TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 503

February 8, 2012

Whether a corporation makes a campaign contribution to a candidate by making a campaign expenditure that benefits the candidate, to a vendor shared by the corporation and the candidate. ***(AOR-566)***

The Texas Ethics Commission has been asked about the permissibility of a corporation making campaign expenditures from its general treasury funds to expressly advocate the election or defeat of clearly identified candidates for state and local offices in Texas. The first of several questions is the following:

> If an individual or entity (collectively "vendor") *concurrently* provides services to the corporation and a candidate's campaign committee[1] , then does the fact that the corporation and campaign committee share a common vendor *alone* mean that a campaign expenditure made by the corporation to benefit the candidate will constitute a coordinated campaign expenditure?

(emphasis in original).

The requestor of this opinion provided the following example ("Example 1") to clarify the question:

> The corporation plans to use its general treasury funds to produce and air a television advertisement (the "ad") two weeks before the 2012 general election that expressly advocates for the election of a specific candidate to the Texas House of Representatives (the "candidate"). The corporation has identified the individual it plans to hire to produce the ad, but the individual (the "common vendor") has also been retained by the candidate to produce television advertisements for his campaign. The corporation plans to insert a clause into the contract between the corporation and the common vendor specifying that the common vendor is not permitted to share non-public information related to the ad with the candidate, nor is the common vendor permitted to share non-public information about the candidate's plans, projects, activities, or needs with the corporation. If the common vendor produces the ad in the same week that he produces a television advertisement for the candidate, but the common vendor does not share non-public information in accordance with the terms of his contract with the corporation, then will these facts alone mean that the cost of producing and airing the ad will constitute a coordinated campaign expenditure by the corporation?

Texas campaign finance law does not use the term "coordinated expenditure," which is a term used in federal campaign finance law[2] . Instead, Texas law regulates campaign expenditures, campaign contributions, and direct campaign expenditures. A corporation is prohibited from making a campaign expenditure that constitutes a political contribution to a candidate or to a political committee for the purpose of supporting or opposing a candidate. Elec. Code § 253.094. A corporation may, however, make a campaign expenditure that constitutes a direct campaign expenditure to support or oppose a candidate. *See* Ethics Advisory Opinion No. 489 (2010).

A campaign expenditure, in pertinent part, is a payment of money or any other thing of value, and includes an agreement made or other obligation incurred to make a payment, in connection with a campaign for an elective office. Elec. Code § 251.001(6). A campaign contribution is defined as a direct or indirect transfer of money,

goods, services, or any other thing of value, and includes an agreement made or other obligation incurred to make a transfer, to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office. *Id.* §§ 251.001(2), (3). A direct campaign expenditure is a campaign expenditure that does not constitute a contribution by the person making the expenditure. Ethics Commission Rules § 20.1(5). A campaign expenditure is a direct campaign expenditure if it is made without the prior consent or approval of the candidate or officeholder on whose behalf the expenditure was made.[3] *Id.*

The question before us is whether a campaign expenditure by a corporation in the circumstances presented by the requestor is a permissible direct campaign expenditure or a prohibited campaign contribution.

The single fact that a corporation shares a common vendor with a candidate would not constitute a campaign contribution by the corporation to the candidate. For example, a corporation may use the same law firm as a candidate but that single fact would not mean that the corporation has made a contribution to the candidate. The facts presented in the examples provided for our review, however, go beyond the narrow question presented.

In Example 1, the vendor is an individual who concurrently produces a television advertisement for a candidate and a corporation. In our opinion, this is strong evidence that the corporation's expenditure may constitute a campaign contribution to the candidate and, if the vendor was required to seek the candidate's approval or consent before providing the production services to the corporation, there is a presumption of a campaign contribution to the candidate. If the expenditure is made with the prior consent or approval of the candidate, then the expenditure is a campaign contribution to the candidate. It is a fact question whether any particular expenditure is made with the prior consent or approval of a candidate. *See, e.g.,* Ethics Advisory Opinion No. 336 (1996).

The requestor asks if our answer to Example 1 depends on whether the vendor provides "strategic" services for the corporation, such as media production, versus "non-strategic" services, such as legal compliance and accounting. The requestor listed the following services as "strategic:" development of media strategy, including the selection or purchasing of advertising slots; selection of audiences; polling; fundraising; developing the content of a public communication; producing a public communication; identifying voters or developing voter lists, mailing lists, or donor lists; selecting personnel, contractors, or subcontractors; and consulting or otherwise providing political or media advice. The requestor identified the production and airing of a television advertisement, as stated in Example 1, as strategic services.

As stated previously, a campaign contribution includes a direct or indirect transfer of money, goods, services, or any other thing of value to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office. Elec. Code §§ 251.001(2), (3). Title 15 does not exclude any particular type of service from the definition of a campaign contribution. Thus, if a corporation uses its general treasury funds to make any campaign expenditure to a vendor for services to benefit a candidate, and the vendor is concurrently providing campaign services to both the corporation and the candidate, this is evidence that the expenditure may constitute a prohibited contribution to the candidate. Ultimately, however, whether the corporate expenditure constitutes an impermissible campaign contribution to the candidate depends on the specific facts.

The requestor provided a second example ("Example 2") regarding "non-strategic" services, in which the corporation plans to use its funds to produce and air a television advertisement that supports a candidate and the corporation also intends to hire a vendor to file the corporation's campaign finance reports to disclose the expenditures. The vendor has also been retained by the candidate to provide accounting and campaign finance report services to the candidate. The requestor states that the corporation plans to insert a clause in the contract between the corporation and the vendor, specifying that the vendor is not permitted to share non-public information about the candidate's plans, projects, activities, or needs with the corporation. The requestor asks if, assuming that the vendor does not share non-public information, the cost of producing and airing the ad would constitute a "coordinated campaign expenditure" by the corporation if the vendor files the corporation's direct campaign expenditure report in the same week that the vendor assists the candidate with filing a campaign finance report.

In Example 2, the corporation would pay the vendor to file a campaign finance report to disclose the corporation's expenditures. The corporation's payment to the vendor would constitute a campaign contribution to the candidate only if it constitutes a transfer of anything of value to the candidate and is offered or given with the intent that it be used in connection with a campaign for elective office. In these circumstances, we do not think that the corporation's payment to the vendor for the campaign finance report filing services would constitute anything of value that is offered or given to the candidate with the intent that it be used in connection with a campaign for elective office. Thus, the payment would not constitute a campaign contribution to the candidate. Whether a payment made by the corporation for any other service constitutes a campaign contribution depends upon the specific facts.

Firewall

The requestor raised an additional question regarding a "firewall" to prevent the sharing of information about the candidate. The requestor asks the following:

> If the Vendor has established and uses a "firewall" to prevent the sharing of non-public information about the candidate's plans, projects, or needs with the Corporation, does a campaign expenditure made by the Corporation to benefit the candidate constitute a Coordinated Campaign Expenditure?

The requestor asks us to assume the following:

- The Vendor is an entity, as opposed to an individual, that employs multiple employees;
- The Vendor employees who provide services to the candidate's campaign committee do not also provide services to the Corporation;
- The Vendor implements the "firewall" in a written policy (the "Firewall Policy") that is distributed to all relevant employees, consultants, subcontractors, and clients affected by the policy; and
- The Firewall Policy is designed and implemented to prohibit the flow of information between the employees and/or consultants providing services for the Corporation and the employees and/or consultants providing services to the candidate's campaign committee.
- Specifically, the Firewall Policy would include the following policies:

> a. Vendor employees who provide services to a candidate may not also provide services to corporations that make direct campaign expenditures supporting that candidate.
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> b. Non-public information about a candidate (or the candidate's election) that is obtained by Vendor employees who are providing services to a candidate may not share that information with any corporation that makes direct campaign expenditures supporting that candidate. Vendor and its employees must also take the necessary precautions to prevent the inadvertent sharing of this non-public information, including, but not limited to, requiring Vendor employees working for the candidate and Vendor employees working for the corporation to use separate printers.
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> c. Non-public information about a corporation's direct campaign expenditure that is obtained by Vendor employees who are providing services to the corporation may not share that information with the candidate(s) who benefits from the direct campaign expenditure. Vendor and its employees must also take the necessary precautions to prevent the inadvertent sharing of this non-public information, including, but not

> limited to, requiring Vendor employees working for the candidate and Vendor employees working for the corporation to use separate printers.
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> d. Vendor employees who are providing services to a candidate may not request, suggest, or approve any action taken or proposed by a corporation that makes direct campaign expenditures to support that candidate.

(emphasis in original).

It should be noted that, although the firewall policy would prohibit the exchange of non-public information, that alone would not necessarily prevent a prohibited campaign contribution. There may be instances in which the sharing of publicly available information could result in a contribution (e.g., the use of public information to provide strategic advice to the candidate).

The implementation of the firewall policy, as described above, would be evidence that the corporation's expenditure would not constitute a prohibited campaign contribution, if it is applied to prevent the exchange of both public and non-public information. If the firewall policy is fully implemented and followed, and no information, both public and non-public information is shared, then the expenditure by the corporation would not constitute a campaign contribution to the candidate.[4]

Previous Employment

The requestor asks the following:

> If a Vendor who has previously provided services to a candidate's campaign committee provides services to the Corporation, then does the fact that the Vendor previously provided services to the campaign committee alone mean that a campaign expenditure made by the Corporation to benefit the candidate will constitute coordination?

(emphasis in original).

The requestor asks whether our answer depends on the length of time between the last day that the vendor provided services to the candidate and the first day that the vendor provided services to the corporation. Furthermore, the requestor asks whether a vendor who previously provided services to a candidate is prohibited, in perpetuity, from providing services to a corporation that makes a campaign expenditure to benefit that candidate. The requestor also asks us to assume that the vendor will not share non-public information regarding the corporation's campaign expenditures with the candidate, and vice-versa.

The requestor provides two examples:

> The Corporation plans to use its general treasury funds to provide and air a television advertisement (the "Ad") two weeks before the 2012 General Election that expressly advocates for the election of a specific candidate to the Texas House of Representatives (the "Candidate"). The Corporation has identified the individual it plans to hire to produce the Ad, but the individual ("Former Common Vendor") previously produced television advertisements for the Candidate during the 1998 election cycle. If the Former Common Vendor produces the Ad, then will these facts alone mean that the cost of producing and airing the Ad will constitute a Coordinated Campaign Expenditure by the Corporation?
>
> The Corporation plans to use its general treasury funds to provide and air a television advertisement (the "Ad") two weeks before the 2012 General Election that expressly advocates for the election of a specific candidate to the Texas House of Representatives (the "Candidate"). The Corporation has identified the individual it plans to hire to produce the Ad, but the individual ("Former Common Vendor") previously produced television advertisements for the Candidate in 2012 until the Former Common Vendor's business relationship with the Candidate was terminated 15 days ago. If the

> Former Common Vendor produces the Ad, then will these facts alone mean that the cost of producing and airing the Ad will constitute a Coordinated Campaign Expenditure by the Corporation?

The fact that the vendor has previously provided services to the candidate does not alone mean that a campaign expenditure made by the corporation to benefit the candidate constitutes a campaign contribution. Whether the expenditure constitutes a contribution to the candidate depends on whether it is made with the prior consent or approval of the candidate and, as we have stated in previous opinions, an advisory opinion cannot resolve fact issues.

SUMMARY

The single fact that a corporation shares a vendor with a candidate would not constitute a campaign contribution by the corporation to the candidate. If a corporation uses its general treasury funds to make a campaign expenditure to a vendor for services to benefit a candidate, and if the vendor is concurrently providing campaign services to both the corporation and the candidate or if the vendor has previously provided campaign services to the candidate, the expenditure may constitute a prohibited contribution to the candidate. Whether the expenditure constitutes a prohibited contribution depends on whether the expenditure is made with the prior consent or approval of the candidate. An expenditure that is not made with the prior consent and approval of the candidate is not a campaign contribution to the candidate.

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[1] Title 15 of the Election Code does not use the term “campaign committee.” For purposes of this advisory opinion, we shall assume that the term “campaign committee” refers to a candidate for public office in Texas.

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[2] We note that federal statutes require the Federal Election Commission (FEC) to promulgate regulations on coordinated communications and the use of a common vendor. 2 U.S.C. § 441a, note. The FEC has also adopted rules that specifically address a commercial vendor providing services to a candidate committee for the development of media strategy, polling, fundraising, and other services. *See* 11 CFR 109.21(d)(4). Federal statutes and rules do not compel a particular conclusion in this case.

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[3] For example, a person who pays for a billboard supporting a candidate by making a payment directly to the owner of the billboard, without obtaining prior consent or approval from the candidate, would make a direct campaign expenditure. If the candidate gives prior consent or approval to the offer to pay for the billboard, the person has made (and the candidate has accepted) a campaign contribution to the candidate. *See* Ethics Advisory Opinion No. 331 (1996).

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[4] We assume, however, that the corporation has not communicated with the candidate regarding the vendor and the expenditures at issue.