



# TEXAS ETHICS COMMISSION



**\*\* Withdrawn by Commission on December 7, 2010 \*\***

Also see [S.B. 1269](#), 82nd Leg., R.S. (2011)

## ETHICS ADVISORY OPINION NO. 484

August 6, 2009

*May an elected officeholder accept transportation, meals, and lodging from a corporation or labor organization in return for addressing an audience or participating in a seminar when the reason they are asked to participate is their public position or duties and the service is more than perfunctory? (AOR-547)*

The Texas Ethics Commission has been asked to consider whether section 36.07 of the Penal Code and Title 15 of the Election Code allow an elected officeholder to accept transportation, meals, and lodging from a corporation or labor organization in return for addressing an audience or participating in a seminar when the reason the officeholder is asked to participate is the officeholder's public position or duties and the service is more than perfunctory. Specifically, the requestor of this opinion is concerned that making expenditures to provide transportation, meals, or lodging would be an officeholder contribution and would thus be prohibited if it is made by a corporation or labor organization, even if it otherwise does not violate the honorarium provision of section 36.07 of the Penal Code. The Penal Code, the lobby law, and the campaign finance law contain restrictions that are relevant to these questions. It is important to review the relevant restrictions in each of these laws because what is permissible under one law may not be permissible under another.

### PENAL CODE RESTRICTIONS

The first question is whether the expenditures for transportation, meals, and lodging are permissible under the Penal Code, which contains several restrictions on benefits to public servants. A benefit is "anything reasonably regarded as pecuniary gain or pecuniary advantage, including a benefit to any other person in whose welfare the beneficiary has a direct and substantial interest." Penal Code § 36.01(3). A public servant includes a person elected, selected, appointed, employed, or otherwise designated as an officer, employee, or agent of government. *Id.* § 1.07(41)(a). Section 36.10 includes several exceptions to the prohibition on accepting a benefit, which may apply depending upon the specific facts of the individual case. *Id.* § 36.10.

Section 36.07 of the Penal Code also includes a prohibition on acceptance of an honorarium by a public servant. It states:

1. A public servant commits an offense if the public servant solicits, accepts, or agrees to accept an honorarium in consideration for services that the public servant would not have been requested to provide but for the public servant's official position or duties.
2. This section does not prohibit a public servant from accepting transportation and lodging expenses in connection with a conference or similar event in which the public servant renders services, such as addressing an audience or engaging in a seminar, to the extent that those services are more than merely perfunctory, or from accepting meals in connection with such an event.

3. An offense under this section is a Class A misdemeanor.

Penal Code § 36.07.

Under the requestor's facts, the provision of transportation, meals, and lodging to an officeholder would be honoraria provided to the officeholder in part because of the officeholder's status as a public servant. However, section 36.07(b) of the Penal Code would exempt the honoraria from the prohibition of section 36.07(a) as long as the event is a conference or similar event and the services provided by the officeholder are more than merely perfunctory. If the honoraria are exempted by section 36.07(b), then they are not considered "benefits" subject to the prohibitions on accepting benefits in sections 36.08 and 36.09 of the Penal Code.

### **LOBBY LAW RESTRICTIONS**

If the transportation, meals, and lodging are permissible under the Penal Code, the next question is whether they are permissible under the lobby law, which is set out under Chapter 305 of the Government Code. The requestor does not state whether the corporation or labor organization that would be providing transportation, meals, and lodging is registered as a lobbyist under the lobby law. However, the lobby law is a necessary part of the analysis when determining whether certain public servants may accept anything from another person.

Chapter 305 of the Government Code prohibits an elected officer of a state agency, department, or office in the executive branch or of the legislature or of a legislative committee from accepting certain benefits from a registered lobbyist or from a person on a registrant's behalf and with the registrant's consent or ratification. *See generally*, Gov't Code §§ 305.002(4), (7), 305.024. The prohibited benefits include an expenditure for transportation and lodging. *Id.* § 305.024(a)(2)(A). However, the prohibition does not apply to necessary expenditures for transportation, lodging, and food and beverages provided in connection with a conference, seminar, educational program, or similar event in which the officeholder renders services, such as addressing an audience or engaging in a seminar, to the extent that those services are more than merely perfunctory. *Id.* § 305.025(4). In addition, if a registered lobbyist makes an expenditure for transportation and lodging or food and beverages, the lobbyist must be present at the event. *Id.* § 305.006(f).

In the circumstances provided by the requestor, necessary expenditures for transportation, meals, and lodging that are made by a registered lobbyist or a person on a registrant's behalf and with the registrant's consent or ratification in connection with addressing an audience or participating in a seminar would not be prohibited under the lobby law as long as the recipient's services at such an event are more than merely perfunctory and the person making the expenditures is present at the event.<sup>1</sup>

### **CAMPAIGN FINANCE LAW RESTRICTIONS**

If the expenditures for transportation, meals, and lodging are permissible under the Penal Code and under the lobby law, the next question is whether they are permissible under the campaign finance law, which is set out in Title 15 of the Election Code. The expenditures at issue would be made by a corporation or labor organization for an elected officeholder who would be asked to address an audience or participate in a seminar because of his or her position as an elected officeholder. Under the campaign finance law, "officeholder" refers to a person who holds an elective public office and to the secretary of state. Elec. Code § 251.002. Thus, there is a question as to whether the expenditures would constitute an officeholder contribution.<sup>2</sup>

A contribution is a direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement to make such a transfer. *Id.* § 251.001(2). A political contribution includes campaign contributions and officeholder contributions. *Id.* § 251.001(5). An officeholder contribution is a contribution to an officeholder that is offered or given with the intent that it be used *to defray expenses that are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office and are not reimbursable with public money.* *Id.* § 251.001(4) (emphasis added). If an expenditure is required to be reported under section 305.006(b) of the Government Code, it is not a "contribution" for purposes of Title 15 and is therefore not regulated as a political contribution. *Id.* § 251.001(2)(B).

It is illegal for a corporation or labor organization to make a political contribution to a candidate or officeholder, or for a candidate or officeholder to knowingly accept a contribution he or she knows to be prohibited. *Id.* §§ 253.003, 253.094. Anytime an officeholder benefits from money spent by a corporation or labor organization, a fact question arises as to whether the corporation or labor organization has made a political contribution to the officeholder.

Whether an expenditure is an officeholder contribution depends upon several factors. In a 1993 advisory opinion, we concluded that a commercial sponsor that would be providing funding for a television program for a state representative with the intent that the state representative use the time to explain his position on legislative matters would be making an officeholder contribution. [Ethics Advisory Opinion No. 144](#) (1993). That conclusion was based on the fact that the officeholder essentially created and controlled the television program as a forum to communicate with his constituents. *Id.* We also cautioned that the opinion did not apply to a situation in which the officeholder is merely a featured guest on an independently established program. *Id.*

We have recognized that, in some circumstances, an officeholder may receive a thing of value without it constituting a political contribution. For example, in a 1996 advisory opinion we held that a nonprofit organization would not make a political contribution by providing an officeholder an opportunity to appear at the organization's fundraiser if the intent of the organization was not to make a political contribution but rather that the officeholder's presence was desirable at the fundraiser as a "draw" for others to attend the fundraiser. [Ethics Advisory Opinion No. 346](#) (1996). In 2006, we addressed whether an incorporated organization with incorporated chapters may invite elected officials to address its membership regarding issues of interest to the membership. [Ethics Advisory Opinion No. 471](#) (2006) (EAO 471). In the request for EAO 471, the requestor stated that the intent of the organization was not to make a political contribution but rather to "educate" its membership by directly presenting the views of the state policymakers on relevant issues. We stated that, if the organization did not intend to make a political contribution and if the officeholder did not create or control the presentation as a forum to communicate with his or her constituents or potential voters, then the organization would not be making a political contribution by providing the officeholder the opportunity to speak to the organization's membership.

In the situation at hand, the issue is about expenditures for transportation, meals, and lodging that would be made by a corporation or labor organization for an elected officeholder in return for addressing an audience or participating in a seminar in an instance in which the reason for asking the officeholder to participate is his or her position or as elected an officeholder. In previous advisory opinions addressing the provision of an opportunity to address an audience or appear at a fundraiser, there was no indication of any expense incurred by the officeholder to attend the event. The facts presented by the requestor in the current opinion present a new question, which is distinguishable from past advisory opinions.

Providing transportation, meals, and lodging to an officeholder to facilitate the officeholder's addressing an audience or participation in a seminar is distinct from simply providing the officeholder the *opportunity* to address an audience or participate in a seminar. In the situation at hand, the officeholder would be asked to perform the services because of the officeholder's official position and, therefore, performing those services is a duty or activity in connection with the office. The fact that the officeholder may have no control over the event does not change the fact that addressing an audience or participation in a seminar is a duty or activity in connection with the office. Thus, the provision of transportation, meals, and lodging to an officeholder to facilitate the officeholder's attendance at the event would constitute an officeholder contribution if the expenses are not reimbursable with public money.

Whether an expense is reimbursable with public money depends on the facts and applicable law in each case. There is no indication in the facts presented by the requestor as to whether any expenses that may be incurred by the officeholder would be reimbursable with public money. However, if any of the expenses at issue are not reimbursable with public money, then defraying the expenses would constitute an officeholder contribution. As such, a corporation or labor organization may not provide transportation, meals, and lodging to the officeholder in these circumstances.<sup>3</sup>

The requestor also suggests that there may be a conflict between the honorarium provision in section 36.07 of the Penal Code and section 253.094 of the Election Code, which prohibits a corporation or labor organization from making a political contribution. Specifically, the requestor asks whether an expenditure made by a corporation or labor organization that does not violate the honorarium provision would be prohibited if the expenditure is also an officeholder contribution. We do not think that there is a conflict between the applicability of section 36.07 of the Penal Code and section 253.094 of the Election Code. The acceptance of honoraria covered by the exemption provided by section 36.07(b) of the Penal Code does not limit the application of Title 15 of the Election Code.<sup>4</sup> Thus, if an expenditure for transportation, meals, and lodging made by a corporation or labor organization meets the definition of an officeholder contribution, the expenditure is prohibited by section 253.094 of the Election Code.<sup>5</sup> This advisory opinion is intended to provide guidance for future activity and not intended to criminalize past activity.

## SUMMARY

Anytime an officeholder benefits from money spent by a corporation or labor organization, a fact question arises as to whether the corporation has given a thing of value to the officeholder for purposes of one of the laws under the Ethics Commission's jurisdiction. Pursuant to Title 15 of the Election Code, an elected officeholder may not accept transportation, meals, and lodging from a corporation or labor organization in return for addressing an audience or participating in a seminar if the officeholder's services are in connection with his or her duties or activities as an officeholder. This advisory opinion is intended to provide guidance for future activity and not intended to criminalize past activity.

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<sup>1</sup> If the person making the expenditures is not a registered lobbyist or making the expenditures on behalf of a registered lobbyist and with the consent or ratification of a registered lobbyist, then section 305.024 of the Government Code does not apply to the expenditures. However, other reporting requirements under chapter 305 may apply if the person subsequently registers as a lobbyist. *See* Gov't Code §§ 305.006, 305.0061.

<sup>2</sup> The requestor of the opinion does not indicate that the expenditures at issue in this opinion are related to a campaign, but it is clear that the expenditures would be prohibited if the corporation or labor organization is making the expenditures in connection with a campaign unless they are specifically authorized by law. *See generally*, Elec. Code, chapter 253, subchapter D.

<sup>3</sup> It should be noted, however, that other methods exist for defraying the expenses raised in the requestor's fact pattern. An officeholder may use his or her own political contributions for transportation, meals, and lodging in connection with officeholder duties or activities. In addition, an officeholder may accept such transportation, meals, and lodging as an officeholder contribution from other permissible sources, such as a political committee, or from a registered lobbyist in accordance with chapter 305 of the Government Code and the restrictions therein. *See, e.g.*, section 305.024(a)(2)(A), Gov't Code.

<sup>4</sup> We note that sections 36.02 and 36.10 of the Penal Code provide that certain prohibitions do not apply to a benefit in the form of a political contribution or certain lobby expenditures that are properly reported. *See* Penal Code §§ 36.02(d) and 36.10(a)(4), (5). There are no similar provisions in section 36.07 of the Penal Code.

<sup>5</sup> The prohibitions applicable to campaign contributions and campaign expenditures made by a corporation or labor organization also apply.