



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 343

September 13, 1996

Whether a candidate forum to which only certain candidates are invited constitutes a communication in support of the candidates invited and whether a promise to abide by provisions in a city campaign finance ordinance is "consideration" for purposes of the definition of "political advertising." (AOR-381)

The Texas Ethics Commission has been asked about the application of Election Code section 255.003, which prohibits a person from spending or authorizing the spending of political subdivision funds for political advertising. The resolution of the issues raised ultimately turns on the construction of terms used to define "political advertising" in section 251.001(16) of the Election Code.

The request letter describes a city proposal to limit participation in a candidate forum broadcast on the city's public access cable television channel to candidates who have agreed to comply with voluntary contribution and expenditure limits. The request letter then asks whether the proposal would involve the use of political subdivision funds for political advertising in violation of section 255.003 of the Election Code.

For purposes of that provision "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 in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication.

Elec. Code § 251.001(16). The issues raised here are whether the forum would be "a communication supporting or opposing a candidate" and whether the forum would be broadcast "in return for consideration."

In our view, a forum from which certain candidates are excluded would be a communication in support of those present. We considered a similar question in [Ethics Advisory Opinion No. 336](#) (1996). The question raised there was whether a corporation would be expressly advocating the election or defeat of a specific candidate by allowing all candidates in an election to make materials available on corporate premises. In response to the question of whether the "express advocacy" contained in the candidates' campaign materials becomes "express advocacy" by the corporation if the corporation displays the material, we wrote:

[T]he answer to this question depends on whether each candidate in the election is given the same opportunity to provide information. If the opportunity provided to each candidate is in fact the same, then in our opinion the corporation would not be expressly advocating the support or defeat of any of those candidates.

[Ethics Advisory Opinion No. 336](#) (1996) at 3. Similarly, a forum at which all candidates in an election are provided the same opportunity to appear and speak is not a forum in support or opposition to any individual

candidate, regardless of how the candidates actually perform. Excluding candidates from such a forum, however, makes the forum itself a communication in support of those included because the exclusion of certain candidates lends the sponsor's tacit support to those included as the candidates worthy of consideration by the audience.¹

The remaining question is whether the communication is broadcast² "in return for consideration." The request letter states that a city ordinance invites a candidate for city office to sign a contract voluntarily agreeing to campaign contribution and expenditure limits. In a section titled "Other Consideration for Campaign Contract" the ordinance provides:

Candidate forums. Each candidate who has entered into a campaign contract must participate in a series of candidate forums to be produced for public access television, whether or not the candidate qualifies for matching funds. At least three forums shall be produced for each contested race. In addition:

- (A) Videotapes of the candidate forums shall be made available to the public at all branches of the city library;
- (B) Advertising promoting the candidate forums may be purchased by the city on commercial television stations and in the daily circulation newspapers in the city; and
- (C) The Ethics Review Commission shall be responsible for establishing equitable guidelines for the coordination and production of candidate forums.

Austin, Tex., Austin Fair Campaign Ordinance § 2-9-35 (1994). Legally, "consideration" is the inducement to a contract. Black's Law Dictionary 211 (6th ed. 1991). Put more formally, "consideration" is some "right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." *Id.* In this case, the ordinance itself identifies participation in candidate forums broadcast on public access television as consideration for candidates' agreement to abide by contribution and expenditure limits. Consequently, it appears that the broadcast of candidate forums is one of the inducements for a candidate's agreement to abide by contribution and expenditure limits and therefore that the broadcasts are "in return for consideration."³

SUMMARY

Excluding candidates from a candidate forum makes the forum itself a communication in support of those included because the exclusion of certain candidates lends the sponsor's tacit support to those included as the candidates worthy of consideration by the audience.

¹ Limiting the opportunity to participate in a forum to candidates who agree to restrictions on campaign contributions and expenditures may also raise issues under the First Amendment to the United States Constitution. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

² Broadcasts of political advertising may be subject to regulation by the Federal Communication Commission.

³ The legal value of an Ethics Advisory Opinion is to provide a defense to prosecution for activities that, in the opinion of the Ethics Commission, are not in violation of the laws under the jurisdiction of the Ethics Commission. Gov't Code § 571.097. We may issue an opinion providing such a defense only if there is no dispute as to relevant fact issues. Although arguments have been raised suggesting that the broadcast of the forums described in the request letter is not part of the consideration for candidates' agreement to abide by contribution and expenditure limits, it is not our role to resolve a fact issue in regard to whether there is consideration in a particular case.