure statement each year. Gov't Code §§ 572.021, .026. On the disclosure statement a state officer must provide

> identification of a person or other organization from which the individual or the individual's spouse or dependent children received a gift of anything of value in excess of $250 and a description of each gift.

Gov't Code § 572.023(b)(7).[1] The question here is whether a reception can be a "gift" for purposes of that reporting requirement.

[1]There are exceptions from that reporting requirement for gifts from certain relatives, political contributions reported as required by the Election Code, and lobby expenditures required to be reported under the lobby law. Gov't Code § 572.023(b)(7)(A),(B),(C). Apparently none of those exceptions would apply in this instance.

The officeholder specifically states that the reception was not a campaign or officeholder contribution. *See generally* Ethics Advisory Opinion No. 332 (1996) (setting out standard for determining whether expenditures in connection with a party for an officeholder are "officeholder contributions" for purposes of Election Code title 15).

In a 1992 opinion, we concluded that the term "gift" in section 572.023(b)(7) included things of value provided to a state officer at a reception.[2] Ethics Advisory Opinion No. 71 (1992). Similarly, we conclude that providing a reception to honor a state officer is a "gift" to the state officer for purposes of Government Code section 572.023(b)(7).

The reception at issue in Ethics Advisory Opinion No. 71 was part of a charitable fundraiser, not an event to honor an officer. Consequently, we concluded that the value of the "gift" to the state officer was the total value of the things provided to the state officer at the event. In the situation at hand, in contrast, the entire purpose of the reception is to honor an officer. In that case, the value of the "gift" to the officer is the total cost of the reception. *See generally* Ethics Advisory Opinion No. 93 (1992) (regarding valuation of an event for purposes of the 1992 version of the Texas lobby law). We note that the state officer is not required to report the specific value of a gift. Rather, he must simply know whether the value exceeds $250 in order to determine whether he is required to report the gift.

SUMMARY

A reception to honor a state officer is a "gift" for purposes of Government Code section 572.023(b)(7) and is reportable on the state officer's personal financial statement unless an exception provided by section 572.023(b)(7) applies.

Return to Recommendation No. 17

[2]We stated that the term "gift" in Government Code section 572.023(b)(7) is broader than the term "gift" in Penal Code chapter 36 (bribery and gifts laws) or in Government Code chapter 305 (lobby law). Ethics Advisory Opinion No. 71 (1992), n.3.

EXHIBIT K

TEXAS ETHICS COMMISSION

P. O. Box 12070, Capitol Station
Austin, Texas 78711-2070

George Bayoud
Chair
James Marston
Vice Chair

Commissioners

Fran Coppinger
James Cribbs
Norman Lyons
Louis Muldrow
Richard Slack
Isaias Torres

ETHICS ADVISORY OPINION NO. 72

October 23, 1992

Whether a legislator may provide legal services to a special-purpose district under section 7C of article 6252-9b, V.T.C.S. (AOR-93)

A state legislator has asked the Texas Ethics Commission whether section 7C of article 6252-9b, V.T.C.S., would prohibit a legislator from providing legal services to a special-purpose district. The statutes now in effect that are subject to interpretation by the Ethics Commission do not prohibit a state legislator from providing legal services to a special-purpose district. Ethics Advisory Opinion No. 41 (1992). Section 7C(a) of article 6252-9b, which takes effect on January 1, 1993, provides as follows:

> A state officer may not solicit or accept from the state, a political subdivision of the state, or a governmental entity created under the constitution or laws of the state a commission, fee, bonus, retainer, or rebate that is compensation for the officer's personal solicitation for the award of a contract for services or sale of goods to the state, a political subdivision of the state, or a governmental entity created under the constitution or laws of the state, excluding contracts that are awarded by competitive bid as provided by law and that are not otherwise prohibited by law and all court appointments.

As indicated, at present section 7C has no effect on a contract between a legislator and a special-purpose district. Further, it is difficult to determine what section 7C will prohibit when it takes effect. The due process clause of the United States Constitution requires that a penal statute define a criminal offense with sufficient definiteness that an ordinary person can understand what conduct is prohibited. *United States v. Daniel*, 813 F.2d 661, 663 (5th Cir. 1987). This commission, therefore, will recommend to the legislature that it clarify this provision.

SUMMARY

Section 7C of article 6252-9b, V.T.C.S., does not take effect until January 1, 1993. The Ethics Commission will recommend that the legislature clarify section 7C.

Return to Recommendation No. 20

EXHIBIT L

CHAPTER 305. REGISTRATION OF LOBBYISTS

SUBCHAPTER A. GENERAL PROVISIONS; REGISTRATION

§ 305.003. Persons Required to Register

(a) A person must register with the commission under this chapter if the person:

(1) makes a total expenditure of an amount determined by commission rule but not less than $200 in a calendar quarter, not including the person's own travel, food, or lodging expenses or the person's own membership dues, on activities described in Section 305.006(b) to communicate directly with one or more members of the legislative or executive branch to influence legislation or administrative action; or

(2) receives compensation or reimbursement, not including reimbursement for the person's own travel, food, or lodging expenses or the person's own membership dues, of more than an amount determined by commission rule but not less than $200 in a calendar quarter from another person to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action.

(b) Subsection (a)(2) requires a person to register if the person, as part of his regular employment, has communicated directly with a member of the legislative or executive branch to influence legislation or administrative action on behalf of the person by whom he is compensated or reimbursed, whether or not the person receives any compensation for the communication in addition to the salary for that regular employment.

(b-1) Subsection (a)(2) does not require a member of the judicial, legislative, or executive branch of state government or an officer or employee of a political subdivision of the state to register. This subsection does not apply to an officer or employee of a quasi-governmental agency. For purposes of this subsection, "quasi-governmental agency" means a governmental agency, other than an institution of higher education as defined by Section 61.003, Education Code, that has as one of its primary purposes engaging in an activity that is normally engaged in by a nongovernmental agency, including:

(1) acting as a trade association; or

(2) competing in the public utility business with private entities.

(b-2) Subsection (a)(2) does not require an officer or an employee of a state agency that provides utility services under Section 35.102, Utilities Code, and Sections 31.401 and 52.133, Natural Resources Code, to register.

(c) A person who communicates directly with a member of the executive branch to influence administrative action is not required to register under Subsection (a)(2) if the person is an attorney of record or pro se, the person enters his appearance in a public record through pleadings or other written documents in a docketed case pending before a state agency, and that communication is the only activity that would otherwise require the person to register.

§ 305.004. Exceptions

The following persons are not required to register under this chapter:

(1) a person who owns, publishes, or is employed by a newspaper, any other regularly published periodical, a radio station, a television station, a wire service, or any other bona fide news medium that in the ordinary course of business disseminates news, letters to the editors, editorial or other comment, or paid advertisements that directly or indirectly oppose or promote legislation or administrative action, if the person does not engage in further or other activities that require registration under this chapter and does not represent another person in connection with influencing legislation or administrative action;

(2) a person whose only direct communication with a member of the legislative or executive branch to influence legislation or administrative action is an appearance before or testimony to one or more members of the legislative or executive branch in a hearing conducted by or on behalf of either the legislative or the executive branch and who does not receive special or extra compensation for the appearance other than actual expenses incurred in attending the hearing;

(3) a person whose only activity is to encourage or solicit members, employees, or stockholders of an entity by whom the person is reimbursed, employed, or retained to communicate directly with members of the legislative or executive branch to influence legislation or administrative action;

(4) a person whose only activity to influence legislation or administrative action is to compensate or reimburse an individual registrant to act in the person's behalf to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action;

(5) a person whose only activity to influence legislation or administrative action is attendance at a meeting or entertainment event attended by a member of the legislative or executive branch if the total cost of the meeting or entertainment event is paid by a business entity, union, or association;

(6) a person whose only compensation subject to Section 305.003(a)(2) consists of reimbursement for any wages not earned due to attendance at a meeting or entertainment event, travel to and from the meeting or entertainment event, admission to the meeting or entertainment event, and any food and beverage consumed at the meeting or entertainment event if the meeting or entertainment event is attended by a member of the legislative or

executive branch and if the total cost of the meeting or entertainment event is paid by a business entity, union, or association; and

(7) a person who communicates directly with a member of the legislative or executive branch on behalf of a political party concerning legislation or administrative action, and whose expenditures and compensation, as described in Section 305.003, combined do not exceed $5,000 a calendar year.

§ 305.006. Activities Report

(a) Each registrant shall file with the commission a written, verified report concerning the activities described by this section.

(b) The report must contain the total expenditures under a category listed in this subsection that the registrant made to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action and that are directly attributable, as that term is used in Section 305.0062(b), to a member of the legislative or executive branch or the immediate family of a member of the legislative or executive branch. The report must also include expenditures for the direct communications under a category listed in this subsection that other people made on the registrant's behalf if the expenditures were made with the registrant's consent or were ratified by the registrant. The expenditures must be reported in the following categories:

(1) transportation and lodging;

(2) food and beverages;

(3) entertainment;

(4) gifts, other than awards and mementos;

(5) awards and mementos; and

(6) expenditures made for the attendance of members of the legislative or executive branch at political fund-raisers or charity events.

(c) The report must also list the total expenditures made by the registrant or by others on the registrant's behalf and with the registrant's consent or ratification for broadcast or print advertisements, direct mailings, and other mass media communications if:

(1) the communications are made to a person other than a member, employee, or stockholder of an entity that reimburses, retains, or employs the registrant; and

(2) the communications support or oppose or encourage another to support or oppose pending legislation or administrative action.

(d) The report must also contain a list of the specific categories of subject matters about which the registrant, any person the registrant retains or employs to appear on the registrant's behalf, or any other person appearing on the registrant's behalf communicated directly with a member of the legislative or executive branch and that has not been reported under Section 305.005. The list must include the number or other designation assigned to the administrative action, if known.

(e) A registrant who reports an expenditure under one category provided by Subsection (b) may not report the same expenditure under another category of Subsection (b).

(f) An expenditure described by Subsection (b)(1), (2), (3), or (6) may not be made or accepted unless the registrant is present at the event. This subsection does not apply to a gift of food or beverages required to be reported under Subsection (b)(4) in accordance with Section 305.0061(e-1).

§ 305.0062. Expenditures Attributable to Groups

(a) The report filed under Section 305.006 must also contain the total expenditures described by Section 305.006(b) that are directly attributable to members of the legislative or executive branch. The expenditures must be stated in only one of the following categories:

(1) state senators;

(2) state representatives;

(3) elected or appointed state officers, other than those described by Subdivision (1) or (2);

(4) legislative agency employees;

(5) executive agency employees;

(6) the immediate family of a member of the legislative or executive branch;

(7) guests, when invited by an individual described by Subdivision (1), (2), (3), (4), or (5); and

(8) events to which all legislators are invited.

(b) For purposes of Subsection (a), an expenditure is directly attributable to the person who consumed the food or beverage, to the person for whom admission, transportation, or lodging expenses were paid, or to the person to whom the gift, award, or memento was given.

(c) All expenditures made by a registrant or a person on the registrant's behalf and with the registrant's consent or ratification that benefit members of the immediate family of members of the legislative or executive branch shall be aggregated and reported under Subsection (a)(6).

(d) If a registrant cannot reasonably determine the amount of an expenditure under Section 305.006(b) that is directly attributable to a member of the legislative or executive branch as required by Subsection (a), the registrant shall apportion the expenditure made by that registrant or by others on the registrant's behalf and with the registrant's consent or ratification according to the total number of persons in attendance. However, if an expenditure is for an event to which all legislators are invited, the registrant shall report the expenditure under Subsection (a)(7) and not under any other subdivision of that subsection or any other provision of this chapter.

SUBCHAPTER B. PROHIBITED ACTIVITIES

§ 305.022. Contingent Fees

(a) A person may not retain or employ another person to influence legislation or administrative action for compensation that is totally or partially contingent on the passage or defeat of any legislation, the governor's approval or veto of any legislation, or the outcome of any administrative action.

(b) A person may not accept any employment or render any service to influence legislation or administrative action for compensation contingent on the passage or defeat of any legislation, the governor's approval or veto of any legislation, or the outcome of any administrative action.

(c) For purposes of this section, a sales commission payable to an employee of a vendor of a product is not considered compensation contingent on the outcome of administrative action.

(d) This section does not prohibit the payment or acceptance of contingent fees:

(1) expressly authorized by other law; or

(2) for legal representation before state administrative agencies in contested hearings or similar adversarial proceedings prescribed by law or administrative rules.

§ 305.024. Restrictions on Expenditures

(a) Except as provided by Section 305.025, a person registered under Section 305.005 or a person on the registrant's behalf and with the registrant's consent or ratification may not offer, confer, or agree to confer:

(1) to an individual described by Section 305.0062(a)(1), (2), (3), (4), or (5):

(A) a loan, including the guarantee or endorsement of a loan; or

(B) a gift of cash or a negotiable instrument as described by Section 3.104, Business & Commerce Code; or

(2) to an individual described by Section 305.0062(a)(1), (2), (3), (4), (5), (6), or (7):

(A) an expenditure for transportation and lodging;

(B) an expenditure or series of expenditures for entertainment that in the aggregate exceed $500 in a calendar year;

(C) an expenditure or series of expenditures for gifts that in the aggregate exceed $500 in a calendar year;

(D) an expenditure for an award or memento that exceeds $500; or

(E) an expenditure described by Section 305.006(b)(1), (2), (3), or (6) unless:

(i) the registrant is present at the event; or

(ii) the expenditure is for a gift of food or beverages required to be reported under Section 305.006(b)(4) in accordance with Section 305.0061(e-1).

(b) Except as provided by Section 305.025, a member of the legislative or executive branch may not solicit, accept, or agree to accept from a person registered under Section 305.005 or from a person on the registrant's behalf and with the registrant's consent or ratification an item listed in Subsection (a).

§ 305.025. Exceptions

Section 305.024 does not prohibit:

(1) a loan, in the due course of business from a corporation or other business entity that is legally engaged in the business of lending money and that has conducted that business continuously for more than one year before the loan is made;

(2) a loan or guarantee of a loan or a gift made or given by a person related within the second degree by affinity or consanguinity to the member of the legislative or executive branch;

(3) necessary expenditures for transportation and lodging when the purpose of the travel is to explore matters directly related to the duties of a member of the legislative or executive branch, such as fact-finding trips, *including attendance at informational conferences or an event described by Subdivision (4),* but not including attendance at merely ceremonial events or pleasure trips;

(4) necessary expenditures for transportation, lodging, *food and beverages, and entertainment* provided in connection with a conference, seminar, educational program, or similar event in which the member renders services, such as addressing an audience or engaging in a seminar, to the extent that those services are more than merely perfunctory;

(5) an incidental expenditure for transportation as determined by commission rule; or

(6) a political contribution as defined by Section 251.001, Election Code.

§ 305.027. Required Disclosure on Legislative Advertising

(a) A person commits an offense if the person knowingly enters into a contract or other agreement to print, publish, or broadcast legislative advertising that does not indicate in the advertising:

(1) that it is legislative advertising;

(2) the full name of the individual who personally entered into the contract or agreement with the printer, publisher, or broadcaster and the name of the person, if any, that the individual represents; and

(3) in the case of advertising that is printed or published, the address of the individual who personally entered into the agreement with the printer or publisher and the address of the person, if any, that the individual represents.

(b) It is an exception to the application of Subsection (a) to a broadcaster, printer, or publisher of legislative advertising or to an agent or employee of the broadcaster, printer, or publisher that:

(1) the person entering into the contract or agreement with the broadcaster, printer, or publisher is not the actual sponsor of the advertising but is the sponsor's professional advertising agent conducting business in this state; or

(2) the advertising is procured by the actual sponsor of the legislative advertising and, before the performance of the contract or agreement, the sponsor is given written notice as provided by Subsection (d).

(c) A professional advertising agent conducting business in this state who seeks to procure the broadcasting, printing, or publication of legislative advertising on behalf of the sponsor of the advertising commits an offense if the agent enters into a contract or agreement for the broadcasting, printing, or publication of legislative advertising and does not, before the performance of the contract or agreement, give the sponsor written notice as provided by Subsection (d).

(d) The notice required by Subsections (b) and (c) must be substantially as follows:

Section 305.027, Government Code, requires legislative advertising to disclose certain information. A person who knowingly enters into a contract or other agreement to print, publish, or broadcast legislative advertising that does not contain the information required under that section commits an offense that is a Class A misdemeanor.

(e) In this section, “legislative advertising” means a communication that supports, opposes, or proposes legislation and that:

(1) in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast by radio or television; or

(2) appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, button, or similar form of written communication.

TEXAS ETHICS COMMISSION RULES

Chapter 34. REGULATION OF LOBBYISTS

SUBCHAPTER A. GENERAL PROVISIONS

§ 34.5. Certain Compensation Excluded

Compensation received for the following activities is not included for purposes of calculating the registration threshold under Government Code § 305.003(a)(2), and this chapter and is not required to be reported on a lobby activity report filed under Government Code, Chapter 305, and this chapter:

(1) requesting a written opinion that interprets a law, regulation, rule, policy, practice, or procedure administered by a state office or agency;

(2) preparation or submission of an application or other written document that merely provides information required by law, statute, rule, regulation, order, or subpoena, or that responds to a document prepared by a state agency;

(3) communicating merely for the purpose of demonstrating compliance with an audit, inspection, examination of a financial institution, or government investigation to interpret and determine compliance with existing laws, rules, policies, and procedures;

(4) communicating for the purpose of achieving compliance with existing laws, rules, policies, and procedures, including communications to show qualification for an exception of general applicability that is available under existing laws, rules, policies, and procedures;

(5) communicating in the capacity of one’s service on an advisory committee or task force appointed by a member;

(6) responding to a specific request for information from a member of the legislative or executive branch, when the request was not solicited by or on behalf of the person providing the information;

(7) communicating to an agency’s legal counsel, an administrative law judge, or a hearings examiner concerning litigation or adjudicative proceedings to which the agency is a party, or concerning adjudicative proceedings of that agency;

(8) providing testimony, making an appearance, or any other type of communication documented as part of a public record in a proceeding of an adjudicative nature of the type authorized by or subject to the Administrative Procedure Act, Government Code, Chapter 2001, whether or not that proceeding is subject to the Open Meetings Law;

(9) providing oral or written comments, making an appearance, or any other type of communication, if documented as part of a public record in an agency's rule-making proceeding under the Administrative Procedure Act, Government Code, Chapter 2001, or in public records kept in connection with a legislative hearing;

(10) providing only clerical assistance to another in connection with the other person's lobbying (for example, a person who merely types or delivers another person's letter to a member); or

(11) communicating to a member of the executive branch concerning purchasing decisions of a state agency, or negotiations regarding such decisions.

§ 34.11. Attribution of Expenditure to More Than One Person; Reimbursement of Lobby Expenditure

(a) A lobby expenditure made on a person's behalf and with the person's consent or ratification is an expenditure by that person for purposes of registration and reporting under Government Code, Chapter 305, and this chapter.

(b) Payment of reimbursement to a registrant is not included for purposes of calculation of the registration threshold under Government Code, § 305.003(a)(1), and is not required to be reported if the registrant receiving the reimbursement reports the expenditure on a lobby activity report.

(c) A registrant is not required to report a lobby expenditure attributable to more than one person if another registrant has reported the expenditure.

SUBCHAPTER B. REGISTRATION REQUIRED

§ 34.41. Expenditure Threshold

(a) A person must register under Government Code, § 305.003(a)(1), if the person makes total expenditures of more than $500 in a calendar quarter, not including expenditures for the person's own travel, food, lodging, or membership dues, on activities described in Government Code § 305.006(b) to communicate directly with one or more members of the legislative or executive branch to influence legislation or administrative action.

(b) An expenditure made by a member of the judicial, legislative, or executive branch of state government or an officer or employee of a political subdivision of the state acting in his or her official capacity is not included for purposes of determining whether a person is required to register under Government Code, § 305.003(a)(1).

(c) An expenditure made in connection with an event to promote the interests of a designated geographic area or political subdivision is not included for purposes of determining whether a person has crossed the registration threshold in Government Code, § 305.003(a)(1), if the

expenditure is made by a group that exists for the limited purpose of sponsoring the event or by a person acting on behalf of such a group.

§ 34.43. Compensation and Reimbursement Threshold

(a) A person must register under Government Code, § 305.003(a)(2), if the person receives more than $1000 in a calendar quarter in compensation and reimbursement, not including reimbursement for the person's own travel, food, lodging, or membership dues, from one or more other persons to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action.

(b) For purposes of Government Code, § 305.003(a)(2), and this chapter, a person is not required to register if no more than 5.0% of the person's compensated time during a calendar quarter is time spent engaging in lobby activity.

(c) For purposes of Government Code, § 305.003(a)(2), and this chapter, a person shall make a reasonable allocation of compensation between compensation for lobby activity and compensation for other activities.

§ 34.45. Entity Registration

(a) An entity that is required to register under Government Code, § 305.003, and this chapter may nonetheless avoid registration if all activity otherwise reportable by the entity is reported by one or more individual registrants in accordance with § 34.65 and § 34.85 of this title (relating to Compensation Reported by Lobby Firm Employee and Individual Reporting Expenditure by Entity).

(b) Registration by an entity does not relieve any individual of the requirement to register if that individual meets one of the registration thresholds in Government Code, § 305.003.

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EXHIBIT M

TEXAS ETHICS COMMISSION

P. O. Box 12070, Capitol Station
Austin, Texas 78711-2070

ETHICS ADVISORY OPINION NO. 30

June 4, 1992

Application of the lobby statute to an event sponsored by a nonprofit organization that features a golf tournament and the opportunity to win valuable prizes, and related questions. (AOR-26)

The Texas Ethics Commission has been asked to consider the application of chapter 305 of the Government Code to an event sponsored by a nonprofit organization. Participants in the event would include representatives of the federal, state, and local governments. Activities would include a tour of a local business facility, a luncheon, and a golf tournament. The golf tournament is the featured event. A participant who made a hole-in-one would receive a valuable prize such as a car. After the tournament, valuable door prizes such as golf equipment would be awarded at a drawing. Participants would receive transportation to and from the airport and a packet of gifts such as a tote bag, shirt, and golf balls.

The requestor's first question is whether the nonprofit entity would be prohibited from providing transportation to and from a local airport.[1] Section 305.024(a)(3) of the Government Code prohibits a person required to register as a lobbyist[2] from making an expenditure for transportation.[3] The statutory exceptions to this prohibition are for (1) "necessary expenditures

[1]Because the requestor asks about the application of various provisions of the lobby statute, chapter 305 of the Government Code, we assume the requestor considers the activity in question to be covered by that statute.

[2]Chapter 305 applies only to expenditures made for the benefit of members of the legislative and executive branches of state government.

[3]Chapter 305 also prohibits a member of the executive or legislative branch from accepting transportation under the same circumstances in which a lobbyist is prohibited from making expenditures for transportation. Gov't Code § 305.024(b).

for transportation and lodging when the purpose of the travel is to explore matters directly related to the duties of a member of the legislative or executive branch, such as fact-finding trips, but not including attendance at merely ceremonial events or pleasure trips" and (2) "necessary expenditures for transportation and lodging provided in connection with a conference or similar event in which the member renders services, such as addressing an audience or engaging in a seminar, to the extent that those services are more than merely perfunctory." Gov't Code § 305.025(3), (4). The event described above would not fall within either of those exceptions. This commission has, however, adopted a rule providing that the term "transportation" in chapter 305 does not include "transportation of incidental value, such as a ride of short duration by personal car or taxi-cab." Tex. Ethics Comm'n, 17 Tex. Reg. 360 (emergency rule to be codified at title 1, section 10.27, of the Texas Administrative Code).[4] Transportation between an airport and a local entertainment event would generally be within this exception.

The requestor also asks whether a person or entity other than the nonprofit organization may provide transportation to the golf tournament for a member of the legislative or executive branch. Again, the prohibition on expenditures for transportation is not applicable to transportation of incidental value. We note, however, that the general prohibition on the provision of transportation by a lobbyist applies not only to a registrant but also to a person who makes an expenditure "on the registrant's behalf and with the registrant's consent or ratification."

The requestor's next question is whether a prize awarded to a member of the legislative or executive branch of state government on the basis of golf performance or a drawing at a reception would be prohibited by section 305.024(a)(5) of the Government Code. That section prohibits an expenditure or series of expenditures for gifts that in the aggregate exceed $500 in a calendar year.[5] Thus a lobbyist could not, in the circumstances described above, give a member of the legislative or executive branch of state government a prize or series of prizes worth more than $500.[6]

The requestor also asks whether a prize would have to be reported on a financial disclosure statement required under article 6252-9b, V.T.C.S. *See generally* Ethics Advisory Opinion No. 1 (1992) (regarding requirement that "state officers" file financial disclosure

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[4]The rules of the Ethics Commission that were proposed for codification at chapter 10 of title 1 of the Texas Administrative Code actually should have been proposed for codification at chapter 40 of that title. For purposes of this opinion, we have cited to the rules as published.

[5]Again, a member of the legislative or executive branch is prohibited from accepting a gift that a lobbyist is prohibited from giving. Gov't Code § 305.024(b).

[6]*See* Ethics Advisory Opinions Nos. 29, 12 (1992) (regarding the application of chapter 36 of the Penal Code.)

statements). A financial disclosure statement must include the "identification of any person, business entity, or other organization from whom the person or his spouse or dependent children received a gift of anything of value in excess of $250 in value." V.T.C.S. art. 6252-9b, § 4(c)(7). Excepted from that requirement, however, are "expenditures required to be reported by a person required to be registered under Chapter 305, Government Code." *Id.* In the situation described, the prizes would be expenditures required to be reported under chapter 305. *See* Ethics Advisory Opinion No. 29 (1992). Therefore the prizes would not need to be reported on a personal financial statement.

The final question is whether expenditures made in connection with an event to which all legislators are invited are to be reported only under section 305.0062 and not under any other section of chapter 305. Section 305.0062 requires a report that attributes expenditures to different categories such as state senators and state representatives or events to which all legislators are invited. Gov't Code § 305.0062(a). Subsection (d) of that section provides as follows:

> If a registrant cannot reasonably determine the amount of an expenditure under Section 305.006(b) that is directly attributable to a member of the legislative or executive branch or to the registrant as required by Subsection (a), the registrant shall apportion the expenditure made by that registrant or by others on the registrant's behalf and with the registrant's consent or ratification according to the total number of persons in attendance. *However, if an expenditure is for an event to which all legislators are invited, the registrant shall report the expenditure under Subsection (a)(8) and not under any other subdivision of that subsection or any other provision of this chapter.* (Emphasis added.)

Subsection (a)(8) of section 305.0062, which is referred to in the provision set out above, requires expenditures to be reported in the category of "events to which all legislators are invited." By the plain language of subsection (d) of section 305.0062, expenditures reported under section 305.0062(a)(8) need not be reported under any other section of chapter 305.

We note that this opinion addresses only the specific questions asked. It does not address any other questions that may be raised by the facts described.

SUMMARY

A person required to register as a lobbyist may make a lobby expenditure for transportation between a local airport and the site of a local golf tournament. A state officer is not required to report on his financial disclosure statement a prize awarded by an organization

required to register as a lobbyist. Expenditures reported under section 305.0062(a)(8) of the Government Code need not be reported under any other section of chapter 305.

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provided in alternative. Smith v. State (Cr.App. 1930) 115 Tex.Crim. 88, 29 S.W.2d 350.

Provision in Vernon's Ann.P.C. art. 1442b (repealed), for alternative punishment of theft of chickens by imprisonment in penitentiary or in county jail or by fine made offense a felony under statute notwithstanding alternative punishments which might have been affixed to misdemeanor offenses. Johnson v. State (Cr.App. 1934) 126 Tex.Crim. 466, 72 S.W.2d 288.

The offense of driving automobile while intoxicated, being punishable in discretion of court or jury by confinement in penitentiary, is a "felony," so as to entitle one convicted thereof to suspension of sentence, to five days' imprisonment in county jail and payment of fine. Gordon v. State (Cr.App. 1939) 135 Tex.Crim. 38, 120 S.W.2d 1071.

The offense of stealing turkeys, being one which could be punished by confinement in penitentiary, was a "felony", so that sentence had to be pronounced against person convicted thereof, though punishment assessed was only a fine. Bernard v. State (Cr.App. 1943) 145 Tex.Crim. 502, 170 S.W.2d 231.

Offenses of wife and child desertion, though one of the punishments allowed is that ordinarily affixed to misdemeanors, are "felonies" since penitentiary sentence may be imposed, and the rules applicable to felony prosecutions generally must prevail. Monroe v. State (Cr.App. 1943) 146 Tex.Crim. 239, 172 S.W.2d 699.

Breaking and entering a coin operated machine, although punishable by fine or confinement in jail as well as confinement in department of corrections, was nevertheless a felony which could be employed as a prior felony offense for purpose of enhanced punishment because of prior felony convictions. Murray v. State (Cr.App. 1964) 378 S.W.2d

3. Theft

The theft of property of the value of less than $20 is not a felony. Clark v. State (App. 1888) 9 S.W. 767.

Legislature can select any kind of property and make taking of that property a felony. Johnson v. State (Cr.App. 1934) 126 Tex.Crim. 466, 72 S.W.2d 288.

4. Forgery

A conviction of forgery is a conviction of felony under the laws of Texas. Petner v. State (App. 1887) 5 S.W. 210.

Altering the mark on a hog is a felony, without regard to the value of the hog. Barfield v. State (Cr.App. 1898) 44 S.W. 1104.

5. License revocation

As respects right to revoke license under Vernon's Ann.Civ.St. arts. 4505 and 4506 the offense of a physician in furnishing drugs to an habitual user thereof for which physician was convicted under Harrison Narcotic Act, was a "felony," in view of Vernon's Ann.P.C. art. 47 (repealed) which made an offense which might be punishable by confinement in penitentiary a felony, notwithstanding offense was not expressly designated a felony by Vernon's Ann.P.C. arts. 723, 725 (repealed), and that amendment subsequent to the offense by adding Vernon's Ann.P.C. art. 725a (repealed), which provided that a violation thereof would be a felony. Speer v. State (Civ.App. 1937) 109 S.W.2d 1150, dismissed.

Osteopath, against whom proceeding was brought to revoke his medical license because of his plea of nolo contendere to a twelve count indictment charging him with violating the Harrison Anti-Narcotic Act, and who was sentenced to pay a fine of $5,000, which he paid, was convicted of a "felony" under both federal and state law. Goldman v. State (Civ.App. 1954) 277 S.W.2d 217, ref. n.r.e..

[Sections 12.05 to 12.20 reserved for expansion]

SUBCHAPTER B. ORDINARY MISDEMEANOR PUNISHMENTS

Library References

Punishment, misdemeanor by jury, court's charges, see McCormick et al., 8 Texas Practice § 97.17 (10th ed.).

12.21. Class A Misdemeanor

An individual adjudged guilty of a Class A misdemeanor shall be punished by:

(1) a fine not to exceed $4,000;

(2) confinement in jail for a term not to exceed one year; or

(3) both such fine and confinement.

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1991, 72nd Leg., ch. 108, § 1, eff. Sept. 1, 1991; Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994.

Historical and Statutory Notes

Acts 1991, 72nd Leg., ch. 108, § 1, in subd. (1) substituted "$3,000" for "$2,000".

Section 12 Acts 1991, 72nd Leg., ch. 108 provides:

"(a) The changes in law made by Sections 1, 2, and 11 of this Act apply only to the punishment and court costs for an offense committed on or after the effective date [Sept. 1, 1991] of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

"(b) An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose."

Acts 1993, 73rd Leg., ch. 900, § 1.01, in subd. (1), substituted "$4,000" for "$3,000", in subd. (3), substituted "confinement" for "imprisonment".

Cross References

Bias or prejudice as motive for offense, penalty, see V.T.C.A., Penal Code § 12.47.
"Individual" defined, see V.T.C.A., Penal Code § 1.07.
"Misdemeanor" defined, see V.T.C.A., Penal Code § 1.07.

Law Review and Journal Commentaries

Interference with prospective civil litigation by spoliation of evidence: Should Texas adopt a new tort? 21 St.Mary's L.J. 209 (1989).

Library References

Sentencing and Punishment ⇐66.
Westlaw Topic No. 350H.

Texts and Treatises

25 Texas Jur 3d, Crim L § 3660, 3663, 3692; 65 Texas Jur 3d, Sch § 2.5.

13 Am Jur Trials 465, Defending Minor Felony Cases; 44 Am Jur Trials 459, Representing Criminal Defendants at Sentencing Hearings.

Notes of Decisions

1. In general

Defendant who pleaded guilty to burglary of vehicle was properly sentenced under law in effect when he committed crime, rather than more lenient law in effect at time of sentencing, where legislature specifically provided that offense committed before effective date of new law was to be governed by law in effect when offense was committed. Delgado v. State (App. 8 Dist. 1995) 908 S.W.2d 317, rehearing overruled, petition for discretionary review refused.

Despite contention that it was unconstitutional for two defendants who committed offenses of burglary of vehicle to be subjected to differing ranges of punishment because one committed his offense before effective date of law lowering sentencing range, defendant sentenced to longer sentence under prior law was not denied equal protection, since he was tried and sentenced in same manner as all defendants who committed similar offense when he did. Delgado v. State (App. 8 Dist. 1995) 908 S.W.2d 317, rehearing overruled, petition for discretionary review refused.

2. Discretion of court

Courts lack authority to reduce first-degree felony to Class A misdemeanor for sentencing

purposes. Bennett v. State (App. 8 Dist. 1992) 831 S.W.2d 20.

§ 12.22. Class B Misdemeanor

An individual adjudged guilty of a Class B misdemeanor shall be punished by:

(1) a fine not to exceed $2,000;

(2) confinement in jail for a term not to exceed 180 days; or

(3) both such fine and confinement.

Acts 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. Jan. 1, 1974. Amended by Acts 1991, 72nd Leg., ch. 108, § 1, eff. Sept. 1, 1991; Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994.

Historical and Statutory Notes

Acts 1991, 72nd Leg., ch. 108, § 1, in subd. (1) substituted "$1,500" for "$1,000".

Section 12 of Acts 1991, 72nd Leg., ch. 108 provides:

"(a) The changes in law made by Sections 1, 2 and 11 of this Act apply only to the punishment and court costs for an offense committed on or after the effective date [Sept. 1, 1991] of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

"(b) An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for this purpose."

Acts 1993, 73rd Leg., ch. 900, § 1.01, in subd. (1), substituted "$2,000" for "$1,500"; and in subd. (3), substituted "confinement" for "imprisonment".

Cross References

"Individual" defined, see V.T.C.A., Penal Code § 1.07.
"Misdemeanor" defined, see V.T.C.A., Penal Code § 1.07.

Library References

Sentencing and Punishment ⇨66.
Westlaw Topic No. 350H.

Texts and Treatises
25 Texas Jur 3d, Crim L §§3663, 3692; 65 Texas Jur 3d, Sch § 8.

13 Am Jur Trials 465, Defending Minor Felony Cases; 44 Am Jur Trials 459, Representing Criminal Defendants at Sentencing Hearings.

Notes of Decisions

In general 1
Habitual offenders 2

In general

"Term six months" as set forth in judgment and sentence of defendant, upon revocation of probation to first offense of possession of less than two ounces of marihuana, was interpreted to mean 180 days. Presley v. State (Cr.App. 1976) 536 S.W.2d 624.

Habitual offenders

Punishment of 35 years confinement for felony shoplifting of property valued at $145, did not constitute cruel or unusual punishment under United States Constitution, even though crime standing alone would have been misdemeanor punishable by fine up to $1500, or confinement of up to 180 days, as defendant was not sentenced to life imprisonment and had possibility of parole in 35 months, and defendant had previously been convicted of burglary of vehicle and robbery, demonstrating pronounced and prolonged inability to bring conduct within social norms prescribed by criminal laws. Lackey v. State (App. 5 Dist. 1994) 881 S.W.2d 418, petition for discretionary review refused.

Pocket Part

Treatises and Practice Aids

Charlton, 6 Tex. Prac. Series § 8.1, Punishment.

Brooks, 36 Tex. Prac. Series § 20.58, Jail-Joint Operation.

SUBCHAPTER B. ORDINARY MISDEMEANOR PUNISHMENTS

§ 12.21. Class A Misdemeanor

Research References

ALR Library

146 ALR 655, Validity, Construction, and Application of Statutes or Ordinances Penalizing One Who Enters or Remains in Dwelling After Having Been Forbidden to Do So.

Encyclopedias

TX Jur. 3d Criminal Law § 1555, Subsequent Offenses.

TX Jur. 3d Criminal Law § 1788, Right of State; Defendant's Bail.

TX Jur. 3d Criminal Law § 4193, Penalties as Legislative Function; Proscribed and Possible Punishments.

TX Jur. 3d Criminal Law § 4196, Punishment Authorized for Misdemeanors, Generally.

TX Jur. 3d Criminal Law § 4245, Place of Confinement.

TX Jur. 3d Criminal Law § 4268, Challenge to Prior Adjudication.

Treatises and Practice Aids

Emp. Discrim. Coord. Analysis of State Law § 48:77, Criminal Penalties.

Texas Family Law Service § 52:30, Tampering With Directive.

Charlton, 6 Tex. Prac. Series § 8.1, Punishment.

McCormick, Blackwell & Blackwell, 8 Tex. Prac. Series § 100.18, Punishment—Misdemeanor by Jury.

Brooks, 22 Tex. Prac. Series § 3.12, Conflicts of Interest.

Koons, 33 Tex. Prac. Series § 25.5, Criminal Penalties.

Brooks, 35 Tex. Prac. Series § 7.19, Criminal Official Misconduct.

Brooks, 36 Tex. Prac. Series § 18.37, Conflict of Interest-General Statute.

Lerner, 37 Tex. Prac. Series App. B, Appendix B. Texas Workers' Compensation Act of 1989 Labor Code.

Lerner, 37 Tex. Prac. Series § 418.043, Overcharging Prohibited; Offense.

Lerner, 37 Tex. Prac. Series § 418.001, Penalty for Fraudulently Obtaining or Denying Benefits.

Lerner, 37 Tex. Prac. Series § 418.002, Penalty for Fraudulently Obtaining Workers' Compensation Insurance Coverage.

Civins, Hall & Sahs, 45 Tex. Prac. Series § 4.17, Offenses Under the Texas Penal Code.

Dix and Dawson, 43A Tex. Prac. Series § 40.113, Sentencing Discretion — Regular Community Supervision.

Notes of Decisions

Appeals 3

1. In general

Sentence of 180 days for conviction for first driving while intoxicated (DWI) offense was within statutory range for a Class B misdemeanor, and thus was not a void sentence, where trial court's oral pronouncement showed trial judge sentenced defendant for Class B misdemeanor, rather than Class A misdemeanor, and oral pronouncement and written judgment consistently showed defendant was convicted for and received the maximum possible sentence for a Class B misdemeanor. Seeker v. State (App. 1 Dist. 2005) 186 S.W.3d 36, petition for discretionary review refused. Automobiles ⇐ 359.4

Municipal court lacked jurisdiction over prosecution for Class A misdemeanor of operating a sexually oriented business within 1,000 feet of a residential zone, and, thus, the county court and Court of Appeals lacked jurisdiction on appeal; the violation was punishable by fine or imprisonment. State v. Xoticas-Laredo, Inc. (App. 4 Dist. 2004) 2004 WL 33054, Unreported. Criminal Law ⇐ 88

3. Appeals

Trial court's pretrial ruling in prosecution for Class B misdemeanor driving while intoxicated (DWI) in which a paragraph of information alleged a prior final DWI conviction, that it would not instruct jury on a Class A misdemeanor punishment range even if jury found "enhancement paragraph" true, effectively terminated prosecution for an "enhanced" offense, thus providing appellate jurisdiction over state's appeal. State v. Morgan (App. 9 Dist. 2003) 110 S.W.3d 512, petition for discretionary review granted 160 S.W.3d 1, reversed 160 S.W.3d 1, rehearing denied. Criminal Law ⇐ 1023(3)

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EXHIBIT O

TEXAS ETHICS COMMISSION

P. O. Box 12070, Capitol Station
Austin, Texas 78711-2070

George Bayoud
Chair
James Marston
Vice Chair

Commissioners

Fran Coppinger
James Cribbs
Norman Lyons
Louis Muldrow
Richard Slack
Isaias Torres

ETHICS ADVISORY OPINION NO. 48

September 9, 1992

Reporting requirements for an organization and for employees of the organization. (AOR-58)

A representative of a nonprofit organization has asked the Texas Ethics Commission several questions about chapter 305 of the Government Code, the lobby statute. The nonprofit organization and several of its employees are registered as lobbyists. In the situation at issue a registered employee makes certain expenditures of the type listed in Government Code section 305.006(b), and the employee is reimbursed for those expenditures by the organization. In the situation described, the expenditures reimbursed by the organization are attributable to the individual registrant, and the employee is required to list these expenditures on his individual lobby activity report. *See* Gov't Code §§ 305.004(4), 305.006(b) . A lobby activity report also must list the expenditures "that other people made on the registrant's behalf if the expenditures were made with the registrant's consent or were ratified by the registrant." *Id.* § 305.006(b). Because the organization reimburses the employee, the question arises as to whether the organization must also report these expenditures as expenditures that other people made on the organization's behalf.

If the organization details on its lobby activity report the same expenses its employee is reporting there will be a duplication of reporting. We think the lobby statute should be construed to avoid "double reporting" of expenditures. Thus, we think the requirement that registrants list expenditures made by "other people" on the registrant's behalf requires reporting of expenditures made by other parties that would not otherwise be reported as lobbying expenditures. For example, a registrant would have to report a meal for a legislator paid for by the registrant's non-lobbyist friend with the registrant's consent if the purpose of the meal was to enable the registrant to communicate with the legislator to influence legislation. In contrast, a registered organization that reimburses an employee is not required to report the same expenditures that a registered employee lists on his activity report.

The requestor also asks about section 305.005(f)(5) of the Government Code, which requires registrants to list information on their lobby reports about

> each person employed or retained by the registrant for the purpose of assisting in direct communication with a member of the legislative or executive branch to influence legislation or administrative action.

Specifically, the requestor asks about two registered employees of an entity who work together with neither one in charge of the other's work. The Texas Ethics Commission has promulgated a rule clarifying the phrase "employed or retained by the registrant." Rule 40.9 states:

> (a) For purposes of the Government Code, § 305.005(f)(5), persons employed or retained by the registrant to assist in direct communication with a member of the legislative or executive branch include other registrants and persons who provide administrative or research assistance to the registrant, but not persons whose assistance is clerical in nature.
>
> (b) *A person employed by the same employer as the registrant and who assists the registrant in lobby activities at the direction of the registrant is employed or retained by the registrant for purposes of the Government Code, § 305.005(f)(5).* A client of a business entity is not an employer for the purposes of this subsection.

Tex. Ethics Comm'n, 17 Tex. Reg. 4445 (1992) (to be codified at title 1, section 40.9, of the Texas Administrative Code) (emphasis added). Thus, if a registered employee assists another registered employee in lobby activities, at the other's direction, the employee receiving assistance must list the assisting employee on his lobby activity report. Circumstances of mutual assistance may lead to each registered employee listing the other as an assistant for purposes of section 305.005(f)(5).

The requestor asks whether an individual member of the nonprofit organization who communicates with members of the executive or legislative branch on behalf of the organization is required to register. The organization does not compensate the member for such communications. Such activity does not by itself require lobby registration under chapter 305. *See* Ethics Advisory Opinion No. 3 (1992) (regarding lobby registration requirements).

The requestor also asks whether the member's communications on behalf of the organization trigger lobby registration if the organization's interests "coincide" with the interests of the member's employer. The lobby statute is applicable if the member is receiving compensation from his employer for his efforts.[1] Whether the member's activities are also part

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[1]Receipt of reimbursement and the making of expenditures can also trigger the registration requirement.

of his employment arrangement is a fact question that must be determined on a case-by-case basis.[2]

The requestor's final question is whether members of a nonprofit organization are "clients" for purposes of section 305.005(j) of the Government Code. That section states:

> If the person described by Subsection (f)(3) [the person who reimburses, retains, or employs the registrant to communicate] is a business entity engaged in the representation of clients for the purpose of influencing legislation or administrative action, the registrant shall give the information required by that subdivision for each client on whose behalf the registrant communicated directly with a member of the legislative or executive branch.

The commission has issued the following rule to clarify this section:

> The members of an organization or association (whether or not it is incorporated) are not clients of the organization or association under the Government Code, § 305.005(j). The shareholders of a for-profit corporation are not clients of the corporation under the Government Code, § 305.005(j).

Tex. Ethics Comm'n, 17 Tex. Reg. 4445 (1992) (to be codified at title 1, section 40.11(d), of the Texas Administrative Code). Members of the nonprofit organization therefore are not "clients" for purposes of section 305.005(j). *See id.* § 305.005(f)(5)

SUMMARY

An organization that is registered as a lobbyist and has several registered employees is not required to report on its lobby activity report reimbursements to those employees for lobby expenditures. The registered employees must list those reimbursed expenditures on their respective lobby activity reports.

If a registered employee assists another employee in lobby activities and acts at the other's direction, the assisted employee must list the assisting employee on his lobby activity report for purposes of Government Code section 305.005(f)(5). Circumstances of mutual assistance may lead to each registered employee listing the other as an assistant.

An individual who communicates to influence, on behalf of an organization of which he

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[2]A person is not required to register if his communication to influence, and time spent in preparing for direct communication, constitutes less or no more than five percent of his compensated time during a calendar quarter. Tex. Ethics Comm'n, 17 Tex. Reg. 4444 (1992) (to be codified at title 1, section 40.3(c), (d), of the Texas Administrative Code).

is a member, is not required to register as a lobbyist unless he crosses either the compensation threshold or the expenditure threshold under chapter 305 of the Government Code, the lobby statute. Whether communications on behalf of the organization that "coincide" with the interests of the member's employer are communications for which the member is compensated is a fact question. Members of a nonprofit organization are not "clients" for purposes of section 305.005(j).

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EXHIBIT P

TEXAS ETHICS COMMISSION

P.O. Box 12070, Capitol Station
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ETHICS ADVISORY OPINION NO. 464

September 9, 2005

Whether a legislative advertising disclosure statement is required to be included on segments of radio broadcasts and on articles that are available on a website and that are included in an e-mail newsletter. (AOR-525)

A non-profit corporation has asked whether the requirement to include a legislative advertising disclosure statement pursuant to section 305.027 of the Government Code applies in several circumstances.

In the first circumstance, the requestor produces a daily radio program and sends it to various radio stations around the country. The radio stations broadcast the program to the public. Some radio stations require the requestor to pay for airtime, while others do not. The requestor wants to include in its Texas broadcast a short segment approximately 30 to 60 seconds in length encouraging listeners to call their state legislators to support specific legislation. The requestor states that the segments are not a "paid advertisement," as that term is commonly understood, but just a part of its regular Texas broadcast, and suggests that these segments are similar to editorials in a daily newspaper.

Section 305.027 of the Government Code provides, in relevant part, the following:

> a) A person commits an offense if the person knowingly enters into a contract or other agreement to print, publish, or broadcast legislative advertising that does not indicate in the advertising:
>
> (1) that it is legislative advertising;
>
> (2) the full name of the individual who personally entered into the contract or agreement with the printer, publisher, or broadcaster and the name of the person, if any, that the individual represents; and
>
> (3) in the case of advertising that is printed or published, the address of the individual who personally entered into the agreement with the printer or publisher and the address of the person, if any, that the individual represents.
>
> . . .
>
> (e) In this section, "legislative advertising" means a communication that supports, opposes, or proposes legislation and that:

(1) in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast by radio or television; or

(2) appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, button, or similar form of written communication.

There would clearly be a contract or agreement between the requestor and a radio station to broadcast the requestor's program and the 30 to 60 second segment added to the program. Additionally, the segment at issue supports legislation. The remaining issue is whether the requestor's communication, which in our opinion includes the regular program and the added 30 to 60 second segment, is broadcast in return for consideration.

In some instances, the requestor pays a radio station to broadcast the communication. We conclude that in those instances the communication is broadcast in return for consideration. Because the segment supports legislation and is part of a communication that is broadcast in return for consideration, it falls within the definition of legislative advertising.

Therefore, because the requestor would be entering into a contract or agreement to broadcast the segment, the segment must include the disclosure statement required by section 305.027 of the Government Code.[1]

In other instances, the requestor does not pay a radio station to broadcast the communication. Without more facts, it is not possible to determine whether the communication is broadcast in return for consideration. If a radio station receives nothing in return for broadcasting the communication, there is no consideration. If there is no consideration, the communication does not fall within the definition of legislative advertising and therefore does not need to include the legislative advertising disclosure statement.

In the second circumstance, the requestor prepares articles that are made available on the requestor's website and that are included in the requestor's daily e-mail newsletter. The requestor does not specify whether the articles support, oppose, or propose legislation. The requestor pays an Internet service provider for server space for the requestor's website and for sending e-mail.

The definition of legislative advertising includes a communication that appears in a pamphlet, circular, flier, or similar form of written communication. The definition of legislative advertising, however, does not specifically include a communication available on a website or a communication made by e-mail.

In 2003, the legislature amended section 251.001(16) of the Election Code to include in the definition of political advertising a communication that appears on a website. Acts 2003, 78th Leg., R.S., ch. 249, § 2.01, at p. 1135; Elec. Code § 251.001(1). The legislature, however, did not add that type of communication to the definition of legislative advertising. Therefore, in our opinion the legislature did not intend the definition of legislative advertising to include a communication that appears on a website or a communication made by e-mail. Thus, those communications are not required to include a legislative advertising disclosure statement. This commission will ask the legislature to clarify whether it intended to include in the definition of legislative advertising a communication that appears on a website and a communication made by e-mail.

[1] In our opinion, the segment and a newspaper editorial are not analogous in this instance because a newspaper editorial is not published in return for consideration.

SUMMARY

A radio segment supporting or opposing legislation that is part of a communication that is broadcast in return for consideration must include a legislative advertising disclosure statement. Articles supporting or opposing legislation that appear on a website or that are made by e-mail are not required to include a legislative advertising disclosure statement.[2]

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[2] The requestor asserts a constitutional argument, stating that the statute is unconstitutionally overbroad based on the Supreme Court's holding in *McIntyre v. Ohio Elections Commission*, 115 S.Ct. 1511 (1995). The *McIntyre* case involved the constitutionality of an Ohio statute regulating political advertising. Both the facts and the law at issue were different from the facts and law at issue here. The Texas Ethics Commission has the authority to issue advisory opinions about certain Texas statutes. The commission assumes that the statutes are constitutional in the absence of a court decision that clearly states that a particular statue is unconstitutional.

EXHIBIT Q

CHAPTER 571. TEXAS ETHICS COMMISSION

SUBCHAPTER E. COMPLAINT PROCEDURES AND HEARINGS

§ 571.133. Appeal of Final Decision

(a) To appeal a final decision of the commission, a person may file a petition in a district court in Travis County or in the county in which the respondent resides.

§ 571.140. Confidentiality; Offense

(a) Except as provided by Subsection (b) or (b-1) or by Section 571.171, proceedings at a preliminary review hearing performed by the commission, a sworn complaint, and documents and any additional evidence relating to the processing, preliminary review, preliminary review hearing, or resolution of a sworn complaint or motion are confidential and may not be disclosed unless entered into the record of a formal hearing or a judicial proceeding, except that a document or statement that was previously public information remains public information.

(b) An order issued by the commission after the completion of a preliminary review or hearing determining that a violation other than a technical or *de minimis* violation has occurred is not confidential.

(b-1) A commission employee may, for the purpose of investigating a sworn complaint or motion, disclose to the complainant, the respondent, or a witness information that is otherwise confidential and relates to the sworn complaint if:

(1) the employee makes a good faith determination that the disclosure is necessary to conduct the investigation;

(2) the employee's determination under Subdivision (1) is objectively reasonable;

(3) the executive director authorizes the disclosure; and

(4) the employee discloses only the information necessary to conduct the investigation.

(c) A person commits an offense if the person discloses information made confidential by this section. An offense under this subsection is a Class C misdemeanor.

(d) In addition to other penalties, a person who discloses information made confidential by this section is civilly liable to the respondent in an amount equal to the greater of $10,000 or the amount of actual damages incurred by the respondent, including court costs and attorney fees.

(e) The commission shall terminate the employment of a commission employee who violates Subsection (a).

(f) A commission employee who discloses confidential information in compliance with Subsection (b-1) is not subject to Subsections (c), (d), and (e).

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