Legislative and Campaign Law
The State Bar of Texas

2014 Winter E-Newsletter Inaugural Issue

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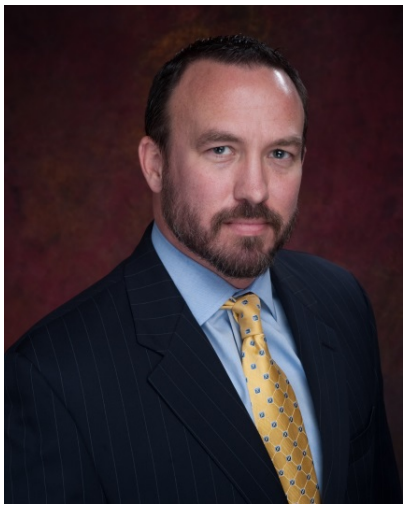
Chair's Message



As the November general election approaches many Texans will be focused on political races. And once the dust settles from the elections, many of us will begin preparing for the coming Legislative Session. Meanwhile, substantive issues relating to campaign and election law are the subject of ongoing judicial and administrative action. Courts are throwing out campaign finance rules, while the Texas Ethics Commission seeks to write new rules in an effort to address the constantly changing legal landscape. The newsletter – the first from the newly created Legislative and Campaign Law Section – is designed to highlight recent court opinions, draw attention to pending proposals, summaries recent advisory opinions, and serve as a resource to Texas attorneys – and their clients – who operate within the realm of legislative and campaign law.

Ross Fischer, Chair,
Legislative and Campaign Law Section

Summaries of Recent Cases

Fifth Circuit Ruling in Bingo Case has Potential to Impact Politically Active Non-Profits

A recent 5th Circuit ruling allows licensed bingo game operators to use bingo proceeds for political purposes.

In a case that could signal increased scrutiny of Texas campaign finance restrictions, the 5th Circuit invalidated a statute prohibiting non-profit bingo businesses from using bingo proceeds for political purposes.

In Department of Texas, Veterans of Foreign Wars et al. v. Texas Lottery Commission, et al., the 5th circuit considered a challenge to the constitutionality of political advocacy restrictions in the Texas Bingo Enabling Act based on First Amendment free speech claims.

Plaintiffs were a group of nonprofit organizations currently licensed to conduct bingo games in Texas by the Texas Lottery Commission. Plaintiffs sued the Commission, challenging the constitutionality of certain sections of the Texas "Bingo Act". Plaintiffs asserted that the following restrictions were a direct abridgement of speech with no compelling or substantial justifying interest:

> A licensed authorized organization may not use the net proceeds from bingo directly or indirectly to: (1) support or oppose a candidate or slate of candidates for public office; (2) support or oppose a measure submitted to a vote of the people; or (3) influence or attempt to influence legislation.

They also alleged that the provision unconstitutionally discriminates between charities and similarly situated businesses, such as racetracks, which are not prohibited from using their revenue for political purposes.

The 5th Circuit reasoned that even though bingo games are regulated by state licensing, that fact alone does not allow the state to attach conditions to how regulated licensees may spend the proceeds from the games as though the state were exercising treasury subsidy powers.

Using Citizens United as a backdrop, the Court ruled that the statute at issue was not sufficiently tailored to further a compelling state interest in its restriction on the use of bingo proceeds for political purposes. The court noted that "combating fraud and promoting charities" were unpersuasive arguments and that perhaps most troubling was the "underinclusiveness" of the law which treats similarly situated actors like horse and dog racetrack operators differently.

In the words of the Chief Justice, "Such obvious underinclusiveness undermines any argument that Texas is truly interested in regulating gambling." The court thus issued a permanent injunction and summary judgment prohibiting the Texas Lottery Commission from enforcing the political advocacy restriction on bingo operators.

Although limited to a section of the Occupations Code, the ruling provides a glimpse into the Court's rationale when considering campaign finance restrictions, especially when those limits impose a distinction between types of corporate entities.

Link to Opinion

Summaries of Recent Cases

Court Tosses 60-day waiting period for newly formed G-PACs

The 5th Circuit recently invalidated certain sections of the Election Code that restricted PAC operations for a period of time after the PAC is formed.

Historically, when a new general purpose political committee is formed in Texas, it must receive contributions from ten contributors and wait 60 days before making election related expenditures in excess of $500. However, in Catholic Leadership Coalition of Texas d/b/a Texas Leadership Coalition et al v. David A. Reisman et al., four plaintiffs successfully challenged the legality of the 60-day waiting period.

The plaintiffs - three general purpose political committees and one nonprofit corporation - raised First Amendment challenges to requirements levied on general purpose committees in the Election Code.

60 day limit – Plaintiffs argued that this limitation is a contribution and expenditure limit which must be viewed in the light of McCutcheon and Emily's List v. FEC that the only real corruption deterrent available for upholding contribution and expenditure limits is quid pro quo corruption. Defendants argued that the limitation is merely a disclosure incentive requirement. The court ruled that this limitation places a ceiling on speech for sixty days regardless of whether or not the committee is willing to comply with all disclosure requirements and that strict scrutiny should apply. The 60 day limit did not survive strict scrutiny and was ruled unconstitutional. "As such, the 60-day limit appears to have no legitimate sweep (or at the very least is vastly overbroad). Nor is this a situation where we can rewrite Texas law to conform to constitutional requirements."

10 contributors – Plaintiffs argued that this requirement was also an unconstitutional expenditure and contribution limit much the same as the previous requirement, but also that it abridged their freedom of association by forcing them to associate with ten other contributors. The court ruled much the same way as the 60 day limit restriction and stated that the ten contributor requirement is facially unconstitutional, and therefore did not address the freedom of association argument.

However, the Court rejected Plaintiffs' argument that requiring any committee to appoint a treasurer prior to exercising constitutionally protected rights of speech is an unconstitutional prior restraint. The court was unmoved, stating that speech is not affected by the treasurer requirement; rather, it is only a registration requirement prior to passing the $500 threshold, and individuals/committees are free to continue their speech unfettered up to that threshold.

Finally, the Court considered the corporate plaintiff's desire to share its email list with its newly created affiliate PAC (an action that would constitute an impermissible corporate contribution). The court stated that Texas' ban on corporate contributions to political committees engaging in political contributions "serves as an anticircumvention measure to prevent corporations from using a political committee to do an end-run around Texas's direct contribution ban." Essentially the court recognized the state's interest in continuing to prohibit mixed-purpose political committees from receiving corporate contributions even if the committees only use them for permissible purposes, because the state "is permitted to undertake some reasonable measures to ensure that any contribution limitations are not circumvented".

As a result of this decision, the Ethics Commission has stated that it will no longer enforce sections 253.037(a)(1) and (a)(2) of the Election Code relating to the 60-day and 10-contributor requirements.

Link to Opinion

Link to Commission Statement

Ethics Commission Proposes Two Significant Rules for Public Comment, Providing Guidance on "Principal Purpose" & "Acting in Concert"

Principal Purpose § 20.1

The Texas Ethics Commission proposed a rule defining the process by which a group is determined to have a principal purpose of accepting political contributions or making political expenditures. Do you know if your group would need to appoint a campaign treasurer under this rule? To read more:

What activities by an organization trigger reporting requirements with the Commission? What transmutes an organization into a PAC? The Texas Ethics Commission has proposed a rule that defines a principal purpose for a group that, when met, triggers filing requirements that include a campaign treasurer appointment in addition to the disclosure of contributions and expenditures. The rule proposes that a group's principal purpose is such when 25% of the group's annual expenses and resources are used to make political expenditures.
Link to Proposed Rule

Ethics Commission Proposes Two Significant Rules for Public Comment, Providing Guidance on "Principal Purpose" & "Acting in Concert"

Acting in Concert § 22.6

Do you or someone you know make direct expenditures on behalf of a candidate? What is a direct expenditure? The Texas Ethics Commission proposed a rule to clarify when one person is "acting in concert" with another for reporting purposes. To read more:

Direct expenditures are reportable under the Texas Election Code and are defined as those political expenditures made by a person who is not "acting in concert" with another person. This is important because direct expenditures must be reported when the amount exceeds $100. The Commission's proposed rule enumerates circumstances that would be evidence of "acting in concert" with another person. Is sharing a consultant always going to be considered "acting in concert" with someone?
Link to Proposed Rule

Summaries of Recent Ethics Advisory Opinions

Summary: A POLITICAL COMMITTEE'S NAME MAY GOVERN WHETHER A CITY MAY ALLOW THE COMMITTEE TO PARTICIPATE IN A PUBLIC ADOPT-A-PARK PROGRAM.

A city asked the Commission whether its "adopt-a-park" program ran afoul of the prohibition on use of public funds for political advertising. The program involved an individual, group, association, partnership or corporation signing an agreement to conduct clean-up activities in a local municipal park. In exchange for the clean-up activity by the person or entity, the city agreed to purchase and install a sign with the person's or entity's name attached. The person or entity is loaned vests, gloves and retrieval tools that belong to the city on clean-up day. The city purchases and maintains the signage with the persons or entities name attached. No other words, symbols or icons are allowed.

The question posed was whether the city may lawfully allow a registered specific- or general-political action committee to participate in the "adopt-a-park" program, where the program will allow the political action committee to use city-purchased equipment and will result in the purchase, display, and maintenance of a sign, on city property, listing the name of the political action committee without violation the Texas Election Code, Section 255.003.

"Spending" of public funds includes the use of political subdivision employees' work time, the use of existing political subdivision equipment, and the use of facilities maintained by a political subdivision. Ethics Advisory Opinion No. 443 (2002) (EAO 443). Thus, an officer or employee of a city may not use or authorize the use of the city's employees' work time, equipment, or facilities for political advertising. Whether any particular sign or other communication constitutes political advertising depends upon its specific content. However, a sign that bears the name of a political committee may constitute political advertising if the name supports or opposes a candidate, political party, public officer, or measure. A sign bearing the name of a political committee named "Citizens for Jane Doe for Mayor," for example, would likely constitute political advertising. The city's intent in creating and administering the program is presumably not to support or oppose a candidate, political party, public officer, or measure. Nevertheless, we have previously stated that the prohibition in section 255.003 applies to any use of a political subdivision's resources for political advertising, regardless of whether a political subdivision shows a preference for political advertising from a particular source. A city may not use its resources to create or maintain political advertising bearing the name of a political committee pursuant to the "adopt-a-park" program described in the opinion. EAO 516. *See also* EAO 443, EAO 102.

Summary: "PRINCIPAL PURPOSE" OF A PAC DEPENDS ON CIRCUMSTANCE, BUT 20% OR LESS OF RESOURCES GOING TO DCE DOES NOT CONSTITUTE A PRINCIPAL PURPOSE.

The Commission was asked whether a nonprofit organization, under the facts presented, would be required to register with the commission as a political committee. The requestor stated that the organization is organized under section 501(c)(4) of the Internal Revenue Code and plans to make direct campaign expenditures from its general treasury funds and use other resources to expressly advocate for the election or defeat of clearly identified candidates for state and local offices in Texas. The Organization plans to spend exactly 20% of its total expenditures and total time (measured by the Organization's employee and volunteer hours and the Organization's use of equipment and resources) during its fiscal year to make direct campaign expenditures.

The Commission noted that two or more persons acting in concert to make political expenditures, including direct campaign expenditures, constitute a political committee. If the group has a principal purpose of accepting political contributions or making political expenditures, then the group would be a political committee.

1. A political committee is defined as a group with "a principal purpose," as opposed to the principal purpose, of accepting political contributions or making political expenditures. The requesting corporation stipulated that it will not make political contributions, leaving the Commission to determine whether the organization has a principal purpose of making political expenditures.
2. In determining whether a group has a principal purpose of making political expenditures, the Commission considered the following factors:
3. The proportion of the group's total expenditures that constitute political expenditures;
4. The amount of the group's staff or volunteer time, equipment, or other resources allocated to making political expenditures;
5. The content of the group's public statements regarding its goals or support of or opposition to candidates, officeholders, or measures;
6. The group's government filings and organizational documents, including mission statements; and
7. The group's other activities that are unrelated to making political expenditures.

The requestor stated that exactly 20% of the organization's resources (including staff, volunteer time, and equipment) and funds (including the proportional share of administrative expenses) will be used to make direct campaign expenditures. Therefore, under the facts presented, the Commission opined that the organization does not have as a principal purpose making political expenditures.

Summaries of Recent Ethics Advisory Opinions

Summary: TEXAS CANDIDATE MAY ACCEPT IN-KIND CONTRIBUTION FROM OUT-OF-STATE PAC IF CERTAIN REQUIREMENTS MET. (EAO 519)

The Commission was asked whether a candidate for public office in Texas may accept an in-kind political contribution from an out-of-state political committee that is not currently registered with the Federal Election Commission. Title 15 of the Election Code does not prohibit a candidate from accepting an in-kind political contribution from an out-of-state political committee if the contribution is made from a permissible source and the candidate properly complies with applicable disclosure requirements. To determine what disclosure requirements apply, the candidate must determine whether the total amount of political contributions accepted from the out-of-state committee during the reporting period exceeds $500, including the fair market value of the in-kind contribution and any monetary contributions.

Before accepting political contributions totaling more than $500 in a reporting period, including the value of any in-kind contributions, from an out-of-state political committee, a candidate must receive certain information from the out-of-state political committee:

(1) a written statement, certified by an officer of the out-of-state committee, listing the full name and address of each person who contributed more than $100 to the out-of-state committee during the 12 months immediately preceding the date of the contribution; or

(2) a copy of the out-of-state committee's statement of organization filed as required by law with the Federal Election Commission and certified by an officer of the out-of-state committee.

Member Profile: Marshall Doke

Gardere Partner Marshall J. Doke Jr. has been representing some of the leading government contractors in the country, as well as many small businesses and government agencies, for over 50 years. From being labeled "the nation's top government contract lawyer" by Lawdragon Magazine, which also noted that he has "an unrivaled tandem of trial skills and government contracts mastery," to being dubbed a "legend in the profession" by Chambers USA, Mr. Doke truly is one of the nation's leading government contracts attorneys.

Mr. Doke began his legal career in 1959 following his graduation with high honors from Southern Methodist University Dedman School of Law where he served as editor-in-chief of the law review. Since that time, he has developed a successful practice representing clients in all types of federal, state, and local government contract matters, including claims, disputes, procurement protests, changes, breach of contract, suspension and debarment, contract interpretation, contract terminations, fraud, defective pricing, cost accounting standards, and Medicare and Medicaid claims. In addition, he routinely handles issues related to small businesses, the Foreign Corrupt Practices Act, the Buy American Act, and the False Claims Act.

Mr. Doke has testified as a government contracts expert before committees of both the U.S. Senate and the House of Representatives. In 2005, Mr. Doke was appointed by the Administrator of the Office of Management and Budget's Office of Federal Procurement Policy to the Acquisition Advisory Panel composed of recognized experts in government acquisition law and policy and charged with studying the federal procurement system and making recommendations for improvement (the report is available on the Acquisition Advisory Panel's website). He was also appointed by Chief Judge Edward Damich to the U.S. Court of Federal Claims Advisory Council in 2011.

Mr. Doke is heavily involved with the American Bar Association, currently holding the position of chair of the Standing Committee on Audit and serving as a member of the Council of the Public Contract Law Section. He previously served as a member of the ABA's House of Delegates from 1974 to 2003 and also held the positions of chair of the Public Contract Law Section and chair of the Conference of Section & Division Delegates.

Mr. Doke has been recognized for his work in government contracts by Chambers USA on a national level since 2006, earning the rank of "senior statesmen" in the 2014 edition. He is consistently recognized as one of the 500 Leading Lawyers in America by Lawdragon Magazine and has been recognized by *Texas Super Lawyers* and the Best Lawyers in America.