



TEXAS ETHICS COMMISSION



****Overruled, Modified, Clarified, or Superseded****

ETHICS ADVISORY OPINION NO. 198

March 25, 1994

Whether a corporation may make expenditures to communicate various types of information concerning an election to its employees, retirees, and their family members. (AOR-223)

The Texas Ethics Commission has been asked whether a corporation may make expenditures to communicate the following types of information concerning an election to its employees, retirees, and their family members:

1. the voting records of candidates on certain issues;
2. summaries or information concerning the candidates' positions on issues;
3. the candidates' written answers to prepared questions that focus on issues relevant to specific business interests; and
4. information about poll results, third-party endorsements, and special polls.

The requestor explains that the communications would be made through corporate news wires and newspapers, handouts at the workplace, and special mailings. Furthermore, the requestor stipulates that the information would not "expressly advocate" the election or defeat of any candidate.

Prohibition Of Corporate Political Expenditures

The Texas Election Code generally prohibits political expenditures by corporations and labor organizations. Elec. Code § 253.094. None of the exceptions to the general rule apply to communications to the employees and retirees of a corporation.¹ The expenditures in question here would thus be impermissible if they fit within the definition of "political expenditures" under the Election Code.

Section 251.001(10) of the Election Code defines a political expenditure as a campaign or officeholder expenditure. A campaign expenditure is "an expenditure made by any person in connection with a campaign for an elective office or on a measure." *Id.* § 251.001(7). In [Ethics Advisory Opinion No. 37](#) (1992), the commission noted that title 15 does not prohibit corporate expenditures on nonpartisan voter registration and "get out the vote" campaigns, regardless of the target audience, because such notices are not made "in connection with a campaign for an elective office." The communications at issue in the current inquiry go beyond information about registration and the mechanics of voting. It is arguable that expenditures to distribute information about individual candidates' voting records, political positions, and standing in polls and surveys are made "in connection with a campaign for an elective office." However, opinions of the United States Supreme Court restrict us from so broad a definition of political expenditure in this context. Instead, following the Supreme Court's direction, we conclude that a corporation is prohibited from making expenditures for the communications described in the request only if those communications "expressly advocate" the election or defeat of a candidate for public office.

Express Advocacy

In *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), (hereafter, *MCFL*) the Supreme Court held that an expenditure must constitute "express advocacy" of the election or defeat of a candidate to be subject to the Federal Election Campaign Act provision prohibiting corporations from using treasury funds to make expenditures "in connection with" any federal election. 479 U.S. at 249 (interpreting title 2, section 441b, of the United States Code). Without this construction, the Court ruled that the statute would be overbroad and violative of the U.S. Constitution's First Amendment protection of freedom of speech. *Id.* Provisions of the Texas Election Code must be similarly interpreted to avoid infringing upon the freedom of speech guaranteed by the U.S. and Texas Constitutions.

The Supreme Court's ruling on "express advocacy" in *MCFL* was based on its First Amendment analysis in *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976). That opinion held that restrictions on political expenditures would violate the First Amendment through overbreadth unless they were limited to expenditures that expressly advocate the election or defeat of a candidate. Whether a communication was "express advocacy" depended on its inclusion of words such as "vote for," "elect," "support," "defeat," "reject," "Smith for Congress," etc. The publication at issue in *MCFL* exhorted the reader to "Vote Pro-Life" and provided the photographs and names of candidates who held "pro-life" positions. Relying on *Buckley*, the Court found that the publication expressly advocated the election of the named candidates, even though the message was "marginally less direct than 'Vote for Smith,'" and despite the publication's explicit disclaimer of endorsement of any candidate. *MCFL*, 479 U.S. at 249-50.

We believe the Texas Legislature intended section 253.094 to prohibit political expenditures by corporations and labor organizations to the full extent allowed by the Constitution, as interpreted by the United States Supreme Court. Communications conveying candidates' positions and voting records, poll results, and endorsements by third parties could certainly be made without "expressly advocating" the election or defeat of a candidate, as the term has been interpreted by the Supreme Court.² Nevertheless, whether an actual communication constitutes express advocacy can be answered only on a case-by-case basis. Certainly, if a corporation spends treasury funds on a communication containing one or more of the phrases discussed in the *Buckley* opinion, or a communication analogous to the one questioned in *MCFL*, the expenditure would be prohibited under Election Code section 253.094.³ Whether other communications constitute express advocacy depends on the precise language of the communications, and on further authoritative court decisions.

SUMMARY

A corporation is prohibited by Election Code section 253.094 from making expenditures to communicate with its employees, retirees and their families about an election only if the communication "expressly advocates" the defeat or election of an identified candidate, as that term has been used by the United States Supreme Court. The inclusion of words such as "vote for," "elect," "support," "defeat," "reject," or "Smith for Senate" would clearly constitute express advocacy. Whether communications including candidates' voting records and positions on issues, poll results, and third-party endorsements constitute express advocacy would depend on the precise language of the communication.

¹ Election Code section 253.098, which permits a corporation or labor organization to make direct campaign expenditures to communicate directly with its stockholders or members, and their families, does not extend to communications to a corporation's employees and retirees. Election Code section 253.100, on the other hand, allows a corporation to finance solicitations of political contributions from employees and stockholders to a general-purpose committee it has established or administers. This opinion addresses corporate communications other than solicitations for contributions to a general-purpose committee. We are not considering whether there are limitations on the types of communications that may be contained in a corporate solicitation for employee contributions to a general-purpose committee.

² Although the lower federal courts in other jurisdictions have addressed whether particular communications meet the "express advocacy" definition, courts within the Fifth Circuit have not done so. The trend in the decisions in other jurisdictions seems to be toward the courts' insistence that a communication contain one of the phrases indicated in *Buckley* before the court will find express advocacy. See *Faucher v. Federal Election Comm'n*, 743 F. Supp 64 (D. Me. 1990), *aff'd*, 928 F.2d 468 (1st Cir.), and *cert. denied*, 112 S. Ct. 79 (1991) (Federal Election Commission regulation prohibiting corporate-funded voter guide from containing wording favoring a position or expressing an editorial opinion on issues covered by candidate survey found to be invalid); *Federal Election Comm'n v. Colorado Republican Federal*

Campaign Cmte., 839 F. Supp. 1448 (D. Colo. 1993) (in order to constitute express advocacy, communication must be a direct plea for specific action, using words set out in Buckley); Federal Election Comm'n v. Survival Educ. Fund, Inc. , 1994 WL 9658 (S.D.N.Y.) (summarized in FEC v. Survival Education Fund, Inc. , R ec . (Federal Election Commission, Washington, D.C.) March, 1994, at 1, 3) (letters urging readers to send a "special election-year ANTI-WAR BALLOT" seeking "your No vote for President Reagan" on several Reagan administration policies and asking readers to express their views on predictions that a second Reagan term would lead to arms escalation, war, and life-threatening cuts in human services did not constitute express advocacy of candidate's defeat, because they did not contain Buckley language.)

³ The commission encountered a situation analogous to the MCFL case in [Ethics Advisory Opinion No. 77](#) (1992). That opinion concerned corporate expenditures for the distribution of postcards bearing the phrase "Let's Elect Qualified Judges" above the names of judges who had won a local bar poll. We stated in Ethics Advisory Opinion No. 77 that "[p]aying for postcards advocating the election of identified candidates is a political expenditure." We note that the phrases used in the Buckley opinion are not "magic words"; synonymous phrases, such as "cast your ballot for X," would also constitute express advocacy.